

# The Treasury

## Project Korimako - Release of advice

December 2022

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- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [34] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions
- [35] 9(2)(g)(ii) - to maintain the effective conduct of public affairs through protecting ministers, members of government organisations, officers and employees from improper pressure or harassment
- [36] 9(2)(h) - to maintain legal professional privilege
- [37] 9(2)(i) - to enable the Crown to carry out commercial activities without disadvantage or prejudice
- [38] 9(2)(j) - to enable the Crown to negotiate without disadvantage or prejudice
- [39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage

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## Treasury Report: Project Korimako - Establishment of PFA Schedule 4A Company

<b>Date:</b>	10 May 2022	<b>Report No:</b>	T2022/934
		<b>File Number:</b>	SE-1-3-22-2

### Action sought

	Action sought	Deadline
<b>Minister of Finance</b> (Hon Grant Robertson)	<b>Approve</b> the Company's constitution, limitations on financial powers, and identity of shareholders.	16 May 2022
<b>Associate Minister of Finance</b> (Hon David Parker)	<b>Approve</b> the Company's constitution, limitations on financial powers, and identity of shareholders.	16 May 2022

### Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact	
David Stanley	Principal Advisor, Commercial and Institutional Performance	[39]	[35]	✓
Shelley Hollingsworth	Manager, Commercial and Institutional Performance			

### Minister's Office actions (if required)

**Return** the signed report to Treasury.

Note any feedback on the quality of the report

**Enclosure:** Yes - Project Korimako - Crown vehicle constitution (Treasury:4647772v1)

# Treasury Report: Project Korimako - Establishment of PFA Schedule 4A Company

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## Executive Summary

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This report seeks decisions to commence the process of establishing a new company (the Company) listed in Schedule 4A of the Public Finance Act 1989 (PFA) (PFA Schedule 4A) to hold the Crown's interest in Kiwi Group Holdings Limited (KGH).

Specifically, in this report we seek your approval to the proposed constitution of the Company, primarily focused on the purpose and nature sections. We also seek approval to the Company's proposed financial powers and shareholders.

### **Constitution**

A draft constitution is attached to this Report for your agreement (Appendix 1). It meets the requirements for a company that will be listed in PFA Schedule 4A and is largely similar to the constitutions of other recently established PFA Schedule 4A companies. The key provisions requiring consideration are in relation to the Company's purpose and nature.

These sections have been developed to recognise that the Company's purpose is to be the entity through which the Crown oversees its (likely majority) shareholding in KGH, while ensuring that nothing in these sections limits KGH and its subsidiaries' ability to conduct their businesses. These sections make clear that the Company is a holding company that only acts indirectly through its subsidiaries to provide the specified financial services. It has the objective of being a successful business and, subject to agreement between the Company and its shareholders, is required to distribute all its financial returns to its shareholders.

### **Financial Powers**

PFA Schedule 4A requires you to specify which of the Crown Entities Act 2004 (CEA) provisions that place restrictions on the entity's financial powers will apply to the Company, including restrictions on acquisition of financial products, borrowing, giving of guarantees and indemnities, and use of derivatives. In addition, section 165 of the CEA if specified enables the Minister of Finance to require a company to pay its net surplus to the Crown.

As the Company is just the entity through which the Crown holds its interest in KGH, it has no need for exemption from any of the restrictions noted above. A specific exemption for the Company's ongoing holding of the KGH shares can be approved separately by Ministers under section 160(1)(b) of the CEA.

Although the Company itself has no need for exemption from these restrictions, KGH and its subsidiaries need full access to these financial powers to operate their businesses in the financial sector. Section 97 of the CEA may in some circumstances require the Company to ensure that the powers of its subsidiaries are no greater than its own (as set out in Appendix 2). To ensure that these restrictions on the Company do not cascade down to its subsidiaries, we recommend that Ministers issue a blanket approval under section 160(1)(b) of the CEA in favour of KGH and any of its subsidiaries (current and future).

As the Company is just the entity through which the Crown holds a specific investment (that is, the shares of KGH), it has no reason to retain its surpluses. It would therefore be prudent, and consistent with the nature and purpose of the Company, to enable the Minister to require distribution of surpluses back to the shareholders under s165 of the CEA. This would allow the Minister of Finance (after consultation with the responsible Minister and the Company) to require the net surplus to be payable. Any such direction, if issued, should only be made in respect of the Company and should not purport to apply to KGH or its subsidiaries.

## Shareholders

The CEA (as applied by the PFA) requires that PFA Schedule 4A companies have at least two shareholding Ministers, who must hold an equal number of shares. One of the shareholding Ministers must be the Minister of Finance. We seek your agreement that the other shareholding minister will be the Minister for State Owned Enterprises. If you agree, we will seek his confirmation that he accepts this role.

## Future Decisions

To incorporate the Company, at least one director is required; for Crown-owned companies, at least two is usual. The process of identifying suitable directors for the Company is underway and you have also received advice (T2022/924 refers) seeking your further instructions on the board search process. Following the Cabinet paper on the Company's establishment, and after the preferred candidates have confirmed they will serve on the board, the Treasury will prepare an appointment Cabinet paper for Ministers to seek approval to Board appointments from the Cabinet Appointment and Honours Committee.

The Company will have some operational expenses, such as Board fees and costs associated with accounting and financial reporting. In its initial phase it will be responsible for the purchase of the shares in KGH and associated preliminary costs. If required by the Office of the Auditor General (OAG), these may need to include reimbursing the Treasury for the due diligence costs undertaken prior to the reaching of final sale and purchase agreements with selling shareholders. The Company will also need to establish the usual policies and processes. We propose that the Company be provided with an initial level of working capital via appropriation. We will seek this appropriation as part of the Cabinet paper seeking appropriations to cover the purchase of KGH shares. Longer term funding would be agreed with the directors of the Company in due course alongside the Statement of Intent.

A name for the Company will be required for its incorporation. There is no need to make this decision until closer to incorporation but we will talk to your office staff to check if you have a preference for the Company name at this stage.

## Recommended Action

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We recommend that you:

- a **approve** the Company constitution attached as Annex 1

Agree / Disagree  
Minister of Finance

Agree / Disagree  
Associate Minister of Finance

- b **agree** that the following sections of the Crown Entities Act 2004 will apply to the Company

- i. section 161: Restrictions on acquisition of financial products;
- ii. section 162: Restrictions on borrowing;
- iii. section 163: Restrictions on giving of guarantees and indemnities;
- iv. section 164: Restrictions on use of derivatives;
- v. section 165: Enabling the Minister of Finance to require a company to pay its net surplus to the Crown.

Agree / Disagree  
Minister of Finance

Agree / Disagree  
Associate Minister of Finance

c **agree** that the shareholding Ministers of the Company will be the Minister of Finance and the Minister for State Owned Enterprises

Agree / Disagree  
Minister of Finance

Agree / Disagree  
Associate Minister of Finance

d **refer** this report to Hon Dr Megan Woods for her information

Yes / No  
Minister of Finance

Shelley Hollingsworth  
**Manager, Commercial and Institutional Performance**

Hon Grant Robertson  
**Minister of Finance**

\_\_\_\_\_ / May / 2022

Hon David Parker  
**Associate Minister of Finance**

\_\_\_\_\_ / May / 2022

# Treasury Report: Project Korimako - Establishment of PFA Schedule 4A Company

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## Purpose of Report

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1. This report seeks decisions to commence the process of establishing a new company (the Company) listed in Schedule 4A of the Public Finance Act 1989 (PFA) (PFA Schedule 4A) to hold the Crown's interest in Kiwi Group Holdings Limited (KGH).

## Background

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2. The Government's intention is to pursue direct majority Crown ownership of KGH, as a step toward putting in place long-term ownership arrangements for KGH [DEV-22-MIN-0051 refers]. Ministers have agreed in principle to establish a new company to be listed in PFA Schedule 4A to hold the Crown's interest in KGH (T2022/707 refers).
3. Establishment of a new company listed in PFA Schedule 4A requires decisions on:
  - a the company's constitution and, in particular, the description of the company's purpose and nature
  - b financial powers
  - c shareholders
  - d directors, and
  - e funding.

## Constitution

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4. PFA Schedule 4A companies are required to have a constitution. A draft constitution is attached to this report for your agreement (Appendix 1). It meets the requirements for a company that will be listed in PFA Schedule 4A. Its form is largely similar to the constitutions of other recently established PFA Schedule 4A companies; in particular, other than the purpose and nature sections (and minor mechanical updates), it is identical to the constitution of New Zealand Green Investment Finance Limited. The key provisions requiring consideration are in relation to the Company's purpose and nature.
5. Provisions in a company's constitution in relation to its purpose and nature provide a formal means for Ministers (on behalf of the Crown) to communicate to directors (and to make generally transparent) the broad parameters within which the company is required to be operated and managed. We anticipate that, upon the establishment of the Company, shareholding Ministers will send the directors a "Letter of Expectations" that will set out in more detail the parameters within which Ministers expect the Company (and its board) to operate (discussed further below in paragraph 31).

### ***Purpose of the Company***

6. A provision in the Company's constitution on the purpose of the Company is an opportunity to summarize the relevant overall objectives of the Crown. The following proposed statement of purpose for the Company is based on the existing shareholder's agreement in respect of KGH:

- a The purpose of the Company as a holding company is to oversee the investment in KGH and its subsidiaries and, indirectly through KGH and its subsidiaries, to carry on and develop the Business. (Note that the “Business” would be defined as “the business carried on by KGH and its subsidiaries, including the provision of banking and financial services, the provision of home loans and insurance, wealth management and asset financing”.)
- b The Company may exercise its rights, powers and privileges only for the Company’s purpose.

7. [36]

### ***Nature of the Company***

8. A provision in the Company’s constitution on the nature of the Company is an opportunity to summarise the overall parameters within which the Company will operate, and their implications for the management and operation of the Company. The proposed constitutional clause on the Company’s nature states that the Company will have a commercial focus while behaving as a good corporate citizen (with (a)(ii) and (iii) based on state enterprise requirements). This provides an important signal to any other remaining KGH shareholders [33], [37], [38], and is consistent with the Government’s Kiwibank disruptor goal. The proposed clause is as follows:

- a The principal objective of the Company as a holding company is to operate, indirectly through KGH and its subsidiaries, as a successful business and, to this end:
  - i to maximise its long-term value and achieve the maximum financial return to the Company’s shareholders;
  - ii to be as profitable and efficient as comparable businesses that are not owned by the Crown; and
  - iii to be an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.
- b Except to the extent shareholders agree otherwise, all financial returns of the Company are expected to be distributed to shareholders to the maximum extent permitted by law.
- c The Company is a Crown-owned company, and is or will be a company named in Schedule 4A of the Public Finance Act and listed in Schedule 1 of the Ombudsmen Act 1975. To the extent that, following its incorporation, the Company is not named in Schedule 4A of the Public Finance Act, the Company must act as if it was a company named in Schedule 4A of the Public Finance Act (including in respect of the sections of the Crown Entities Act that would apply to a company listed in Schedule 4A of the Public Finance Act) until its name is added to Schedule 4A of the Public Finance Act.
- d Under the Public Audit Act 2001 the Controller and Auditor-General is to be the auditor of the Company.
- e The Company is an employer for the purposes of clauses 12 to 14 of Schedule 8 to the Public Service Act 2020.

9. As with the Company's statement of purpose, the above clause on the Company's nature has been drafted to ensure that there is minimal restriction or other impact upon KGH and its subsidiaries.

## Financial powers

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10. When a company is added to PFA Schedule 4A, it is necessary to specify which of the Crown Entities Act 2004 (CEA) sections relating to financial powers apply to the company.
11. PFA Schedule 4A includes a table of tick-columns to specify which of the CEA provisions that place restrictions on the entity's financial powers will apply to the Company. The relevant CEA sections are:
  - a section 161: Restrictions on acquisition of financial products;
  - b section 162: Restrictions on borrowing;
  - c section 163: Restrictions on giving of guarantees and indemnities;
  - d section 164: Restrictions on use of derivatives;
  - e section 165: Enabling the Minister of Finance to require a company to pay its net surplus to the Crown.

### ***Restrictions on financial instruments (CEA sections 161-164)***

12. Practice varies across the PFA Schedule 4A companies as to which restrictions on financial instruments apply but, generally, most of these restrictions apply to most PFA Schedule 4A companies (that is, they are ticked). Each of the types of restriction has exemptions for routine matters of normal company operation (bank accounts, director indemnities, etc.).
13. As the Company is just the entity through which the Crown holds its interest in KGH, it has no need for exemption from any of the restrictions in sections 161 to 164 of the CEA, so each of those columns in PFA Schedule 4A could be ticked. A specific exemption for the Company's ongoing holding of the KGH shares can be approved separately by Ministers under section 160(1)(b) of the CEA.
14. Although the Company itself has no need for exemption from these restrictions, KGH and its subsidiaries need full access to these financial powers to operate their businesses in the financial sector. Section 97 of the CEA may in some circumstance require the Company to ensure that the powers of its subsidiaries are no greater than its own (as set out in Appendix 2). To ensure that these restrictions on the Company do not cascade down to its subsidiaries, we recommend that Ministers issue a blanket approval under section 160(1)(b) of the CEA. The approval would be in favour of KGH and any of its subsidiaries (current and future) in respect of sections 161 to 164 of the CEA, if and to the extent that those sections are ever taken to apply to those companies. This is the preferred approach because it makes clear the Company itself has no financial powers other than as the shareholder of KGH.
15. An alternative approach would be to exempt the Company altogether from these restrictions (that is, no ticks in PFA Schedule 4A in the columns for these sections). This is not preferred because it does not make clear that the Company is just the entity through which the Crown holds its interest in KGH, and that all the "business" of this investment is to be carried out by KGH and its subsidiaries.

## ***Enabling the Minister to require surplus payments (CEA section 165)***

16. Other PFA Schedule 4A companies are not subject to the provision enabling the Minister to require repayment of surpluses to the Crown. In contrast, shareholding Ministers can determine the amount of dividend payable by state-owned enterprises (although we are not aware of that power having been used).<sup>1</sup>
17. In the case of the Company, it is just the entity through which the Crown holds a specific investment (that is, the shares of KGH), and it has no reason to retain its surpluses. It would therefore be prudent, and consistent with the nature and purpose of the Company, to enable the Minister to require distribution of surpluses back to the shareholders. This column in PFA Schedule 4A therefore should be ticked for the Company. This would allow the Minister of Finance (after consultation with the responsible Minister and the Company) to require the net surplus to be payable. Any such direction, if issued, should only be made in respect of the Company and should not purport to apply to KGH or its subsidiaries.

## **Shareholders**

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18. The CEA (as applied by the PFA) requires that PFA Schedule 4A companies have at least two shareholding Ministers, who must hold an equal number of shares. One of the shareholding Ministers must be the Minister of Finance.
19. We propose that the other shareholding Minister be the Minister for State Owned Enterprises. This would be consistent with other similar PFA Schedule 4A companies, specifically Crown Asset Management Limited (which like the Company operated in the financial sector), and Crown Infrastructure Partners Limited.
20. If you agree, we will seek confirmation from the Minister for State Owned Enterprises that he accepts this role. We are also exploring with DPMC whether any conflicts of interest arise from the proposed shareholdings.

## **Directors**

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21. To incorporate any company, at least one director is required; for Crown-owned companies, at least two is usual. The process of identifying suitable directors for the new Company is underway, with a particular focus on an establishment chair and one director as previously agreed (T2022/707 refers). The Treasury manages the process to select directors and recommend candidates to Ministers. You have also received advice (T2022/924 refers) seeking your further instructions on the board search, including the search process, capability profiling, candidate identification and short-listing. Following the Cabinet paper on the Company's establishment, and after the preferred candidates have confirmed they will serve on the board, the Treasury will prepare an appointment Cabinet paper for shareholding Ministers. Ministers then seek approval from the Cabinet Appointment and Honours Committee and Cabinet accordingly. Those two directors would serve as the Company board for the purpose of completing the KGH share purchase transaction, and would later be joined by more directors.

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<sup>1</sup> s13(1)(b) State-Owned Enterprises Act 1986.

## Funding

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22. As the Company will primarily act in a holding capacity, its operational expenses should be limited. It will, however, have expenses such as Board fees and costs associated with accounting and financial reporting.
23. The Company will be responsible for the purchase of the shares in KGH and associated preliminary costs, with funds raised for this purpose through the issue of shares to the Crown. If required by the Office of the Auditor General (OAG), initial company costs may need to include reimbursing the Treasury for certain preliminary costs - notably the due diligence costs undertaken prior to the reaching of final sale and purchase agreements with selling shareholders. The Treasury is currently in discussions with the OAG about its requirements so that the only Tier 1 provider of due diligence services not insurmountably conflicted can provide the Treasury with due diligence services in respect of the proposed purchase of shares in KGH.
24. We propose that the Company be provided with an initial level of working capital via appropriation. We will seek this appropriation as part of the Cabinet paper seeking appropriations to cover the purchase of KGH shares. Longer term funding would be agreed with the directors of the Company in due course alongside the Statement of Intent. [25], [34], [37]

We have allowed for this kind of arrangement in the constitution's proposed nature of the company section.

## Next Steps

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### ***Company name***

25. A name for the company will be required for its incorporation. There is no need to make this decision until closer to incorporation but we will talk to your office staff to check if you have a preference for the company name at this stage.

### ***Cabinet, board search and incorporation***

26. Following your agreement to the proposals set out in this paper, the Treasury will prepare a Cabinet paper seeking agreement to the Company's establishment, covering matters such as its status (being a PFA Schedule 4A company), its shareholding Ministers, and its nature, purpose, and financial powers. This would also include appropriations for establishment/operating costs. Our initial thinking is that this Cabinet approval could be sought at the same time as any appropriations for the KGH share purchase, after the Budget Moratorium. The board search will also proceed in parallel.
27. As noted above, company incorporation can take place following Cabinet approval, and following director appointments (including approval from the Cabinet Appointment and Honours Committee and Cabinet).
28. As previously advised (T2022/707 refers), shareholding Ministers can finalise the arrangements for the share purchase before 30 June, prior to the Company being established. The settlement of the share purchase would then take place at a later date, once the PFA Schedule 4A company has been established.

### ***Adding the Company to PFA Schedule 4A***

29. Following incorporation, an Order in Council to add the Company to PFA Schedule 4A can be prepared. The Order in Council goes through the Cabinet Legislation Committee and gets signed by the Governor General. Ordinarily it would become

effective 28 days after it is gazetted. However, we consider there are good grounds for obtaining a waiver of this usual 28-day rule; if a waiver is obtained, the Order in Council would take effect once gazetted. The constitution would then be presented to the House of Representatives.

30. As we note at paragraph 28 above, shareholding Ministers can finalise the arrangements for the share purchase prior to the Company being established, with the share purchase settlement taking place at a later date. As previously advised (T2022/707 refers), Treasury considers that, in the event that the new PFA Schedule 4A company is not in place by the time of settlement, the Company can undertake the share purchase transaction (that is, take ownership of KGH shares) after it has been incorporated, but before its listing on PFA Schedule 4A has been completed. The process to make the Crown vehicle into a PFA Schedule 4A would then proceed in parallel with settlement of the commercial transactions (so the KGH purchase might take place before the Order in Council listing the Crown vehicle on PFA Schedule 4A takes effect).

### ***Letter of Expectations and SOI/SPE***

31. The Treasury will prepare a draft Letter of Expectations, which sets out shareholding Ministers' strategic objectives for the organisation and what they expect it to achieve and when during the establishment process. Shareholding Ministers can consult with the proposed directors on the intended Letter of Expectations prior to incorporation. The Letter of Expectations can then be put in place from incorporation. This will enable shareholding Ministers' expectations to be made clear to the Company prior to the KGH share purchase, in the event that it takes place before listing on Schedule 4A.
32. As soon as practicable after it is established, the Company must prepare a Statement of Intent (SOI). The SOI must cover a minimum four-year horizon and sets out the Company's strategic objectives, the nature and scope of its activities, how it will meet its strategic objectives, how it will manage its organisational capability and how it will assess its overall performance. The Company must also prepare a Statement of Performance Expectations (SPE). The SPE sets out what will be delivered, how performance will be assessed in detail, and forecast financial information for the year ahead.

### ***Operational establishment activities***

33. Given that the Company will primarily act in a holding capacity, and it is not expected that premises or employees will be required, we envisage that setting up the Company operationally will be fairly straightforward. The board will need to develop usual policies and processes (processes for reporting to government, risk management, compliance, conflicts of interest, etc). The Company may also need service arrangements, including for accounting and financial reporting. To the extent possible, Treasury may engage an establishment advisor to assist with this workstream, prior to the appointment of establishment directors.
34. [33]. [37], [38]





