



Public Finance (Mixed Ownership Model) Amendment Act 2012

Public Act 2012 No 45
Date of assent 29 June 2012
Commencement see section 2

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Public Finance (Mixed Ownership Model) Amendment Act 2012.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

*Amendments to Public Finance Act 1989***3 Amendments to Public Finance Act 1989**

Sections 4 to 10 amend the Public Finance Act 1989.

4 Section 1A amended (Purpose)

After section 1A(2)(e), insert:

“(ea) places limits on the ownership of the companies named in Schedule 5; and”.

5 Section 2 amended (Interpretation)

In section 2(1), insert in its appropriate alphabetical order:

“**mixed ownership model company** has the meaning set out in section 45P”.

6 New sections 3B and 3C inserted

After section 3A, insert:

“3B Power to amend Schedule 5 to reflect name changes

The Governor-General may, by Order in Council, amend Schedule 5 to replace the name of any company in recognition of a change in its name.

“3C Power to amend Schedule 5 to restore company to State-Owned Enterprises Act 1986

“(1) The Governor-General may, by Order in Council, repeal the name of a company from Schedule 5 and insert the name of that company in Schedules 1 and 2 of the State-Owned Enterprises Act 1986.

“(2) Every Order in Council made under subsection (1) must (unless the amendment is redundant), and is empowered to, also—
“(a) insert the name of that company in Part 2 of Schedule 1 of the Ombudsmen Act 1975; and

“(b) repeal the name of that company from Part B of Schedule 36 of the Income Tax Act 2007 and insert the name of that company in Part A of that schedule.

“(3) An Order in Council may be made under this section only if the Governor-General in Council is satisfied, at the time of the making of the Order in Council, that 100% of the issued ordinary shares in the company are held by Ministers of the Crown on behalf of the Crown.”

7 Section 4 amended (Expenses or capital expenditure must not be incurred unless in accordance with appropriation or statutory authority)

After section 4(2)(b)(ii), insert:

“(iia) a mixed ownership model company listed in Schedule 5; or”.

8 Section 27 amended (Annual financial statements of Government)

In section 27(3), after paragraph (b), insert:

“(ba) all mixed ownership model companies listed in Schedule 5:”.

9 New Part 5A inserted

After Part 5, insert:

“Part 5A

“Mixed ownership model companies

“Preliminary provisions

“45P Definitions of mixed ownership model company and other terms

“(1) In this Act, **mixed ownership model company** means a company listed in Schedule 5.

“(2) In this Part,—

“**10% limit** has the meaning set out in section 45S

“**Crown** means Her Majesty the Queen in right of New Zealand

“**excess securities** means those shares or voting securities in which a person has a relevant interest in excess of the 10% limit

“**FMA** means the Financial Markets Authority established under section 6 of the Financial Markets Authority Act 2011

“**relevant interest** has the meaning given to it by sections 5 to 6 of the Securities Markets Act 1988

“**security** has the meaning set out in paragraph (a) of the definition of that term in section 2(1) of the Securities Markets Act 1988

“**voting right** means a currently exercisable right to cast a vote at meetings of shareholders of a company (and, for this purpose, a right is treated as currently exercisable even if section 45T(1)(c) applies to prevent its exercise), other than a right to vote that is exercisable only in 1 or more of the following circumstances:

“(a) during a period in which a payment or distribution (or part of a payment or distribution) in respect of the security that confers the voting right is in arrears or some other default exists:

“(b) on a proposal that affects rights attached to the security that confers the voting right:

“(c) on a proposal to put the company into liquidation:

“(d) during the liquidation of the company:

“(e) in respect of a special, immaterial, or remote matter that is inconsequential to control of the company

“**voting security** means a security that confers a voting right.

“**45Q Treaty of Waitangi (Te Tiriti o Waitangi)**

“(1) Nothing in this Part shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

“(2) For the avoidance of doubt, subsection (1) does not apply to persons other than the Crown.

“Compare: 1986 No 124 s 9

*“51% Crown control***“45R Restriction on reduction of the Crown’s holding below 51% control**

- “(1) No Minister who is a shareholder in a mixed ownership model company may take any of the following actions if it would result in the Crown having less than 51% control of the company:
- “(a) sell or otherwise dispose of any shares in, or voting securities of, the company held in the Minister’s name;
 - “(b) permit shares in, or voting securities of, the company to be allotted or issued to any person.
- “(2) A mixed ownership model company must not issue, acquire, or redeem shares in, or voting securities of, the company if the issue, acquisition, or redemption would result in the Crown having less than 51% control of the company.
- “(3) An issue, acquisition, or redemption of shares or voting securities is invalid and of no effect to the extent that it breaches subsection (2) (and, if more than 1 person has participated in an issue of shares or voting securities affected by this provision, the invalidity applies to the issue of shares or voting securities to those persons on a pro-rata basis).
- “(4) The Crown has less than 51% control of a mixed ownership model company, for the purposes of this section, if the Crown holds less than—
- “(a) 51% of any class of issued shares in the company; or
 - “(b) 51% of any class of voting securities of the company.

*“10% limit***“45S 10% limit on holdings by persons other than the Crown**

- “(1) No person (other than the Crown) may have a relevant interest in shares in, or voting securities of, a mixed ownership model company that comprise more than—
- “(a) 10% of a class of issued shares in the company; or
 - “(b) 10% of a class of voting securities of the company.
- “(2) In this Part, **10% limit** means the maximum relevant interest permitted under subsection (1).
- “(3) Subsection (1) is subject to section 45U.

“45T Effect of exceeding 10% limit

- “(1) Every person who contravenes section 45S must—
- “(a) comply with any written notice that the person receives from the mixed ownership model company requiring that the person sell or otherwise dispose of interests in excess securities of the company, or take any other steps that are specified, for the purpose of ensuring that the 10% limit is not exceeded; and
 - “(b) without limiting paragraph (a), take the steps that are necessary to ensure that the person is no longer in contravention of that section at the end of 60 days after the date on which the person becomes aware, or ought to have become aware, of the contravention; and
 - “(c) while the person contravenes that section, not exercise or control the exercise of the voting rights attaching to the excess securities.
- “(2) A person has no right to be paid a dividend or other distribution in respect of the excess securities (despite the Companies Act 1993).
- “(3) An exercise of a voting right in contravention of subsection (1)(c) is of no effect and must be disregarded in counting the votes concerned.
- “(4) However, subsections (1)(c) and (3) do not invalidate a resolution if the votes concerned were counted by the company in good faith and without knowledge that the voting rights were exercised in contravention of subsection (1)(c).
- “(5) Nothing in section 45S or this section limits or prevents the constitution of a mixed ownership model company from providing for the 10% limit and the consequences of a person exceeding the 10% limit (including to implement, or to add to, the consequences set out in this section), and the company may, in accordance with the constitution, determine which shares or voting securities are the excess securities for the purposes of its application of this section.

“Compare: 1988 No 234 s 36U

“45U Exemption from 10% limit for trustee corporations and nominee companies, etc

“(1) A person (A) may exceed the 10% limit without contravening section 45S if—

“(a) A complies with both of the following subparagraphs:

“(i) A exceeds the 10% limit merely because A holds securities on behalf of another person in the ordinary course of business as a trustee corporation or nominee company; and

“(ii) section 31(1)(b) of the Securities Markets Act 1988 currently applies to A (and so exempts A as a trustee corporation or a nominee company under that Act); or

“(b) A exceeds the 10% limit merely because A is attributed with (under section 5B of the Securities Markets Act 1988) the relevant interests of another person who is exempt from the 10% limit under paragraph (a) or this paragraph.

“(2) A person to whom subsection (1)(a) applies must—

“(a) keep under continuing review the transactions of all persons for whom A holds securities of the mixed ownership model company in A’s name; and

“(b) inform the mixed ownership model company if any of those persons exceeds the 10% limit.

“(3) The exemption under this section does not apply to a person who is currently designated under section 45V as no longer exempt.

“Compare: 1988 No 234 ss 31–32A

“45V Power of FMA to remove exemption from 10% limit for trustee corporations, nominee companies, etc

“(1) The FMA may, by notice in the *Gazette*, designate a person as no longer exempt under section 45U if it is satisfied that—

“(a) the person has not complied with the condition in section 45U(2); or

“(b) the exemption is being used for the purpose or purposes of circumventing, evading, or defeating the operation of the 10% limit taking into account the nature, substance,

and economic effect of the interest or relationship or other facts (and not the mere form).

- “(2) The FMA may, by notice in the *Gazette*, revoke a designation under this section.
- “(3) A notice under this section takes effect from the date stated in the notice (which must not be earlier than the date of the *Gazette* notice).
- “(4) Before designating a person as no longer exempt, the FMA must—
- “(a) do everything reasonably possible on its part to advise the person of the proposed designation; and
 - “(b) give the person a reasonable opportunity to make submissions to the FMA on the proposal.
- “(5) Subsection (4) does not apply to a designation if the FMA considers that it is desirable in the public interest for the exemption to be removed urgently.
- “(6) Failure to comply with subsection (4) does not invalidate the designation.

“Compare: 1988 No 234 ss 48C, 48D

“Continuing application of certain provisions

“45W Certain provisions of State-Owned Enterprises Act 1986 and other enactments continue to apply

- “(1) Sections 22 to 30(1) of the State-Owned Enterprises Act 1986, the provisions listed in subsection (2), and any Order in Council made at any time under any of those provisions continue to apply to a mixed ownership model company, despite it ceasing to be a State enterprise, as if—
- “(a) the company were a State enterprise and a company named in Schedule 2 of the State-Owned Enterprises Act 1986; and
 - “(b) the Minister of Finance and the Minister responsible for that company were the shareholding Ministers for the company.
- “(2) The provisions are—
- “(a) the definition of State forest land in section 2(1) and sections 24(1) and (6), 24B(4) to (6), and 61(2) of the Conservation Act 1987:

- “(b) section 11 of the Crown Pastoral Land Act 1998:
“(c) sections 8A to 8H of the Treaty of Waitangi Act 1975.
“Compare: 1998 No 99 s 3(2), (4)”.

10 New Schedule 5 inserted

After Schedule 4, insert Schedule 5 as set out in Schedule 1 of this Act.

Amendments to other enactments

11 Amendments to other enactments

Amend the enactments specified in Schedule 2 as set out in that schedule.

Schedule 1	s 10
New Schedule 5 inserted	
Schedule 5	s 45P
Mixed ownership model companies	

Schedule 2

s 11

Amendments to other enactments**Electricity Act 1992 (1992 No 122)**

In section 2(1), replace the definition of **corporation** with:

“**corporation** means a State enterprise (within the meaning of section 2 of the State-Owned Enterprises Act 1986) or a mixed ownership model company (within the meaning of section 45P of the Public Finance Act 1989) that is a generator of electricity, and includes any of its subsidiaries”.

Employment Relations Act 2000 (2000 No 24)

In Schedule 1, Part A, replace clause 3 with:

“2A The production or supply of electricity.

“3 The operational management of a State enterprise (within the meaning of section 2 of the State-Owned Enterprises Act 1986) or a mixed ownership model company (within the meaning of section 45P of the Public Finance Act 1989) that is a generator of electricity.”

Finance Act (No 2) 1988 (1988 No 128)

Repeal sections 7 to 9 and the cross-heading above section 7.

Financial Markets Authority Act 2011 (2011 No 5)

In Schedule 1, Part 1, after the item relating to Parts 4 and 5 and Schedules 1 and 2 of the KiwiSaver Act 2006, insert “Sections 45U and 45V of the Public Finance Act 1989”.

Income Tax Act 2007 (2007 No 97)

After section CW 38(5), insert:

“*Exclusion: mixed-ownership enterprises*

“(5B) Subsection (2) does not apply to an amount of income derived by a mixed-ownership enterprise.”

In section CW 38, in the list of defined terms, insert in its appropriate alphabetical order “mixed-ownership enterprise”.

Income Tax Act 2007 (2007 No 97)—*continued*

After section IC 3(2), insert:

“Restriction for mixed-ownership enterprises

“(2A) A mixed-ownership enterprise may be included in a group of companies only if, at the particular time or for the particular period, no other company in the group is a mixed-ownership enterprise.”

In section IC 3, in the list of defined terms, insert in its appropriate alphabetical order “mixed-ownership enterprise”.

In section YA 1, insert in its appropriate alphabetical order:

“**mixed-ownership enterprise** means an entity specified in schedule 36, part B (Government enterprises)”.

In section YA 1, definition of **public authority**, paragraph (d), replace “that section” with “that section; and”.

In section YA 1, definition of **public authority**, after paragraph (d), insert:

“(e) does not include a mixed-ownership enterprise”.

In section YA 1, definition of **state enterprise**, replace “schedule 36 (State enterprises)” with “schedule 36, part A (Government enterprises)”.

After section YB 2(6)(a), insert:

“(ab) a mixed-ownership enterprise:”.

In section YB 2, in the list of defined terms, insert in its appropriate alphabetical order “mixed-ownership enterprise”.

After section YC 5, insert:

“YC 5B Treatment of mixed-ownership enterprises

“(1) Section YC 5 applies to the Crown’s interest in a mixed-ownership enterprise in the same way as it does to the Crown’s interest in a special corporate entity to determine—

“(a) who is treated as holding those shares and related rights that represent the Crown’s interest in the enterprise:

“(b) how those shares and related rights are treated as being held.

Income Tax Act 2007 (2007 No 97)—*continued*

“Transitional provision for changes in status

“(2) If a special corporate entity changes its status to become a mixed-ownership enterprise, no breach of shareholding arises in relation to the Crown’s interest.

“Defined in this Act: mixed-ownership enterprise, share, special corporate entity.”

Replace the Schedule 36 heading with:

**“Schedule 36
“Government enterprises**

“Part A
“State enterprises”.

In Schedule 36, after the item relating to Works and Development Services Corporation (NZ), insert:

“Part B
“Mixed-ownership enterprises

“Air New Zealand Limited”.

Land Act 1948 (1948 No 64)

In section 172(1), after “State-Owned Enterprises Act 1986,” insert “or as against a mixed ownership model company within the meaning of section 45P of the Public Finance Act 1989,”.

In section 172(2), after “State-Owned Enterprises Act 1986,” insert “a mixed ownership model company (within the meaning of section 45P of the Public Finance Act 1989),”.

Manapouri-Te Anau Development Act 1963 (1963 No 23)

In section 2, definition of **corporation**, after “a State enterprise within the meaning of section 2 of the State-Owned Enterprises Act 1986”, insert “, or a mixed ownership model company (within the meaning of section 45P of the Public Finance Act 1989),”.

Maori Purposes Act 1959 (1959 No 90)

In section 4(7)(l), after “electricity”, insert “or of a mixed ownership model company (within the meaning of section 45P of the Public Finance Act 1989) that is a generator of electricity”.

Ngāi Tahu Claims Settlement Act 1998 (1998 No 97)

In section 8, definition of **Crown body**, replace “or a State enterprise or any company which is wholly-owned by a Crown entity or a State enterprise” with “, a State enterprise, or a mixed ownership model company, or a company that is wholly-owned by a Crown entity, a State enterprise, or a mixed ownership model company”.

In section 8, insert in its appropriate alphabetical order:

“**mixed ownership model company** has the same meaning as in section 45P of the Public Finance Act 1989”.

In section 48(1), definition of **Crown body**, paragraph (a), replace “or any company that is wholly-owned by a Crown entity or a State enterprise” with “a mixed ownership model company, or a company that is wholly-owned by a Crown entity, a State enterprise, or a mixed ownership model company”.

In section 48(1), insert in its appropriate alphabetical order:

“**mixed ownership model company** has the same meaning as in section 45P of the Public Finance Act 1989”.

Public Audit Act 2001 (2001 No 10)

In Schedule 1, insert in its appropriate alphabetical order “Mixed ownership model companies as listed in Schedule 5 of the Public Finance Act 1989”.

Public Records Act 2005 (2005 No 40)

After section 5(6), insert:

“(7) This Act continues to apply to a mixed ownership model company (within the meaning of section 45P of the Public Finance Act 1989) that was a public office immediately before becoming a mixed ownership model company, as if it were still a public office, but only in respect of its affairs before it ceased to be a public office (regardless of when the records of those affairs are created).”

Public Works Act 1981 (1981 No 35)

In section 42B(1), replace “is advised by a State enterprise within the meaning of the State-Owned Enterprises Act 1986 that any land held by that State enterprise” with “is advised by a State enterprise within the meaning of the State-Owned Enterprises Act 1986 or a mixed

Public Works Act 1981 (1981 No 35)—continued

ownership model company (within the meaning of section 45P of the Public Finance Act 1989) that any land held by that State enterprise or mixed ownership model company”.

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (2010 No 24)

In section 6(3), insert in its appropriate alphabetical order:

“**mixed ownership model company** has the meaning given to it by section 45P of the Public Finance Act 1989”.

In section 64(2), replace “or a state enterprise” with “a state enterprise, or a mixed ownership model company”.

In section 64(3), replace “or state enterprise” with “state enterprise, or mixed ownership model company”.

In section 64(4), after paragraph (a), insert:

“(aa) in relation to a mixed ownership model company, includes only activities that relate to an asset held by that company; and”.

Legislative history

21 June 2012	Divided from Mixed Ownership Model Bill (Bill 7–2) by committee of the whole House as Bill 7–3B
26 June 2012	Third reading
29 June 2012	Royal assent

This Act is administered by the Treasury.
