Extension of the Mixed Ownership Model

A proposal to change legislation in relation to:

Genesis Power
Meridian Energy
Mighty River Power
Solid Energy New Zealand

Consultation with Māori

February 2012

New Zealand Government

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This document is available on the Treasury's website:
http://www.treasury.govt.nz/mixed-ownership-consultation
PURL: http://purl.oclc.org/nzt/r-1429

Foreword

Under the mixed ownership model, the Government will continue to control the mixed ownership model companies but offer a minority stake to private investors. Air New Zealand has operated successfully under this model since 2001.

In order to raise funds for high-priority future investment in new assets and to reduce its need for extra borrowing, the Government is proposing to reduce its current majority shareholding in Air New Zealand and extend the mixed ownership model to four state-owned energy companies – Genesis Power, Meridian Energy, Mighty River Power and Solid Energy.

It will retain a majority shareholding stake.

Priority will be given to New Zealand investors, who will have the opportunity to invest in large and proven companies. The stock market will be strengthened by increasing the breadth and depth of investment opportunities. Public scrutiny of the companies will improve, creating sharper incentives to run them efficiently. And the companies will be better able to raise the capital they need to grow.

The proceeds from the sale of these assets, estimated by the Treasury to total $5 billion to $7 billion, will be invested in schools, hospitals and public infrastructure.

In order to proceed, the Government proposes to remove Genesis Power, Meridian Energy, Mighty River Power and Solid Energy from the State-Owned Enterprises Act and put them under new legislation that will ensure it retains at least 51 per cent ownership and other individual shareholdings are limited to 10 per cent.

The Government is committed to meeting its Treaty of Waitangi obligations. It is consulting Māori on legislative changes, including what provisions aimed at protecting the rights and interests of Māori, such as general or specific Treaty clauses, should be carried over into the new legislation covering these companies.

It is seeking written submissions through this consultation document. Your feedback is welcomed.

Hon Bill English
Minister of Finance

Hon Tony Ryall
Minister for State Owned Enterprises

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The opinions and proposals contained in this document are for consultation purposes only and do not reflect final Government policy.

Please seek specific legal advice from a qualified professional person before undertaking any action in reliance on the contents of this publication. The contents of this consultation document must not be construed as legal advice. The Government does not accept any responsibility or liability whatsoever for any action taken as a result of reading, or reliance placed because of having read, any part, or all, of the information in this consultation document or for any error, inadequacy, deficiency, flaw in or omission from this consultation document.

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Purpose of this Document

The Crown is consulting with Māori on its proposal to change legislation to enable its mixed ownership model policy to proceed. This consultation document outlines the proposal.

How to make a submission

The Government welcomes feedback on the consultation document. You can make a submission by using the form at the back of this document or electronically at www.treasury.govt.nz/mixed-ownership-consultation.

Submissions can be sent by email to mixed-ownership-consultation@treasury.govt.nz or by post to:

FreePost Authority No.126395
Mixed Ownership Model: Consultation with Māori
Commercial Transactions Group
The Treasury
PO Box 3724
Wellington 6140

The deadline for receipt of submissions is **5pm on Wednesday 22 February 2012.** Late submissions will not be considered.

The Government is also holding a series of consultation hui as a further means of presenting its proposals and receiving feedback from interested parties:

Date	Time	Venue	Location
8 February	10.00am-1.00pm	Distinction Rotorua	Rotorua
8 February	3.00pm-6.00pm	Waikato Stadium	Hamilton
9 February	3.00pm-6.30pm	Whanganui Racecourse	Whanganui
10 February	9.30am-12.30pm	Toll Stadium	Whangarei
10 February	3.30pm-6.30pm	Novotel Auckland Airport	Auckland
14 February	10.00am-1.00pm	Waihopai Runaka Murihiku Marae	Invercargill
14 February	4.00pm-7.00pm	Chateau on the Park	Christchurch
15 February	10.00am-1.00pm	Emerald Hotel	Gisborne
15 February	3.30pm-6.30pm	Te Puni Kōkiri	Wellington

Following consultation, the Government will consider the feedback and submissions and then decide the final form of the legislation.

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Part 1 – Policy and Approach

Overview

The Crown has ongoing obligations to honour the Treaty of Waitangi in all its activities. In relation to its continued 51 per cent ownership of the Mixed Ownership Model Companies, the Crown is committed to maintaining its obligations under the Treaty.

The Government is consulting on three options to express its Treaty obligations, in addition to retaining the memorials regime for land, contained in section 27A-D of the State-Owned Enterprises Act (SOE Act):

1 include section 9 of the SOE Act in the new legislation in relation to the Crown's shareholding in these companies

2 include a more specific Treaty clause describing how the Crown will meet its obligations

3 no general Treaty clause.

Section 9 will remain in the SOE Act and will continue to apply to all SOEs.

Why the Government is consulting Māori

To proceed with the mixed ownership model, the Government proposes to remove four State Owned Enterprises (SOEs) from the ambit of the State-Owned Enterprises Act 1986 (SOE Act). The SOEs are Genesis Power, Meridian Energy, Mighty River Power and Solid Energy (the Mixed Ownership Model Companies). The Government also proposes to reduce its shareholding in Air New Zealand, which is already a mixed ownership company listed on the New Zealand Stock Exchange (NZX), from around 74 per cent to no less than 51 per cent. As Air New Zealand is not an SOE, it does not fall within the scope of this consultation process.

Up to 49 per cent in each company will be sold by means of an initial public offering (IPO) and each company will be listed on the New Zealand Stock Exchange (NZX). The companies will remain under the ambit of the Companies Act 1993; in addition, they will come under the ambit of the Securities Markets Act 1988 and the NZX Listing Rules.

The Government has announced that it will pass new legislation that will guarantee the Crown retains at least 51 per cent of the shares with voting rights in each company, and that no other investor may own more than 10 per cent of the shares with voting rights in each company.

The SOE Act contains provisions aimed at protecting the rights and interests of Māori, as follows:

- Section 9 of the SOE Act provides that "nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".
- Sections 27A-D provide a regime for memorials to be placed on the titles of land that is transferred by the Crown to SOEs . This land must be resumed by the Crown if the Waitangi Tribunal makes a recommendation for its return to Māori ownership or if the Governor-General, by order in council, requires the Crown to resume ownership of land that is wahi tapu.

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The Government proposes to continue the application of sections 27A-D of the SOE Act in their entirety to each of the Mixed Ownership Model Companies in the new legislation in order to protect the specific rights they confer on Māori. In respect of section 9, the Government sees three options for the new legislation: retaining section 9 as it applies to the Crown as shareholder in these four companies; including a new provision relating to the Crown's specific obligations under the Treaty; or no general Treaty clause. Some arguments for and against these options are laid out in Part 2 of this document.

The Government is consulting with Māori to ensure that, before it makes final decisions on legislation, and specifically on options on section 9, it fully understands Māori views on how Māori rights and interests under the Treaty of Waitangi are affected by the proposals.

The Government's mixed ownership model

The Government plans to sell shares in four SOEs that it owns – Genesis Power, Meridian Energy, Mighty River Power, and Solid Energy. No other SOEs are being considered as candidates for the mixed ownership model. The Government will offer shares in the companies at intervals over three to five years, beginning in 2012 with Mighty River Power. The exact timing of the sales will depend on market conditions.

The shares in the Mixed Ownership Model Companies will be available to the public for purchase both at the time of the initial public offering (share float) and subsequently on the stock exchange (NZX). The Government will continue to hold at least 51 per cent of the shares with voting rights in each company, which means it will continue to hold a controlling interest. No other investor will be able to hold more than 10 per cent of the shares with voting rights in each company, which will help to ensure widespread ownership.

When shares in each company are sold, it is proposing that Māori will have the same investment opportunities as all other New Zealanders. For retail investors (individuals), this means shares will be available by direct subscription and through brokers at the time of the IPO, and subsequently on the stock exchange. For large investors (such as financial institutions and iwi), this means shares will be marketed through a book build. Widespread and substantial New Zealand ownership can be achieved through the initial allocation of the shares. The Government will control this initial allocation.

Initial public offerings (IPOs)

An initial public offering, or share float as they are often called, is a way of selling some or all of a company to a large number of investors. Shares in the company are offered for sale to retail investors (individuals, sometimes referred to as "mums and dads") through an advertising campaign to the public and through share brokers. Shares are also offered directly to large investors (such as KiwiSaver funds and other managed funds and, if they wish to invest, iwi) by investment banks working on behalf of the vendor (the "book build"). The book build is a type of auction that determines the price for all investors.

The offer runs over approximately four weeks during which investors apply for shares. When the offer closes, shares are allocated to investors. If demand is too high, some investors may receive fewer shares than they applied for (called "scaling"). The Crown has control over which groups of investors are scaled and by how much.

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Once a minority shareholding in each company is sold, the Government proposes that the company will be governed in the same way as other listed companies and that they will be subject to the Companies Act 1993 and other relevant legislation, the NZX listing rules and the companies' constitutions. The Crown will not reserve any special rights to itself, except that it is still to decide whether it will a have any special power to approve the chairman of the Board, as it has for Air New Zealand.

The companies

Genesis Power is New Zealand's largest electricity retailer with about 27 per cent of retail customers (650,000 customers, including customers of its subsidiary Energy Online). It also generates electricity from hydro-electric schemes, wind farms, and gas-fired and coal-fired power stations in both the North and South Islands.

Meridian Energy is New Zealand's largest electricity generating company, predominantly from South Island hydro-electric schemes but also from wind farms in both islands. It has an approximately 15 per cent retail market share with 295,000 customers (including customers of its subsidiary Powershop).

Mighty River Power is an electricity generating company, with North Island hydro-electric schemes and geothermal generation plants. It also retails electricity and gas under the Mercury Energy and Bosco brands to about 400,000 customers.

Solid Energy is New Zealand's largest coal mining company and an investor in and developer of other energy technologies.

What will change with mixed ownership

The sale of the shares will mean increased investment opportunities for New Zealanders – both individuals and institutions.

Once the Mixed Ownership Model Companies are partially owned by private sector shareholders and listed on the NZX, the companies will be able to raise capital for future growth from the markets rather than relying solely on taxpayer-funded government support.

The Mixed Ownership Model Companies are likely to have improved business performance because they would be subject to the market disciplines that come from being listed, including increased scrutiny from market analysts and the media.

Timetable

The Government plans to conduct the first initial public offering (IPO) of shares in Mighty River Power, most likely in the third quarter of 2012, provided legislation has been passed and market conditions are suitable. The Government plans to introduce legislation in March subject to the outcome of consultation with Māori.

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The timetable for consultation is as follows:

1 February:	Consultation document released
8 – 15 February:	Hui
1 – 22 February:	Written submissions

The Government will also consult with specific Māori groups as appropriate.

The exact timing of the Mighty River Power initial public offering will not be decided until the legislation is passed and will also be subject to market conditions. Once under way, the marketing and offer period for the sale will run for about nine weeks.

Legislation

The Government proposes the following changes to legislation:

a) **Creation of a power to remove the Mixed Ownership Model companies from schedules 1 and 2 of the SOE Act by order in council**. This is necessary to be able to remove the companies from the ambit of the SOE Act which prohibits the sale of shares. By using an order in council, the Government will have the flexibility to remove each company when it believes market conditions are appropriate.

b) **Placing the companies under new legislation**. The legislation will require shareholding Ministers in the Mixed Ownership Model Companies to retain 51 per cent of the shares with voting rights in each company and restrict any other individual entity shareholding to a maximum of 10 per cent of the shares with voting rights in each company (although trustee corporations and nominee companies that hold shares on behalf of other persons may be exempt from the 10 per cent limit).

c) **Continued application of sections 22 to 30(1) of the SOE Act**. Section 22 of the SOE Act retains an administrative provision to allow existing shareholding Ministers to transfer their shares between Ministers without needing to formally register a transfer of shares, and enables a shareholding Minister to authorise another person to act as the Minister's representative at a meeting of shareholders.

Sections 23-29 of the SOE Act enable the transfer of land and other assets from the Crown to State enterprises. These provisions need to continue to apply to the Mixed Ownership Model Companies to ensure that all as-yet uncompleted processes (resulting from historical contracts) for the transfer of land from the companies can continue once the companies are no longer State enterprises.

Sections 27A-D provide a regime for memorials to be placed on the titles of land that is transferred by the Crown to SOEs . This land must be resumed by the Crown if the Waitangi Tribunal makes a recommendation for its return to Māori ownership or if the Governor-General, by order in council, requires the Crown to resume ownership of land that is wahi tapu.

Section 30(1) ensures that any changes to the names of any of the Mixed Ownership Model companies are not in breach of any legislation.

d) **Removal of the companies from the ambit of the Ombudsmen Act 1975 and Official Information Act 1982 at the point the order in council comes into effect**. This will mean

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the Mixed Ownership Model Companies will not be subject to review by the Ombudsman or to Official Information Act requests. Instead, they will be subject to the stock exchange's continuous disclosure regime.

e) **Continued application of the Public Records Act 2005 to the Mixed Ownership Model Companies in respect of records relating to their affairs while a State enterprise.**

f) **Consequential, technical amendments to other legislation to preserve the existing property rights of either the companies or of third parties.**

In the nine Acts identified below, the only change is to amend the definition of the terms "state enterprise" or "Crown body" to make it clear that the Acts will continue to apply to the mixed ownership companies. The changes to these definitions are necessary to preserve existing property rights of either the companies or third parties:

- Manapouri-Te Anau Development Act 1963
- Electricity Act 1992
- Public Works Act 1981
- Ngāi Tahu Claims Settlement Act 1988
- Ngāti Turangitukua Claims Settlement Act 1999
- Waikato Raupatu Claims Settlement Act 1995
- Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010
- Māori Purposes Act 1959
- Employment Relations Act 2000

Affected iwi are being consulted directly in respect of the changes to settlement legislation outlined above.

Certain sections in the four Acts identified below will also continue to apply to the Mixed Ownership Model Companies, as if they continued to be State enterprises. The continued application of these sections is necessary to preserve existing property rights of either the companies or third parties:

- Land Act 1947
- Conservation Act 1987
- Crown Pastoral Land Act 1998
- Treaty of Waitangi Act 1975

In the two Acts identified below, other changes are proposed:

- Income Tax Act 2007. The changes will: ensure that the companies continue to be unable to group losses with other mixed ownership companies: and provide that the companies will no longer be special corporate entities, which means that in line with the tax rules for private sector companies, shareholder continuity will be lost for the purposes of the imputation credit utilisation rules when the Crown sells below 66 per cent.
- Finance Act (No 2) 1988. The changes will remove redundant provisions that enabled the removal of Solid Energy from the SOE Act by order in council, and which will be superseded by this new legislation.

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Part 2 – Discussion of Issues

The general Treaty clause – section 9 of the SOE Act

Section 9 of the SOE Act provides that "nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi". The Government has yet to come to a view on the treatment of section 9 in the new legislation and sees three options: no general Treaty clause; retaining section 9 as it applies to the Crown's shareholding; or including a new provision relating to the Crown's obligations under the Treaty. Before making a decision, it would like to understand Māori views on the specific rights and interests that section 9, or a new Treaty clause, would protect in respect of the powers that Ministers will be able to exercise over the Mixed Ownership Model Companies.

The Government recognises the historic significance of section 9 of the SOE Act and the role it has played in the development of the place of the Treaty in modern New Zealand and the relationship between the Crown and Māori. Litigation brought under section 9 in the *Lands* case, led to the articulation of Treaty principles by the Court of Appeal. The same case led to the section 27A-D memorials regime that protects specific Māori interests in land transferred by the Crown to SOEs. These provisions require the Crown to resume ownership of the land where the Waitangi Tribunal has recommended its return to Māori ownership. They also enable the Governor-General, by order in council, to require the Crown to resume ownership of land that is wāhi tapu.

The Government notes that in the 25 years since section 9 was legislated, much has changed. The Crown recognises the principles of the Treaty, including the nature of the Treaty relationship as one akin to partnership. This recognition routinely informs the Crown's relationship with Māori. For some time now, Parliament has not included general Treaty clauses like section 9 in legislation. Instead, where a Treaty clause is considered necessary, legislation has specified the manner in which the Crown must meet its Treaty duties and linked any reference to Treaty principles to the relevant, operative provisions of the legislation.

Under the Mixed Ownership Model, Ministers' legal powers will be those afforded to shareholders under the Companies Act 1993. In practice, Ministers will look to best commercial practice in how they exercise those powers. This is a necessary pre-requisite where the decisions of the Crown as majority shareholder could affect the property rights of minority shareholders, including Māori where they are investors. Under the new legislation, the main actions likely to be taken by Ministers are:

- Sell (and buy back) shares, provided they retain at least 51 per cent of the shares with voting rights in each company at all times
- Exercise their majority voting rights including in respect of the appointment of directors, the approval of major transactions (in simple terms, transactions with a value equal to half the value of the company) and any other powers conferred on shareholders by the Companies Act 1993 or the companies' constitutions
- Exercise their voting rights in respect of changes to the constitution
- Decide whether to take up any issue of new shares
- Possibly approve the appointment of the chairman of the Board (this is yet to be decided).

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Specific iwi and hapu have a range of direct commercial relationships with the Mixed Ownership Model Companies. These rights and interests have been built up through 20 years of interaction between iwi or hapu and the companies or their predecessors in the context of normal commercial laws and wider community and statutory processes.

The Government also recognises that Māori have other interests that are connected to the operations of the Mixed Ownership Model Companies, for example interests in water. However, these interests are provided for in other ways, principally by the Resource Management Act 1991 and other legislation. Other well-developed, collaborative processes are in train to develop policy and legislation in respect of water and resource management more generally. Further, the historical claims of specific iwi in natural resources are subject to Treaty settlements both in negotiation and completed.

This suggests that the continued application of section 27A-D of the SOE Act with their core resumptive protections, irrespective of section 9 of the SOE Act, means that Māori rights and interests can be adequately protected.

While the Mixed Ownership Model Companies can be affected by wider policy changes, such as the Emissions Trading Scheme, these issues are not dealt with under section 9 (and affect all companies in the economy). The Crown is committed to the Treaty relationship through ongoing interaction with iwi and relevant Māori entities across the whole range of policy, well beyond the scope of section 9. Recent discussions on rights and interests in foreshore and seabed, water policy and radio spectrum rights with Māori have been dealt within this broader framework of cooperation and do not rely on section 9. In addition, any future Treaty claims fall as an obligation on the Crown not the company.

Certainty in expressing the Crown's Treaty obligations will help ensure the value of the taxpayers' investment and assist the sales process.

We are engaging with Iwi to get a better understanding of what section 9 means in practice.

Before coming to a firm view, the Government wants to ensure that it understands the views of Māori on these issues.

The memorials regime for land

SOEs have significant land holdings, some of which could be the subject of Treaty of Waitangi claims. In order to preserve the Crown's ability to address these claims, many parcels of land carry memorials on their titles that enable the Crown to resume ownership of the land if the Waitangi Tribunal recommends its return to Māori ownership even if the land has been sold by the SOE. Sections 22 – 30(1) of the SOE Act will be retained in the new legislation in respect of the mixed ownership companies. The provisions for the protective memorials are sections 27A-D. These provisions are among those which will continue to apply in the new legislation. A partial sale of shares in mixed ownership companies will make no difference to the validity of the memorials. The Government believes that Māori rights associated with present or future Treaty settlement processes are fully protected.

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Other issues that are beyond the scope of this consultation

The Government considers that a number of issues, that it recognises may be of interest to Māori, are beyond the scope of this consultation. In particular:

- The consultation is not intended to present specific investment opportunities or seek investment – this will take place during the marketing of each IPO.
- The Government is not consulting on other policy issues with well-established policy processes, for example fresh water or RMA reform.
- This consultation is not part of a Treaty settlement process and does not alter the Government's commitment to Treaty settlements.

A brief rationale for these views is presented below.

Fresh water

The Government considers interests in water to be beyond the scope of this consultation.

Interests in water are subject to Resource Management Act 1991 processes and existing historical settlements such as the Waikato River settlement. Any arrangement for managing and governing water in a Treaty settlement will continue.

Generators access water through water consents issued by regional councils for a limited time under the Resource Management Act 1991. They do not own water. This applies for all generators regardless of whether they are publicly or privately owned, and will remain so under mixed ownership. The existing regulatory regime will be unaffected.

It is recognised that some Māori have concerns about the effectiveness of aspects of the regulatory regime for water. Māori are not alone in such concerns and various processes are under way to review and improve the operation of the Resource Management Act 1991. For example, some Māori are actively participating in the *Land and Water Forum*, and there are parallel discussions between the iwi leaders group and the Crown on Māori interests in water. Mixed ownership will have no effect on these processes.

Geothermal

Geothermal resources are similar to water. They are important both to electricity generators and to Māori. Their use is governed by the Resource Management Act 1991, and there is nothing in this proposal that will change the process for deciding the use of these resources.

Māori participation as investors

The Government welcomes Māori participation as individual and institutional investors, on a commercial basis and on an equal footing to other New Zealanders. It recognises that iwi institutions are not identical to financial market institutions, and will consider how best to engage with iwi and other Māori institutions that wish to invest as it develops allocation policy in the run-up to the first IPO.

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Treaty settlements

Some iwi who have yet to settle may be concerned that they will be disadvantaged by not having the means to take up shares in the initial public offerings. The Crown's view, however, is that those iwi will be no worse off buying shares in the market once they have settled.

Some iwi who have not yet settled may want to request shares in mixed ownership companies as part of their commercial redress. Shares will, however, be readily available for purchase on the stock exchange. It would be straight-forward enough for the Government to purchase shares on the day with any cash that forms part of the settlement package, but equally it will be possible for iwi to purchase shares themselves. The latter would seem much preferable because it would afford iwi greater freedom to decide exactly how their money is used, and would be less likely to slow down the settlement process.

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Mixed Ownership Model Submission Form

The Government welcomes your feedback on this consultation document, particularly the questions set out below.

You can make a submission by using this form, which is also available electronically at www.treasury.govt.nz/mixed-ownership-consultation.

1 Contact Details

I am responding (please complete one):

As an individual

Your name	
Your iwi affiliation	
Address	
Email address	

On behalf of an organisation

Your name	
Organisation you represent	
Address	
Email address	

2 Submission

Question 1: What rights and interests, if any, do Māori have in the Mixed Ownership Model Companies that are not protected by the section 27A-D memorials regime, or by other legislation?

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Question 2: How would any rights and interests identified in question 1 be protected by continued application of section 9 of the State-Owned Enterprises Act 1986?

Question 3: Could any rights and interests identified in question 1 be protected by an alternative, more specific, formulation of the Crown's obligations under the Treaty?

Additional comments: Please insert any other comments you wish to make on this consultation document.

All submissions will be publicly available

The Government will publicly release your submission, a summary submissions and a list of the names of submitters, on The Treasury's website: www.treasury.govt.nz/mixed-ownership-consultation.

Your name will be made publicly available as part of your submission when it is released

Your contact details will be removed from your submission before it is posted on the website, recorded in the summary of submissions or released under the Official Information Act 1982 (OIA).

If you do not wish your name in your submission to be released, please clearly state this in your submission or tick the option below:

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If there is particular information in your submission that you wish to remain confidential, please clearly indicate this and explain your reasons for wanting the information kept confidential.

The Treasury is subject to the OIA and copies of submissions sent to The Treasury will normally be released in response to an OIA request from a member of the public. If your submission is subject to an OIA request, The Treasury will consider your confidentiality request in accordance with the grounds for withholding information outlined in the OIA. You can view a copy of the OIA on the New Zealand Legislation website: www.legislation.govt.nz.

The Privacy Act 1993 governs how The Treasury collects, holds, uses and discloses personal information about you which is contained in your submission. You have the right to access and correct this personal information.

Submissions can be sent by email to mixed-ownership-consultation@treasury.govt.nz or by post to:

FreePost Authority No.126395
Mixed Ownership Model: Consultation with Māori
Commercial Transactions Group
The Treasury
PO Box 3724
Wellington 6140

The deadline for receipt of submissions is **5pm on Wednesday 22 February 2012.** Late submissions will not be considered.

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Ministers' powers in respect of the Mixed Ownership Model Companies will not be as great as the powers they have under the SOE Act. For example, Ministers will no longer be able to direct the companies to pay dividends, or to change the content of their main accountability document, the Statement of Corporate Intent. This regime will be replaced by the commercial framework that applies to listed companies (with only a small overlay from the new legislation in respect of the Crown retaining 51% of the shares with voting rights in each company and restricting individual ownership by other investors to 10% of the shares with voting rights in each company). This is part of the intent of the policy – to move the companies into a legislative and governance framework that will create a greater commercial focus to their operations.

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Crown Law commented that "We recommend deleting this sentence because although the SOEs are not the Crown and in that sense are not covered by s 9, the Crown under the SOE Act has

powers in respect of SOEs. In the Broadcasting Assets case the Privy Council commented on the ability for the Crown to control SOEs in certain circumstances and the Tribunal has commented on this in respect of Transpower. Therefore we suggest the sentence is better omitted."

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Section 9 has no jurisdiction in respect of these arrangements as it binds the Crown as shareholder, not the companies themselves.

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Given the limited powers that Ministers will exercise, the continued application of section 9, or a section 9-like provision, would have no practical effect and is therefore not necessary, particularly in a broader context where the Crown is aware of its Treaty obligations. It is relevant to note that no section 9-like provision applied in respect of Contact Energy and other former SOEs that were sold in the 1980s and 1990s.

It can of course be argued that this conclusion can be turned around and that the application of such a section 9-like provision would also cause little harm. Assessing any harm requires consideration of the full range of the Government's policy objectives for mixed ownership, which include releasing capital for investment in higher priority activities, reducing borrowing, and developing capital markets by ensuring widespread private ownership of the companies by New Zealand individuals and institutions, including Māori individuals and institutions. In respect of institutional investors, section 9 will not be well understood; on this basis alone there is a likelihood that its continued application will create uncertainty and have a negative effect on investment in the companies, which will curtail achievement of both the Government's fiscal and capital market objectives. Further, the generalised, non-specific nature of the obligation under section 9 may mean that even with reasonable effort from potential investors, the obligation cannot be sufficiently well understood to allay any concerns. Investors will also look to the precedent of other sales of Crown assets, particularly Air New Zealand and observe that no section 9 obligation applies.

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The Crown's preference is to outline in relevant legislation the way in which its Treaty duties are met. On the basis of analysis to date, it has not identified any specific rights and interests that would only be protected by a section 9-like provision, given the retention of sections 27A-D of the SOE Act and the other legal provisions that exist in the Resource Management Act 1991 and elsewhere.

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On balance, the Government tends to the view that continued application of section 9, or application of a new Treaty clause, to the mixed ownership companies is not appropriate when its policy intent is for the companies to be treated like other private sector companies, i.e. in a commercial framework.

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