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BILLS DIGEST

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Mixed Ownership Model Bill 2012

Date of Introduction:	05 March 2012
Portfolio:	State Owned Enterprises
Select Committee:	As at 07 March, 1st Reading not held.
Published: 07 March 2012 by John McSoriley BA LL.B, Barrister, Legislative Analyst Phone: (04) 471-9626 (Ext. 9626)	Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status. Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.

Purpose

The aim of the Bill is to enable the Crown to remove, except for the application of Sections 22-30(1) and a section based on Section 9, Genesis Power Limited, Meridian Energy Limited, Mighty River Power Limited, and Solid Energy New Zealand Limited from the State-Owned Enterprises Act 1986 (the SOE Act). The new legislation will restrict the Crown from holding less than 51% of the voting rights in each of the companies and will restrict non-Crown individuals and entities from holding more than 10% of the voting rights in each of the companies.

Background

Procedural

The Government intends that this Bill be divided into the following two separate Bills at the committee of the whole House stage:

- a State-Owned Enterprises Amendment Bill (consisting of Part 1 of the Bill); and

- a Public Finance (Mixed Ownership Model) Amendment Bill (consisting of Part 2 and Schedules 1 and 2 of the Bill).

Regulatory impact statement

A regulatory impact statement is available:

<http://www.treasury.govt.nz/publications/informationreleases/ris>

Main Provisions

Companies to cease to be State enterprises except in certain respects

The Bill removes the names of Genesis Power Limited, Meridian Energy Limited, Mighty River Power Limited, and Solid Energy New Zealand Limited from Schedules 1 and 2 of the SOE Act and so each company ceases to be a State enterprise and ceases to be subject to the main provisions of that Act. However, the Bill continues the application to the “mixed ownership model companies” (see below) of:

- Section 22 (relating to Ministers' shareholdings, including Ministers' powers to exercise the rights and powers attaching to shares and to authorise other persons to act as their representatives at meetings of shareholders);
- Sections 23-29A of the SOE Act (relating to the transfer by the Crown to State enterprises of land, other assets, and liabilities and providing that the transfer of assets to these companies can be completed, despite the companies no longer being State enterprises);
- Sections 27A-27D (relating to the Crown's obligations to resume land or interests in land and return it to Māori in certain circumstances (such as when a recommendation is made to that effect by the Waitangi Tribunal under the Treaty of Waitangi Act 1975), and
- Section 30(1) (relating to certain provisions of the Companies Act 1993 relating to company names and registration) (*Part 1, Clauses 4 and 5; Part 2, Clause 16, inserting New Part 5A, New Section 45X into the Finance Act 1989*).

Mixed ownership model companies: definitions, Treaty and 51% threshold

The Bill provides that a mixed ownership model company means a company that is listed in new Schedule 5 of the Public Finance Act 1989 and provides that nothing in new Part 5A of the Public Finance Act 1989 (inserted by this Bill and headed “Mixed ownership model companies”) “shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”. The Bill prohibits a shareholding Minister in a mixed ownership model company from disposing of any shares in the Minister's name or permitting an issue of shares or securities (or a mixed ownership model company from issuing, acquiring, or redeeming its shares or securities) if doing so would result in the Crown holding less than 51% of the voting rights in the company (*Part 2, Clause 16, inserting New Sections 45P-45R into the Public Finance Act 1989*).

Interests limited to 10%

The Bill prohibits any non-Crown individual or entity from having “relevant interests” in securities conferring more than 10% of the voting rights of a mixed ownership model company. The term “relevant interest” has the meaning given to that term by Section 5 of the Securities Markets Act 1988 which provides that there is a “relevant interest” in a security if the person:

- is a registered holder of the security;

- is a beneficial owner of the security;
- has the power to exercise, or to control the exercise of, a right to vote attached to the security; or
- has the power to acquire or dispose of, or to control the acquisition or disposition of, the security.

The section also provides that it does not matter whether the power or control is express or implied, direct or indirect, legally enforceable or not, related to a particular security or not, exercisable presently or in the future, or exercisable alone or jointly with another person or persons (but a power to cast merely one of many votes is not, in itself, a joint power of that kind) and it also does not matter whether or not the power or control is or can be made subject to restraint or restriction or is exercisable only on the fulfilment of a condition. If two or more persons can jointly exercise a power, each of them is taken to have that power (*Part 2, Clause 16, inserting New Section 45S into the Public Finance Act 1989; cf Sections 5 to 6 of the Securities Markets Act 1988*).

Comment

The Explanatory note to the Bill expresses the view that Sections 5 to 6 of the Securities Markets Act 1988 (as described above) means that “powers or controls exercisable through trusts, arrangements, and understandings and, in certain circumstances, securities held by other persons must ... be taken into account”¹.

Effect of person exceeding the maximum 10% limit

The Bill provides that where a “person” (i.e. including “a corporation sole, a body corporate, and an unincorporated body” – *Section 29 of the Interpretation Act 1999*) exceeds the 10% limit, the person must comply with any written notice from the mixed ownership model company requiring the person to sell down or dispose of securities or take any other action needed (eg, terminate any voting agreement) to ensure that the person does not exceed the limit. Regardless of whether the company gives such a notice, the person must take whatever steps are necessary to ensure that the contravention is remedied within sixty days. The person is also prohibited from exercising any voting rights attaching to securities in excess of the maximum 10% limit, and any purported exercise of those voting rights is of no effect and must be disregarded. The Bill provides an exemptions from the maximum 10% limit for persons holding interests on behalf of another person in the ordinary course of business as a trustee corporation or nominee company. The exempt persons must monitor the holdings of those for whom they hold the interests and may lose the exemption (*Part 2, Clause 16, inserting New Sections 45T and 45U into the Public Finance Act 1989*).

Certain provisions of SOE Act and other legislation continue to apply

In addition to continuing the application to mixed ownership model companies of Sections 22-30(1) of the SOE Act as described above, the Bill provides for the continued application to them of:

- the requirement for the reservation of marginal strips from certain land disposed of by the Crown to State enterprises and the Minister of Conservation's power to declare certain dispositions exempt from reservation (including dispositions of land that is part of the core assets of a State enterprise that is a generator of electricity or land that is required in connection with electricity works) (*Sections 24(1) and (6), 24B(4) to (6), and 61(2) of the Conservation Act 1987*);

¹ Mixed Ownership Model Bill, 2012 No 7-1, Explanatory note, General policy statement, p. 5.

- the granting of renewable leases of land vested in a State enterprise in exchange for pastoral leases (Section 11 of the Crown Pastoral Land Act 1998);
- recommendations of the Waitangi Tribunal in respect of land transferred to, or vested in, a State enterprise (Sections 8A to 8H of the Treaty of Waitangi Act 1975) (*Part 2, Clause 16, inserting New Sections 45X into the Public Finance Act 1989*).

Amendments to other enactments

The Bill also makes consequential amendments to a number of statutes to recognise the new status of mixed ownership model companies. These are particularly:

- the Employment Relations Act 2000 (to ensure that electricity generators remain “essential services” for the purpose of strikes or lockouts);
- the Income Tax Act 2007 (to adapt the provisions relating to State enterprises to mixed ownership model companies);
- the Land Act 1948 (to carry over the rights to obtain title to land from State enterprises by user or adverse possession are carried over against mixed ownership model companies);
- the Public records Act 2005 (certain provisions relating to State enterprises to continue to apply to mixed model ownership companies);
- the Public Works Act 1981 (Mixed ownership model companies still subject to offer back requirements where certain land no longer required (i.e. the application of Sections 40-42 of that Act)), and
- the Ngai Tahu Claims Settlement Act 1998 (ensure that the definition of “Crown body” in that Act continues to include State enterprises which become mixed ownership model companies) (*Clause 18, Schedule 2 to the Bill*).

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