

Submission of the Ombudsmen on the Mixed Ownership Model Bill (13 April 2012)

1. The Ombudsmen are Officers of Parliament. We are responsible to Parliament and are independent of the Government. We have functions under the Ombudsmen Act (OA), to investigate the administrative conduct of state sector agencies, and under the Official Information Act (OIA), to investigate the decisions of Ministers and state sector agencies on requests for official information.
2. Our submission concerns clauses 6 and 7 of the Mixed Ownership Model (MOM) Bill, which remove the MOM companies from being subject to the OA and OIA. These Acts are important accountability mechanisms that currently apply to the MOM companies and no sufficient grounds have been advanced for changing the status quo while the companies remain in majority Crown ownership.

Reasons for continued application of the OA and OIA to MOM companies

3. The MOM Bill makes a number of changes, including the removal of ministerial powers to give directions and obtain information,¹ and the good employer and social responsibility requirements of the State-Owned Enterprises (SOE) Act.² The cumulative effect of these changes will be to substantially diminish ministerial and public oversight of the MOM companies.
4. In this context, it seems highly desirable for the OA and the OIA to continue to apply for a number of reasons, including that there appears to be no necessity for companies currently subject to those Acts to cease to be so subject apparently solely on the ground that up to 49 per cent of the shares in those companies are proposed to be made available for sale to private sector interests.
5. The MOM companies will continue to carry on the same operations as they do at present, and the Crown, as majority shareholder, will continue to have the determinative voice on all shareholder decisions. It is therefore difficult to see a principled reason for diminishing their OA and OIA accountability to the public (on whose behalf the majority shares will still be held), particularly in circumstances where it is proposed that their current accountability to Ministers under the SOE Act be diminished.
6. The decision to retain majority Crown ownership sends an important signal about the importance to New Zealand's interests of these companies, and the role they play in the state sector. In our view the proprietary rights of the public in the MOM companies, coupled with the impact their activities have on the lives of individual members of the public, suggest that the current measure of accountability should remain, and not be limited to such rights as are accorded to ordinary shareholders in the private sector.
7. The MOM companies will continue to be "*public entities*" for the purpose of the Public Audit Act because they are controlled by the Crown. It is significant that "*council-controlled organisations*" – which are defined as companies in which one or more local authorities has 50 per cent or more of the voting rights, or the right to appoint 50 per

¹ Sections 13, 14 and 18 of the State-Owned Enterprises Act.

² Section 4.

cent or more of the directors – are subject to the OA and the Local Government Official Information and Meetings Act.³ While there are some specified exclusions from that definition, the general principle appears to be that where an entity that is subject to the OA and/or OIA continues to be owned more than 50 per cent by the Crown (or a local authority), they should remain subject to those public sector accountability mechanisms.

Reasons advanced for removing the MOM companies from the OA and OIA

8. A number of reasons have been advanced for removing the MOM companies from the OA and OIA:

- Competition provides adequate protection;
- Ministers of the Crown and officials will themselves continue to be subject to the OIA, and officials will continue to be subject to the OA;
- application of the OA and OIA would place the MOM companies at a competitive disadvantage;
- Air New Zealand is not subject to the OA or OIA; and
- the companies will be subject to the Stock Exchange's continuous disclosure regime.⁴

9. In our view, these reasons appear not to have taken into account the following matters.

Competition provides adequate protection

10. It has been suggested that sufficient protection may be derived from the fact that the MOM companies operate in a competitive environment. The Ministers of Finance and for State Owned Enterprises have stated:

*"...in the case of commercial entities operating in a competitive environment, the best and ultimate remedy people have is to shift their business to another provider. This is true for people both as consumers of services and as investors/owners. The risk of losing customers provides strong incentives for the companies to be client-focused, and the risk of losing or disappointing shareholders and facing a falling share price incentivises the companies to operate efficiently."*⁵

11. We would observe that the competitive environment cannot always be relied upon to facilitate a fair and just provision of goods and services. Although private remedies exist, their cost may make them prohibitive for some people. In contrast, access to an Ombudsman's services is free, and can lead to better public accountability and improved decision-making and service delivery.

12. The focus on "customers" also obscures the fact that it is not just consumers who stand to be disadvantaged by the administrative conduct of MOM companies. The activities of the MOM companies, which include electricity generators / retailers and a coal mining company, can have significant environmental impacts. Affected persons may have recourse to the Environment Court. However, the OA provides a low-cost and informal means of resolving complaints about the administrative conduct of MOM companies;

³ Section 74 of the Local Government Act.

⁴ See "Memorandum to the Cabinet Economic Growth and Infrastructure Committee: Mixed Ownership Model Bill: Results of Consultation with Māori and Final Policy Approvals for Legislation" (28 February 2012) at 11, available at <http://www.treasury.govt.nz/publications/reviews-consultation/mixed-ownership>.

⁵ Ibid.

and the OIA enables citizens to be informed about the activities of the MOM companies as they affect both the community and them personally. In recent years, for instance, some people have used the OIA to obtain information about controversial electricity generation projects such as wind farms.

Other agencies will be subject to the OA or OIA

13. It has been suggested that the application of the OA and OIA to the MOM companies is unnecessary because *“Ministers of the Crown and officials will themselves continue to be subject to the OIA, and officials will continue to be subject to the OA.”*⁶
14. While Ministers, *“departments”* and *“organisations”* are subject to the OIA, this will not address the significant gap that would be created by excluding the MOM companies themselves.
15. The ability to request official information about the MOM companies will depend on whether it comes to be held by a Minister or agency subject to the OIA. Less information may come to be held by Ministers given they would no longer have the ability to require information under section 18 of the SOE Act. While MOM companies may choose to share information with Ministers voluntarily, potentially making that information accessible under the OIA, confidentiality requirements may operate to restrict its availability under that Act.
16. In addition, the fact that other *“departments”* and *“organisations”* are subject to the OA will provide no remedy for individuals adversely affected by the administrative acts and decisions of the MOM companies. It is somewhat disingenuous to suggest that this will in any way address the gap that would be opened with removal of the MOM companies from the ambit of the OA.

Application of the OA and OIA would place the MOM companies at a competitive disadvantage

17. It has also been suggested that application of the OA and OIA would place the MOM companies at a competitive disadvantage: that investors worried about the extent to which commercially valuable information can be protected from companies' competitors may discount the prices of the shares compared with the shares of companies not subject to the OIA.
18. This suggestion seems speculative at best. It would be equally true to suggest that positive factors associated with the Crown's retention of majority ownership would balance or outweigh any concern that might occur to potential investors in this regard. For instance, for a MOM company to be able to say to its investors and customers that they enjoy the benefit of an independent review procedure not available to those of its private sector counterparts could be a marketing advantage.
19. In our view, the OIA has provided adequate protection for information of a commercially sensitive nature, the disclosure of which would disadvantage the commercial operations of the MOM companies. We are not aware of any case where the release after review by an Ombudsman of information which an SOE initially deemed to be commercially

⁶ Ibid.

sensitive has in fact been shown to have adversely affected the business operations of that organisation.

20. The Law Commission is also considering the appropriateness of whether there should be additional grounds for withholding information where disclosure would be likely to prejudice the competitive position or financial interests of an agency.
21. We are aware that some SOEs consider that the administrative compliance costs of the OA and OIA impose a significant cost burden on them. However, we note that the Parliamentary Select Committee which reviewed the application of the OA and OIA to SOEs in 1990 concluded there was *“not sufficient evidence that the additional costs borne by SOEs are generally significant and that alternative costs would not have been incurred”* (paragraph 4.8).
22. We do not have information about the number of OIA *requests* received by the MOM companies, and the cost involved in processing such requests. We do not dispute that there is some cost, but like the Select Committee in 1990, we consider that *“this needs to be balanced against the benefits to the community of access to information and the potential costs of other forms of remedy”* (paragraph 4.8).
23. We do have information about the number of OIA *complaints* received against the MOM companies (see table 1). The Committee will note that the number of OIA complaints received annually is small, and in some cases no OIA complaints were received. To put this in perspective we **enclose** an appendix showing the number of OIA complaints received against a selection of Ministers and central government agencies in the same period.

Table 1: OIA complaints received 1 July 2006 – 30 June 2011

	2006/07	2007/08	2008/09	2009/10	2010/11	Total
Genesis	1	-	1	-	-	2
Meridian	1	2	3	5	2	13
Mighty River Power	-	-	1	-	-	1
Solid Energy	1	4	1	1	4	11

24. On average (based on figures over the past five years) an OIA complaint costs \$1572 for the Office of the Ombudsmen to resolve.⁷ By far the greater proportion of work involved in a complaint is done within the Office of the Ombudsmen and not in the respondent agency, so it is reasonable to assume that the cost per complaint for a respondent agency is no greater than, and presumably less (if the agency is efficient), than the figures for the Office of the Ombudsmen. The volume of complaints against the MOM companies would have to be many times greater than present to result in a level of cost that could prejudice the enterprise’s competitive position.
25. In addition, we do not consider that the application of the OA to the MOM companies could result in any significant costs on their part. The following table records the number of OA complaints received against the MOM companies in the past five years.

⁷ Annual Reports year ended 2007 p 60, year ended 2008 p 54, year ended 2009 p 90, year ended 2010 p 95, and year ended 2011 p 111.

Table 2: OA complaints received 1 July 2006 – 30 June 2011

	2006/07	2007/08	2008/09	2009/10	2010/11	Total
Genesis	3	-	1	7	8	19
Meridian	-	-	-	1	1	2
Mighty River Power	-	-	2	5	3	10
Solid Energy	-	-	-	-	-	-

26. A small number of these complaints were the subject of informal enquiries enabling the matter to be resolved. Once again, the cost of such work is primarily borne by this Office and not the companies.
27. Only one complaint was formally investigated, and in that case the Chief Ombudsman had sufficient information on which to form an opinion without requiring the provision of information from the company concerned.
28. In most cases, the MOM companies will not even have been aware that a complaint has been received by this office. This is because most electricity and gas consumer complaints are, in the first instance, referred back to the company's internal complaints process, and thereafter to the Electricity and Gas Complaints Commission. These avenues generally provide an adequate alternative remedy to an Ombudsman's investigation, although complainants may subsequently complain to an Ombudsman where this proves not to have been the case. While this alternative remedy is not available in relation to complaints about Solid Energy, the above table shows that any concerns in this regard would appear to be of little, if any, significance.
29. It is important to remember that even if the MOM companies are removed from the Ombudsmen's jurisdiction, complaints will still be made that require resolution. It is inevitable that costs will be incurred by the MOM companies in addressing such complaints.
30. The fact that the Ombudsmen receive so few complaints against the MOM companies should not be taken to suggest there is no benefit in retaining the jurisdiction. That statistic only says that a company is not at present acting in a way that any or many people feel it is necessary to complain about to an Ombudsman. If there are few complaints, then the company is in no practical way affected by the Ombudsmen's jurisdiction, but that is not good reason to derogate from principle, and thereby prejudice anyone in the future for whom an Ombudsman may be the most appropriate remedy.
31. The assumption seems to be that state-owned enterprises must be treated exactly the same as private enterprises if they are to be able to compete with them. However, state-owned enterprises (whether wholly or majority state owned under the mixed ownership model) are different from private enterprises by necessary definition of their ownership and purpose (to provide revenue for the Government to expend in promoting the interests of the public). The issue cannot be one of exact equivalence, but equality of actual competitive position in a practical sense.
32. It should also be noted that in the private sector both in New Zealand and abroad (the banking and insurance industries, to name the two most well known locally), the absence of the Parliamentary Ombudsman's jurisdiction has led to the creation by the participants in those industries of private sector "Ombudsmen" for the very reason that

“Ombudsmen” were recognised as beneficial in providing an appropriate means of dealing with such matters that other accountability mechanisms, including the Courts, could not adequately address, or to which recourse would be prohibitively expensive for most citizens. It is therefore surprising that the suggestion is being made that being subject to an existing Ombudsman regime should be seen as placing MOM companies at a competitive disadvantage.

Air New Zealand is not subject to the OA or OIA

33. It has been suggested that the MOM companies should not be subject to the OA and OIA because Air New Zealand is not subject to that legislation. While that is a correct statement of the position, we see this as an anomaly, given that the Crown holds 74 per cent of the shares in Air New Zealand and it is our national carrier.

34. Until it was wholly privatised in 1989, Air New Zealand was subject to the OA and OIA. On privatisation, the Company, as a private sector entity, was appropriately removed from an Ombudsman’s jurisdiction. When the Crown again became a majority shareholder in 2001, Air New Zealand should arguably have again been made subject to those Acts. To our knowledge, making Air New Zealand again subject to the OA and the OIA was never addressed at that time.

35. The fact that Air New Zealand, with its 74% Crown ownership, is not currently subject to the OA and OIA appears to be more an argument for making it so subject, rather than supporting the proposition that other Crown owned companies need to be exempted from the Acts they are currently subject to on the grounds that the public is being permitted to acquire some of the shares in those companies.

The companies will be subject to the continuous disclosure regime

36. The suggestion appears to be that OIA coverage is not required because the MOM companies will be subject to the continuous disclosure regime.

37. In publicly listed companies, continuous disclosure rules require companies to provide timely advice to the market of events and developments that might impact value as they occur. The MOM companies are already subject to the SOE continuous disclosure rules, which are closely modelled on the continuous disclosure regime for publicly listed companies.

38. The focus of the continuous disclosure regime is on making available “material information”. This is undoubtedly information in which there is a particular public interest. However, the focus of the OIA is much wider, applying to *any* information held by the MOM companies, which much be released on request unless a reason for withholding applies, and in the case of a section 9 reason for withholding, where the public interest in disclosure does not outweigh the public interest in withholding.

39. The application of the SOE continuous disclosure regime, or the NZX disclosure regime once the MOM companies are partially privatised, is not an adequate replacement for the application of the OIA.

Conclusion

40. In our view, any possible advantage that may be seen in the MOM companies being removed from the Ombudsmen's jurisdiction under the OA and OIA appears to be minimal, if not illusory, and needs to be balanced against the public interest in maintaining their accountability to the public of New Zealand, so long as the Crown retains a majority interest in them. We see no reason in principle for their removal, particularly given the potential removal of other accountability requirements.

Appendix: OIA complaints received 1 July 2006 – 30 June 2011 against a selection of Ministers and central government agencies

	2006/07	2007/08	2008/09	2009/10	2010/11	Total
Police	98	97	113	149	122	579
MSD	64	43	36	53	70	266
District Health Boards	47	44	43	62	42	238
Corrections	34	24	31	38	91	218
Department of Labour	37	39	47	24	48	195
ACC	9	21	39	41	39	149
Ministry of Justice	33	33	21	29	30	146
Ministry of Health	28	39	24	18	19	128
Ministry of Education	14	22	18	20	22	96
Minister of Health	17	26	16	11	7	77
Minister of Education	20	20	5	17	7	69
IRD	6	20	15	10	23	74
Minister of Justice	23	19	8	5	6	61
LINZ	23	10	6	10	11	60
Treasury	12	12	12	4	7	47
Minister of Finance	6	7	6	14	11	44