

Regulatory Impact Statement

Providing for greater controls over Mixed Ownership Model companies, by including non-voting shares in the 51% floor and the 10% cap

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by The Treasury.

This RIS provides an analysis of options to ensure that the Mixed Ownership Model Bill (**MOM Bill**) includes economic interests in the 51% floor and 10% cap, to ensure consistency with the Confidence and Supply Agreement dated 5 December 2011 between the New Zealand National Party and United Future New Zealand (**UFNZ**) (the **Confidence and Supply Agreement**), specifically around introducing “statutory limits on the sale of public assets to no more than 49% of shareholding to private interests including limits on the extent of single entity ownership.”

This RIS has been informed by discussions between the Office of the Minister for State Owned Enterprises and the Office of the Leader of UFNZ. Those discussions have prescribed the nature of the regulatory response, particularly in the context of the MOM Bill.

The policy option available is unlikely to impose additional costs on businesses, impair private property rights, market competition or the incentives on businesses to innovate or invest. The option does not over-ride fundamental common law principles.

Chris White, Manager, Commercial Transactions Group

Status quo and problem definition

The Mixed Ownership Model Bill was introduced into the House in March 2012. It contains a 51% floor and a 10% cap: the Crown must hold at least 51% of the voting rights in each company, and no shareholder other than the Crown may have a relevant interest in more than 10% of the voting rights in each company. 'Voting rights' is a defined term, and includes voting rights attached to shares, as well as to other securities. A relevant interest includes legal ownership, but also includes the power to exercise voting rights, trusts, arrangements and understandings.

Cabinet had agreed to this position because of a desire to ensure control of the companies stayed in the hands of the Crown, and was not overly concentrated in the hands of any other shareholder. Only securities which confer voting rights affect the ability to control the company, and for that reason the restrictions apply only to voting shares and securities carrying voting rights

The Bill contains a number of provisions to enforce these limits, and also confirms that the constitutions of the mixed ownership model companies may provide for the 10% maximum limit and provisions dealing with the consequences of a person exceeding that limit. Nothing in the Bill limits what may be included in the constitutions.

This provision was criticised by some submitters during the select committee process, who suggested that the focus on voting rights might mean that the Crown would be in danger of losing an appropriate share of the economic benefits – such as dividends and other distributions. The Minister for State Owned Enterprises has asked that economic interests are included in the 51% floor and 10% cap, to ensure consistency with the Confidence and Supply Agreement with UFNZ.

Objectives

The objective is to ensure that the 51% floor and the 10% cap are consistent with the agreement set out in the Confidence and Supply Agreement.

There is a secondary objective, which is to ensure that any change is consistent with the wider regime of controls over the 10% cap which the Bill puts into place. Those include providing a penalty that responds to a breach, in circumstances when the SOP looks to control not only voting interests, but also economic interests.

The penalty has three separate objectives: to ensure no non-Crown shareholder has a relevant interest in shares or other securities that carry with them more than 10% of the voting rights in a company; to ensure no non-Crown shareholder has a relevant interest in shares or other securities that carry with them more than 10% of the economic interest in the company; and to incentivise shareholders to remain within the 10% cap without the need for further enforcement.

These changes must be approved by Cabinet on or before 18 June 2012.

Regulatory impact analysis

The SOP includes economic interests in the 51% floor and 10% cap, to ensure consistency with the Confidence and Supply Agreement. It does so through three amendments to the Bill. They provide that:

- the Crown must hold 51% of every class of shares in the company (voting as well as non-voting), as well as 51% of the voting securities. This change will secure the 51% floor for both economic and voting interests;
- no shareholder, other than the Crown, will be able to have a relevant interest greater than 10% of any class of shares (whether voting or non-voting) or more than 10% of the voting securities in a MOM company. This change will secure the 10% cap for both voting and economic interests; and
- as a penalty for exceeding the 10% cap, no dividends or distributions will be paid in respect of those shares or securities that exceed the 10% cap. Restrictions on voting for shares in excess of the 10% cap are already contained in the Bill.

It is also anticipated that the draft constitutions of the MOM companies will be updated to reflect these changes.

Floor and cap

No options other than amending the 51% floor and 10% cap to include non-voting shares were available. The amendment will ensure that the Crown retains control of each MOM company, while at the same time giving the MOM companies the ability to issue debt without the Crown having to subscribe for at least 51% of each issue.

That said, the SOP will have the effect that where the companies wish to use non-voting shares to raise capital, the Crown will need to subscribe for at least 51% of each issue of non-voting shares, to allow the issue to proceed. The Crown, like every other shareholder, will need to be persuaded that the proposed use of the capital is sensible, before subscribing. The issue of non-voting shares is very uncommon: we are not aware of any current instances in New Zealand of listed companies issuing non-voting shares.

No other impacts are expected from this change.

Penalty for exceeding the cap

The SOP contains a new penalty provision – no dividends or distributions will be paid to shares in excess of the 10% cap. This has the following effects:

Summary Impact Assessment					
	Objectives achieved?		Impacts		
Penalty options	Maintain Voting Control	Maintain Economic Interest	Costs	Benefits	Net Impact
Suspend voting rights (already in Bill) <u>AND</u> Forced divestment (already in Bill)	Maintains	Partially Maintains, as dividends may still be received before divestment takes place.	Minor transactional costs: Bill suspends voting rights without intervention Shareholders will face costs involved in disposing of shares or ensuring they no longer have a relevant interest that takes them over 10%	Will incentivise shareholders to ensure they do not have a relevant interest in shares or other classes of voting securities, greater than 10%	Benefits outweigh costs
Suspend voting and dividend rights (through SOP)	Maintains	Maintains	Minor transactional costs: Boards already need to consider which securities should receive dividends	Suspension of dividend rights, will incentivise shareholders to ensure they do not have a relevant interest in shares or other classes of voting securities, greater than 10%. Not suspending dividend rights no longer appropriate, given the focus on economic interests as well as voting control	Benefits outweigh costs

Consultation

The SOP has been consulted with UFNZ, ACT New Zealand, and with Mighty River Power. No feedback was received that has required any amendments to the SOP.

No further consultation is proposed before the SOP is introduced.

Conclusions and recommendations

The proposal to include non-voting shares in the 51% floor and the 10% cap has a minimal regulatory burden, and will impose few, if any, costs on businesses and other stakeholders beyond those imposed by the existing 51% floor and 10% cap. Because this is being done by an SOP, it will have limited effect on House time.

Implementation

The policy option will be implemented through a SOP to the MOM Bill. If agreed, the SOP will come into force at the same time as the remainder of Part 2 of the Bill, at Royal Assent. The newly configured 10% cap will be susceptible to the same enforcement as are available at present: that is, by the shareholder, by the company, and by the FMA, through reviewing substantial shareholder notices (SSNs) filed under the Securities Markets Act 1988. Caps on shareholding are not uncommon in companies listed on the New Zealand Stock Exchange, and the operation of SSNs is well-understood. No particular education campaign is needed or planned.

Monitoring, evaluation and review

There are no proposals to monitor or evaluate the inclusion of non-voting shares in the 51% floor or the 10% cap.