FACULTY OF LAW
Professor Jane Kelsey
Associate Dean (Research)

THE UNIVERSITY OF AUCKLAND
NEW ZEALAND
Te Whare Wānanga o Tāmaki Makaurau
Law School Buildings
9-17 Eden Crescent, Auckland
Telephone 64 9 373 7599 ext. 88006
Facsimile 64 9 373 7471
email: j.kelsey@auckland.ac.nz

The University of Auckland
Private Bag 92019
Auckland Mail Centre
Auckland 1142, New Zealand

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Submission on Mixed Ownership Model Bill
Professor Jane Kelsey, School of Law, the University of Auckland

1. I am a Professor of Law at the University of Auckland with long-term research interests in corporatisation and privatisation, the Treaty of Waitangi, and the implications of free trade and investment agreements for government regulation of services and foreign investments.

2. I have written a number of books that address New Zealand's policies and experiences with state-owned enterprises and privatisations in the 1980s and 1990s that inform my submission on this legislation.

3. This submission addresses four issues:

   (i) constitutional oversight of the Crown-controlled companies;

   (ii) the Crown's Treaty of Waitangi obligations;

   (iii) the implications of NZ's free trade and investment agreements; and

   (iv) the public policy rationale for the legislation.

4. I wish to appear before the committee to speak to this submission.

(i) Constitutional Oversight

5. The intention that the Crown retains 51% of voting shares in these enterprises means they will remain Crown-controlled companies and must therefore remain subject to the full ambit of constitutional oversight, including independent review by Parliamentary Officers.[1]

6. It is therefore inappropriate to remove them from the oversight of the Ombudsman.

7. The proposed 'disapplication' of the Official Information Act (OIA) is unjustified for the same reason. There is adequate protection for commercial confidentiality in that Act.

8. As a specific example, 'disapplication' will make it impossible to monitor the means by which the Crown fulfills its obligations to act in a manner consistent with the principles of the Treaty of Waitangi.

[1] The same issues were raised in relation to the original corporatisation process and are discussed in detail in Jane Kelsey, *Rolling Back the State. The privatisation of power in Aotearoa New Zealand*, Bridget Williams Books, 1993, ch 12

9. The proposal to remove coverage of the OIA from the time of the decision to proceed with the partial privatisation will also remove oversight from decisions of the government on crucial policy decisions relating to the sales. As a researcher I have relied heavily on documents released under the OIA to critically evaluate the processes, decisions and conflicts of interest in past privatisations. It is very disturbing that the public policy processes will be removed from scrutiny, even in retrospect, as it would make this kind of research impossible.

10. The claim in the explanatory note that listing on the stock market and compliance with company law requirements will somehow improve public scrutiny of the company's operations is untenable. Those obligations relate to financial information and reporting that is broadly incomprehensible to most New Zealand citizens and fails to address the broader range of issues that are appropriate subjects for oversight and reporting when activities are conducted by the Crown.

11. Equally, it is inappropriate to specify the legal consequences of breaching the cap on 10% of shareholding through the constitution of the company. The appropriate processes for oversight and penalties for a breach of the statutory cap of 10% are properly the matter for specification in legislation or regulations that are subject to parliamentary scrutiny.

12. Explicit provision needs to be made for public oversight, through the office of the Auditor General, of the proposed exemption under Section 45U for persons holding interests on behalf of another as a trustee or nominee company.

(ii) The Crown's Treaty of Waitangi Obligations

13. The retention of Crown control over these entities undermines the logic of the treatment given to Section 9 of the State-owned Enterprises Act 1986 under proposed Section 45Q. The company itself should be subject to the obligation of section 9, not simply the Crown in exercising its powers as 51% shareholder.

14. There is no reason in principle why Treaty of Waitangi obligations should not apply to other shareholders in a Crown-controlled company, especially an energy-generating company that relies for its business on resources that are under claim at the Waitangi Tribunal. The Crown is fully entitled to set that as a condition for participation as shareholders in the company, especially when that is essential for it to be able to perform its own obligations effectively.

15. Even the weak version of the principles of the Treaty requires the Crown's actions to be informed by an understanding of Treaty implications and it would be obliged to actively protect those interests, consulting where necessary. Performing those obligations under section 9 was problematic enough with fully state-owned enterprises that were mandated to work on a purely commercial model. I cannot see how the section could be made operable if it only applies to the Crown's participation in the

company and not to the company itself. If the government believes this is possible it needs to explain how it would do so before this provision is considered acceptable.

16. The New Zealand Maori Council and other claimants have argued at the Waitangi Tribunal that this proposed legislation creates the same risks that promoted their original challenge to the SOE Bill in 1986 and subsequent litigation on SOEs, forestry and coal.[2] If the government pursues the partial privatisations without the Tribunal have heard and made recommendations on those claims it will have put itself in a position where it may be unable to act on those recommendations. That would be a fundamental breach of good faith.

17. Assuming the Tribunal hearing proceeds under urgency in June 2012, the government must delay any further action on this legislation to ensure that it is able to review its proposals in light of the Tribunal's recommendations.

(iii) Implications of New Zealand's free trade and investment agreements

18. New Zealand is party to a number of free trade and investment agreements that will become particularly relevant if the government is no longer the sole owner of the assets.

19. This is an area of my particular academic expertise. I believe that there are serious legal issues that the select committee needs to consider arising from obligations in the chapters on trade in services and investment of New Zealand's existing agreements, and additional obligations from a text on state-owned enterprises that the United States has tabled in the Trans-Pacific Partnership Agreement negotiations.

20. On 19 December 2011 I made a request to the Minister for State Owned Enterprises under the Official Information Act for 'all documents relating to the compatibility with New Zealand's obligations in trade and investment agreements of the sale of state assets, including preferences to nationals'.

21. The Minister's response on 18 January 2012 indicated there was such a document but he withheld it in full to protect the confidentiality of advice to ministers and the effective conduct of public affairs through free and frank expression of opinion.

22. Trade in services agreements impose legal restrictions on the ability of the government to adopt a range of measures that include restrictions on the total and individual level of foreign shareholdings in an enterprise, requirement that a proportion of directors are New Zealand nationals.

23. There are some protections in New Zealand's existing agreements in the schedules of commitments of particular services, and a limitation for assets that were in state ownership at the time the agreements were signed. The nature and extent of those commitments and protections is debatable.

[2] The Sale of Power-Generating State-owned Enterprises (WAI 2357) and The National Freshwater and Geothermal Resources Claim (WAI 2358)

24. As explained in my submission to the Waitangi Tribunal supporting urgency on the WAI 2357 and WAI 2358 claims,[3] the standard Treaty of Waitangi provision would not exempt actions taken by the government in adopting Waitangi Tribunal recommendations from all obligations under these agreements.

25. New Zealand also has obligations to foreign investors from many countries with which we have FTAs. These contain similar obligations on discrimination and legal form. They also provide enforceable guarantees to investors on direct and indirect expropriation and fair and equitable treatment. Similar guarantees have been and currently are the subject of disputes brought by investors in relation to partial and full privatisations of utilities, and policies adopted by governments when those privatisations have failed.

26. These guarantees to foreign investors can be enforced directly against the New Zealand government in private international tribunals, seeking compensation for losses incurred. The hearings are private and the documentation, including the final decision, may never be released.

27. A stronger version of these obligations is currently the subject of negotiations for the proposed Trans-Pacific Partnership Agreement. In addition, the United States has tabled a text for a chapter that would impose novel 'disciplines' on state-owned enterprises, including state-controlled enterprises of the kind proposed in this legislation. That text is secret. However, it is clear from my discussions with officials in this country and other negotiators working on this text that it is potentially far-reaching and they are having great difficulty in assessing its implications.

28. These issues are too technical and complex to outline in this submission, but I would be pleased to present a detailed memorandum to the committee if it would find that helpful.

(iv) The Public Policy Rationale

29. The government has cited fiscal reasons for these partial privatisations, in part to fund social policy initiatives and in part to control debt.

30. I leave it to other submissions to analyse the rationale in relation to the likely price realised from share sales, revenue foregone in the long term, and permanent loss of a valuable and strategic asset value, and the revenue impact on the government's books of income tax cuts awarded to the benefit of high-income earners in 1 October 2010.

31. I note however that the debt repayment rationale is similar to that given by the Douglas government in the 1980s, where the projections were wildly inaccurate and the rationale was subsequently acknowledged to have been a 'red herring' to justify what was an ideologically driven decision.[4]

[3] Statement of Professor Jane Kelsey in Support of Urgency, WAI 2357 & WAI 2357, 8 March 2012

[4] Jane Kelsey*, The New Zealand Experiment. A world model for structural adjustment?,* Auckland University Press, 1996, 135-6

32. Finally, there is abundant evidence in public policy documents and international experience to show that partial privatisation of state assets and entities is a precursor to full privatisation and is often intended to be so.

33. It is also evident that legislation that initially relates to certain assets, in this case electricity companies, can be easily extended by adding further entities (such as Kiwibank or Television New Zealand) to the schedules with limited additional scrutiny of the basic model.

34. Whether or not this is the present government's intention, the select committee is urged to bear these prospects in mind when reviewing of this legislation.