



Cabinet Business Committee

Minute of Decision

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Ngāpuhi Investment Fund Limited: Orders in Council

Portfolio **Treaty of Waitangi Negotiations**

On 9 December 2020, the Cabinet Business Committee:

- 1 **noted** that, on 23 June 2020, the Cabinet Māori Crown Relations, Te Arawhiti Committee:
 - 1.1 approved the establishment of the Ngāpuhi Sovereign Fund;
 - 1.2 agreed that the entity managing the fund will be established as a Schedule 4A Crown Company under the Public Finance Act 1989 (the PFA);

[MCR-20-MIN-0017]
- 2 **noted** that the company - now called Ngāpuhi Investment Fund Limited - requires an Order in Council to be added to Schedule 4A of the PFA;
- 3 **noted** that Schedule 4A companies must comply with certain provisions of the Crown Entities Act 2004, the Official Information Act 1982, and the Ombudsmen Act 1975;
- 4 **noted** the Minister for Treaty of Waitangi Negotiations has agreed with the Minister of Finance that Ngāpuhi Investment Fund Limited will be initially subject to the restrictions outlined in sections 162 to 164 of the Crown Entities Act, but will be exempt from section 161 on acquiring financial products and section 165 on returning surpluses to the Crown;
- 5 **noted** that the Public Finance (Ngāpuhi Investment Fund Limited) Order 2020 gives effect to the decisions above;
- 6 **noted** that section 3AB(1) of the PFA provides that an Order in Council may be made under that section only if:
 - 6.1 more than 50 per cent of the issued ordinary shares in the capital of the company to which the Order relates are held by Ministers of the Crown on behalf of the Crown;
 - 6.2 shares in the company are not listed on a registered market (within the meaning of the Securities Markets Act 1988);
 - 6.3 the company is not a Crown entity or a State enterprise named in Schedule 1 of the State-Owned Enterprises Act 1986;

- 7 **noted** that:
- 7.1 Ngāpuhi Investment Fund Limited will meet the criteria in paragraph 6;
- 7.2 the Minister of Finance has recommended that the company be added to Schedule 4A of the PFA;
- 8 **authorised** the submission to the Executive Council of the Public Finance (Ngāpuhi Investment Fund Limited) Order 2020 [PCO 23363/3.0];
- 9 **noted** that on 30 November 2020, the Minister of Revenue agreed that Ngāpuhi Investment Fund Limited be added to Schedule 35 of the Income Tax Act 2007;
- 10 **noted** that the Income Tax (Ngāpuhi Investment Fund Limited) Order 2020 gives effect to the decision referred to in paragraph 9 above;
- 11 **noted** that section CW 38B of Income Tax Act provides that an Order in Council may be made under that section only if:
- 11.1 the company is listed in Schedule 4A of the PFA or it is a subsidiary of a company listed in Schedule 4A;
- 11.2 Ministers of the Crown hold, on behalf of the Crown, more than 50 per cent of the voting interests in the company;
- 11.3 all other voting interests, if any, in the company are held by local authorities;
- 11.4 the company's primary purpose is the carrying out of a public policy objective of the government;
- 12 **noted** that Ngāpuhi Investment Fund Limited will meet the criteria in paragraph 11;
- 13 **authorised** the submission to the Executive Council of the Income Tax (Ngāpuhi Investment Fund Limited) Order 2020 [PCO 23364/3.0];
- 14 **noted** that a waiver of the 28-day rule is sought:
- 14.1 so that the Orders can come into force as soon as possible;
- 14.2 on the grounds that the orders have little or no effect on the public;
- 15 **agreed** to a waiver of the 28-day rule so that the Orders can come into force on 18 December 2020.

Gerrard Carter
Committee Secretary

Present: (see over)

Present:

Hon Grant Robertson (Chair)
Hon Dr Megan Woods
Hon Carmel Sepuloni
Hon Andrew Little
Hon David Parker
Hon Nanaia Mahuta
Hon Poto Williams
Hon Damien O'Connor
Hon Michael Wood
Hon Dr Ayesha Verrall

Officials present from:

Office of the Prime Minister
Department of the Prime Minister and Cabinet

Proactively released by the Minister for Treaty of Waitangi Negotiations to Te Arawhiti

In Confidence

Office of the Minister for Treaty of Waitangi Negotiations
Chair, Cabinet Business Committee

Ngāpuhi Investment Fund Limited: Orders in Council

Proposal

1. This paper seeks the Committee's authorisation to submit the attached Orders in Council to the Executive Council to:
 - 1.1. add Ngāpuhi Investment Fund Limited to Schedule 4A of the Public Finance Act 1989 (the PFA); and
 - 1.2. add Ngāpuhi Investment Fund Limited to Schedule 35 of the Income Tax Act 2007.

Background

2. On 29 June 2020, Cabinet approved the establishment of the 'Ngāpuhi Sovereign Fund', with final design decisions to be made by the end of 2020 [CAB-20-MIN-0314 refers]. Cabinet also agreed that the entity managing the Fund will be established as a Schedule 4A Crown Company under the Public Finance Act 1989 (**PFA**).
3. The Cabinet policy paper finalising the design of the fund and entity – now Ngāpuhi Investment Fund Limited (**NIFL**) – is being considered alongside this paper. It is now timely to add NIFL to the relevant legislative schedules.
4. These orders are necessary to implement previous decisions and do not require any new policy decisions to be made.

The Public Finance (Ngāpuhi Investment Fund Limited) Order 2020

5. Section 3AB(1) of the PFA authorises the Governor-General by Order in Council made on the recommendation of the Minister of Finance to add the name of a company to Schedule 4A of the PFA and to apply to the company certain provisions of the Crown Entities Act 2004 that appear in Schedule 4A of the PFA.
6. Section 3AB(1) of the PFA provides that such an Order in Council may be made only if the following requirements are met:
 - 6.1. more than 50% of the issued ordinary shares in the capital of the company to which the Order relates are held by Ministers of the Crown on behalf of the Crown;
 - 6.2. shares in the company are not listed on a registered market (within the meaning of the Securities Markets Act 1988); and
 - 6.3. the company is not a Crown entity, or a State enterprise named in Schedule 1 of the State-Owned Enterprises Act 1986.

7. NIFL is in the process of being incorporated under the Companies Act 1993, with the Minister of Finance and Minister for Treaty of Waitangi Negotiations, on behalf of the Crown, each holding 50% of the issued ordinary shares in the capital of the company. Once incorporated, which will be completed prior to 14 December, the company will fulfil the three requirements above.
8. Schedule 4A companies must comply with certain provisions of the Crown Entities Act 2004, as set out in section 45OA of the PFA. These include obligations to provide information to shareholding Ministers, to prepare a statement of intent, to be a good employer, to give effect to directions to support a whole of government approach, and reporting obligations. The provisions of the Official Information Act 1982 and the Ombudsmen Act 1975 will also apply.

Application of Crown Entities Act restrictions

9. When adding a company to Schedule 4A, the Order in Council indicates which of the following restrictions on financial activities will apply:
 - 9.1. s. 161 - Acquiring financial products;
 - 9.2. s. 162 - Borrowing;
 - 9.3. s. 163 - Giving guarantees and indemnities; and
 - 9.4. s. 164 - Using derivatives.
10. This Order in Council is an opportunity to permanently exempt NIFL from any of these restrictions. I propose that NIFL is exempt from s. 161 (acquiring financial products) as this will be a core function of the entity in its work in investing in assets as set out in the accompanying policy decisions paper.
11. I consider the company may also need to be exempt from some of the other restrictions above. However, the company will need some time, as it develops its investment approach, to determine which exemptions it requires, and on what basis. Because of this, I do not propose any additional permanent exemptions through this Order in Council. Any further exemptions can be approved by the Minister of Finance and myself as the company's other responsible Minister in accordance with s160(1)(b) of the Crown Entities Act.
12. Additionally, s 165 allows the Minister of Finance (in consultation with the responsible Minister and the entity itself) to request the return of surplus from the entity to the Crown. All existing Schedule 4A companies have an exemption from this section and one is also proposed here. This exemption enables more confident financial planning from the company Board, as they can be guaranteed to retain operating surpluses over financial years unless an alternative arrangement has been discussed in advance with Ministers.

The Income Tax (Ngāpuhi Investment Fund Limited) Order 2020

13. Section CW 38B of the Income Tax Act 2007 authorises the Governor-General by Order in Council made on the recommendation of the Minister of Revenue to add the name of a company to Schedule 35 of the Income Tax Act 2007.
14. I have recommended to the Minister of Revenue that NIFL should be added to the Schedule on the basis that it meets the necessary criteria outlined in the Act:

- 14.1. the company is listed in Schedule 4A or it is a subsidiary of a company listed in Schedule 4A;
 - 14.2. Ministers of the Crown hold, on behalf of the Crown, more than 50% of the voting interests in the company;
 - 14.3. all other voting interests, if any, in the company are held by local authorities; and
 - 14.4. the company's primary purpose is the carrying out of a public policy objective of the Government of New Zealand.
15. These criteria will be met following the Public Finance Order coming into effect, when it is added to Schedule 4A. On the last criterion, NIFL has the primary purpose of acquiring a diverse range of assets for use in a Ngāpuhi Treaty negotiation and, relatedly, growing fund value.
16. The Minister of Revenue agreed on 30 November 2020 to make a recommendation to this effect.
17. The effect of this addition to Schedule 35 is that the company will be exempt from income tax, will be better enabled to claim back the goods and services tax paid on its purchases and will be eligible for a resident withholding tax exemption certificate.

Timing and 28-day rule

18. It is proposed that the 28-day rule be waived for both orders, on the grounds that the orders have little or no effect on the public and that the establishment of NIFL has already been well publicised.

Compliance

19. The orders comply with the:
- 19.1. Legislative Advisory Committee guidelines;
 - 19.2. New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 19.3. principles and guidelines set out in the Privacy Act 1993;
 - 19.4. relevant international standards and obligations; and
 - 19.5. principles of the Treaty of Waitangi.

Regulations Review Committee

20. There are no grounds for the Regulations Review Committee to draw the orders to the attention of the House under Standing Order 319.

Certification by Parliamentary Counsel

The Public Finance (Ngāpuhi Investment Fund Limited) Order 2020

21. Parliamentary Counsel has certified the Order as being in order for submission to Cabinet:

- 21.1. except that the Order will come into force earlier than the 28th day after its notification in the Gazette (as explained at paragraph 18 above); and
- 21.2. provided that the company is incorporated before the Order is made.

The Income Tax (Ngāpuhi Investment Fund Limited) Order 2020

22. Parliamentary Counsel has certified the Order as being in order for submission to Cabinet:
 - 22.1. except that the Order will come into force earlier than the 28th day after its notification in the Gazette (as explained at paragraph 18 above);
 - 22.2. provided that the company is incorporated before the Order is made; and
 - 22.3. provided that the Order will not be made until after the Public Finance (Ngāpuhi Investment Fund Limited) Order 2020 has been made.

Regulatory impact analysis

23. A Regulatory Impact Statement has not been prepared because the proposals are exempt from regulatory impact analysis requirements.

Publicity

24. The orders will be notified in the New Zealand Gazette.

Proactive release

25. I plan to proactively release this Cabinet paper and associated Cabinet minutes without redaction, once the orders in Council have been gazetted.

Consultation

26. Inland Revenue, the Treasury, and the Department of Prime Minister and Cabinet were informed of this paper.

Financial implications

27. The orders have no financial implications.

Legislative implications

28. The orders amend the Public Finance Act 1989 and the Income Tax Act 2007.

Recommendations

It is recommended that the Cabinet Business Committee:

1. **note** that, on 29 June 2020, Cabinet approved the establishment of the 'Ngāpuhi Sovereign Fund', and that the entity managing the fund will be established as a Schedule 4A Crown Company under the Public Finance Act 1989 [CAB-20-MIN-0314 refers];
2. **note** the company - now called Ngāpuhi Investment Fund Limited - requires an Order in Council to be added to Schedule 4A;
3. **note** this Cabinet paper is part of a suite of three papers to establish Ngāpuhi Investment Fund Limited;

4. **note** that Schedule 4A companies must comply with certain provisions of the Crown Entities Act 2004, the Official Information Act 1982 and the Ombudsmen Act 1975;
5. **note** I have agreed with the Minister of Finance that Ngāpuhi Investment Fund Limited will be initially subject to the restrictions outlined in sections 162-164 of the Crown Entities Act 2004, but will be exempt from section 161 on acquiring financial products and section 165 on returning surpluses to the Crown;
6. **note** that the Public Finance (Ngāpuhi Investment Fund Limited) Order 2020 gives effect to the decisions referred to in recommendations 1 and 4 above;
7. **note** that section 3AB(1) of the Public Finance Act 1989 provides that an Order in Council may be made under that section only if:
 - 7.1. more than 50% of the issued ordinary shares in the capital of the company to which the Order relates are held by Ministers of the Crown on behalf of the Crown;
 - 7.2. shares in the company are not listed on a registered market (within the meaning of the Securities Markets Act 1988); and
 - 7.3. the company is not a Crown entity or a State enterprise named in Schedule 1 of the State-Owned Enterprises Act 1986;
8. **note** that Ngāpuhi Investment Fund Limited will meet the criteria in recommendation 7, and the Minister of Finance has recommended that the company be added to Schedule 4A of the Public Finance Act 1989;
9. **authorise** the submission to the Executive Council of the Public Finance (Ngāpuhi Investment Fund Limited) Order 2020, inserting Ngāpuhi Investment Fund Limited into Schedule 4A of the Public Finance Act 1989 and applying sections 162, 163, and 164 of the Crown Entities Act 2004 to the fund;
10. **note** that on 30 November, the Minister of Revenue agreed that Ngāpuhi Investment Fund Limited should be added to Schedule 35 of the Income Tax Act 2007;
11. **note** that the Income Tax (Ngāpuhi Investment Fund Limited) Order 2020 gives effect to the decision referred to in paragraph 9 above;
12. **note** that section CW 38B of Income Tax Act 2007 provides that an Order in Council may be made under that section only if:
 - 12.1. the company is listed in Schedule 4A or it is a subsidiary of a company listed in Schedule 4A;
 - 12.2. Ministers of the Crown hold, on behalf of the Crown, more than 50% of the voting interests in the company;
 - 12.3. all other voting interests, if any, in the company are held by local authorities; and
 - 12.4. the company's primary purpose is the carrying out of a public policy objective of the Government;
13. **note** that Ngāpuhi Investment Fund Limited will meet the criteria in recommendation 11;

14. **authorise** the submission to the Executive Council of the Income Tax (Ngāpuhi Investment Fund Limited) Order 2020 inserting Ngāpuhi Investment Fund Limited into Schedule 35 of the Income Tax Act 2007;
15. **note** that a waiver of the 28-day rule is sought:
 - 15.1. so that the orders can come into force as soon as possible;
 - 15.2. on the grounds that the orders have little or no effect on the public; and
16. **agree** to waive the 28-day rule so that the orders can come into force on 18 December 2020.

Authorised for lodgement

Hon Andrew Little
Minister for Treaty of Waitangi Negotiations
/ / 2020

Proactively released by the Minister for Treaty of Waitangi Negotiations to Te Arawhiti