The Treasury

New Zealand Superannuation and Retirement Income Act 2001: Amendment to Section 59 Information Release

February 2023

Information Withheld

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act).

Where this is the case, the relevant sections of the Act that would apply have been identified.

Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to sections of the Act under which information has been withheld:

[25] 9(2)(b)(ii) - to protect the commercial position of the person who supplied the information or who is the subject of the information

[26] 9(2)(ba)(i) - to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied

[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

[39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage

Where information has been withheld, a numbered reference to the applicable section of the Act has been made, as listed above. For example, a [25] appearing where information has been withheld in a release document refers to section 9(2)(b)(ii).

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TE TAI ŌHANGA
THE TREASURY

Treasury Report: New Zealand Superannuation and Retirement Income Act: Issues arising from drafting the amendment Bill

Date:	7 April 2022	**Report No:**	T2022/679
		File Number:	CM-1-3-96-5-2-1

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	**Agree** to policy changes and that the draft Bill may be shared with the OAG	12 April 2022

Contact for telephone discussion (if required)

Name	Position	Telephone		1st Contact
Robert Barton	Senior Analyst, Financial Institutions	[39]	N/A (mob)	✓
Emily Howe	Manager, Financial Institutions, Financial Institutions		[35]	

Minister's Office actions (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: Appendix below

Treasury Report: New Zealand Superannuation and Retirement Income Act: Issues arising from drafting the amendment Bill

Executive Summary

This report seeks your agreement to some policy changes to give full effect to Cabinet's decision to repeal section 59 of the NZ Superannuation and Retirement Income Act 2001 (the **NZSRI Act**) (DEV-21-MIN-0233 and CAB-21-MIN-0487).

Cabinet authorised you to make decisions on any further policy matters that arise as part of implementing the decision to repeal section 59.

During consultation over a draft Bill the question of the appropriateness of applying the Public Audit Act 2001 (**PAA**) to the Fund's controlled investments arose. (The Fund itself remains a public entity). After consulting the Fund and the Office of Auditor-General (OAG), we recommend that in repealing section 59 the Bill should ensure that any controlled investment entity should be excluded from public entity status under the PAA. We see the exclusion from public entity status as a consequential amendment forming part of the repeal of section 59 and giving full effect to the intent of Cabinet's November 2021 decision to repeal the restriction on controlling interest. We seek your confirmation of this conclusion and of other consequential technical amendments.

We have also concluded that there are no flow-on consequences of the NZSRI Act changes to the Acts of other Crown funds. We seek your agreement that we do not undertake further policy investigation in this area.

It would be helpful if we could consult the OAG over the text of the Bill. Accordingly, we seek your agreement to sharing the next draft of the Bill with it.

Recommended Action

We recommend that you:

a **Note** that Cabinet authorised you to make decisions on any further policy matters that arise as part of implementing the decision to repeal section 59 of the NZ Superannuation and Retirement Income Act 2001.

b **Agree** that an entity in which the Fund has a controlling interest should not be a public entity for the purposes of the Public Audit Act 2001.

Agree/disagree.

c **Agree** that we do not undertake any investigation to determine if there are other controlled entities sitting within investment portfolios for other Crown financial institutions who should likewise be excluded from "public entity" status under the PAA.

Agree/disagree.

d **Agree** that an entity in which the Fund has a controlling interest is not a Crown entity subsidiary for the purposes of section 7(1)(c) of the Crown Entities Act 2004.

Agree/disagree.

e **Note** that it is not proposed to make changes to the legislation of other Crown funds (the Government Superannuation Fund Act 1956 and the Venture Capital Fund Act 2019).

f **Note** that the Bill will also provide:

i. that entities controlled by the Guardians are expressly excluded from being part of the Guardian's "Crown Entity Group" under the Crown Entities Act 2004 (this will ensure they are provided the same treatment as Fund Investment Vehicles)

ii. that entities controlled by the Guardians are provided the same protection as Fund Investment Vehicles (i.e. to avoid any doubt that commercial transactions entered into by controlled entities cannot be challenged by the counterparty after the fact on the basis that they were *ultra vires).*

g **Agree** to the Treasury sharing the draft Bill with the Office of Auditor-General as part of consultation.

Agree/Disagree

Emily Howe
Manager, Financial Institutions

Hon Grant Robertson
Minister of Finance

Treasury Report: New Zealand Superannuation and Retirement Income Act: Issues arising from drafting the amendment Bill

Purpose of Report

1. A number of consequential policy issues have arisen as we have been working with the Parliamentary Counsel Office (PCO) and the NZ Super Fund in drafting the amendments to the NZSRI Act. The draft Bill will amend the NZSRI Act to remove the section 59 restriction on the Guardians taking a controlling stake in businesses. The policy was agreed by Cabinet Economic Development Committee on 17 November 2021 and confirmed by Cabinet on 22 November 2021 (DEV-21-MIN-0233 and CAB-21-MIN-0487).

2. Cabinet authorised you to make decisions on any further policy matters that arise as part of implementing the decision to repeal section 59. This report seeks your agreement to some policy changes to give full effect to Cabinet's decision.

The draft Bill

3. In line with Cabinet's decision, the draft Bill will repeal section 59 (the restriction on the Fund taking a controlling interest in an entity) and make a number of other changes as agreed by Cabinet. There are also several consequential amendments, including preserving existing arrangements for Fund Investment Vehicles (**FIVs**). These include that any entity controlled by the Fund will not be a Crown entity subsidiary under section 7(10)(c) of the Crown Entities Act 2004 (**CEA**), and that the Official Information Act 1982 and the Ombudsmen Act 1975 do not apply to such controlled entities.

4. In consulting over an earlier draft of the Bill the question of the appropriateness of applying the Public Audit Act to the Fund's controlled investments arose. (The Fund itself remains a public entity). We have consulted both the Guardians and the Office of Auditor-General on this question, and the consensus resulting from those discussions is outlined below.

Public Entity status

5. Public entity status for NZSF's investments was not explicitly addressed in either Cabinet's decision last year or in the Treasury policy review preceding it. The Guardians raised with us its concern that controlled entities would technically be caught within the definition of "public entities" under the PAA. The consequence of such controlled entities being "public entities" is that the Auditor-General would be their auditor.

6. After investigation, we agree that excluding those controlled entities from public entity status would be justified (akin to the Act's existing exclusion of FIVs' controlled entities from the Crown Entities Act, the Ombudsmen Act and the Official Information Act).

7. We therefore recommend that in repealing section 59, the Bill should ensure that any controlled entity should be excluded from public entity status under the PAA. We see the exclusion from public entity status as a consequential amendment forming part of the repeal of section 59. Our reasoning is as follows:

a Any controlling interest the Fund may have in a private commercial entity is purely as an investment – it is not for any other public policy purpose. The Guardians is specifically required to invest the Fund "on a prudent, commercial basis", and in a manner consistent with "maximising return without undue risk to the Fund as a whole" (section 58 of the NZSRI Act).

b The Fund invests on a purely commercial basis and on a double arm's length basis from the Crown, which has no legal power to issue any binding direction in respect of particular investments.

c Any controlling interest may be transitory, as the Fund is continually adjusting its investment positions.

d "Public entities" are subject to a range of interventions and scrutiny by the Auditor-General (such as being audited by the Auditor-General, who may also conduct reviews of the extent to which they are carrying out their activities "effectively and efficiently"). Private commercial entities are not subject to those interventions and scrutiny.

e To a private commercial entity and its other private sector investors/owners, "public entity" status would be an unwelcome consequence of accepting an investment from the Fund. This means that the Guardians would be a less attractive investor/partner relative to other private sector investors.

f The principles of the PAA are very much focused on public sector entities which are ultimately accountable to Parliament and part of the Crown estate. Controlled entities as anticipated by the Bill will be private sector organisations, often companies.

g The term "public entity" is currently used in 79 enactments. If controlled investments were to be public entities, there would be a residual risk that the Fund's controlled entities will inadvertently be picked up in existing or new legislation.

h The Auditor-General is the auditor of the Guardians and the NZ Super Fund, which is the appropriate level for a public audit process. Importantly, the financial statements in respect of the NZ Super Fund will encompass investments in controlled entities.

8. We are also satisfied that the Fund's investments, even if they are a controlling interest, are different from the Mixed Ownership Model companies and Air New Zealand, which are "public entities". In those companies, reflecting in part their state-owned origins, the Crown is a direct shareholder and is in a position to control the outcome of shareholder votes and Board appointments.

9. We therefore see this proposed exclusion as a consequential change so as to give full effect to the intent of Cabinet's November 2021 decision to repeal the restriction on controlling interest. We seek your confirmation of this conclusion.

Other Crown Funds' Legislation

10. There is a policy question as to whether there are other controlled entities sitting within investment portfolios for other Crown financial institutions which should likewise be excluded from "public entity" status under the PAA.

11. We note that last October, you decided not to make any changes to the Government Superannuation Fund Act 1956 (T2021/2430 refers) which may have brought that Act and the NZSRI Act into greater alignment (chiefly by permitting the GSF to create and manage FIVs).

12. The PCO has also raised whether there should be changes to the Venture Capital Fund Act 2019 (**VCF Act**) as a consequence of amendments to the NZSRI Act. We note the direct relevance given that under the VCF Act, the Guardians manage and administer Elevate (the VCF fund). After discussing this with the Guardians, we do not consider that this is necessary. The Elevate Fund differs from the NZ Super Fund in that it is really a fund of funds, with little likelihood that it would hold a controlling interest in any entity (and therefore be subject to public entity status).

13. We seek your agreement that we do not undertake further policy investigation to determine if there are other controlled entities sitting within investment portfolios for other Crown financial institutions which should likewise be excluded from "public entity" status under the PAA. This is on the basis that the Bill's policy is a discrete proposal to remove the restriction on the Guardians obtaining a controlling interest in other entities as part of its management of the Fund under the NZSRI Act.

An entity controlled by the Guardians is not a Crown entity subsidiary under the Crown Entities Act 2004

14. Whether an entity controlled by the Guardians is a Crown entity subsidiary under the Crown Entities Act 2004 was not explicitly addressed in either Cabinet's decision last year or in the Treasury policy review preceding it.

15. In line with the exemptions applied to FIVs, the policy intent is that controlled entities should be excluded from being a Crown entity subsidiary under section 7(1)(c) of the CEA. Accordingly, we will work with PCO to draft this exemption.

Technical Changes to NZSRI Act

16. An outline of further technical amendments as a consequence of repealing section 59 is attached as an appendix to this report.

Consultation

17. Although the OAG is relaxed about the proposed exclusion from public entity status as proposed above, it would be helpful if we could consult it over the text of the Bill. Accordingly, we seek your agreement to consulting the OAG once a further draft of the Bill is available.

Next Steps

18. You have also previously indicated that you would like to introduce the Bill before the end of March. Due to issues raised in consulting the Guardians over the draft Bill, this timetable has slipped by several weeks and involves additional drafting by PCO. These delays mean that it is now unlikely that a draft Bill will be ready for presentation to Cabinet Legislation Committee until June.

19. We understand that this timeframe fits within relative priorities across the Government's legislation programme.

APPENDIX:

Other Technical Changes to the NZSRI Act 2001

In addition to the public entity status of controlled entities, there are a few further consequential amendments required to the NZSRI Act to ensure consistency in the treatment of FIVs and entities controlled by the Guardians.

Entities controlled by the Guardians should be exempt from being part of the Guardian's "Crown Entity Group"

Section 136 of the Crown Entities Act contains a definition of "Crown entity group", which includes a Crown entity, its Crown entity subsidiaries and any other subsidiary under financial reporting standards.

We understand that the current accounting treatment for FIVs in this regard is that they are not part of the Guardian's Crown entity group (based on an interpretation of section 59A(3), which declares interests in FIVs to be Fund investments and part of the Fund (i.e., specifically not owned by the Guardians, so logically not a subsidiary of the Guardians)).

To ensure consistency between the treatment of FIVs and controlled entities, we recommend amending the NZSRI Act to ensure that entities controlled by the Guardians are excluded from being part of the Guardian's "Crown Entity Group" under the Crown Entities Act by applying the wording in section 59A(3) to controlled entities.

If a controlled entity were to become part of the Guardians' Crown entity group, the Guardians would need to consolidate the controlled entity into the Guardians' financial statements. This would be an unintended outcome, since economically the investments are owned by the Crown and not the Guardians.

Section 49A of the NZSRI – Savings of Certain Transactions

Under section 49A of the NZSRI Act, a failure by the Guardians to comply with the NZSRI Act, the VCF Act, or the Crown Entities Act does not affect the validity or enforceability of any deed, agreement, right, or obligation that is entered into, obtained, or incurred by any of the following: the Guardians; a FIV; a Venture Capital FIV referred to in section 25 of the VCF Act; or a Crown entity subsidiary of the Guardians.

To ensure consistency of treatment between FIVs and controlled entities, we recommend that the NZSRI Act should be amended to ensure that entities controlled by the Guardians are provided the same protection as FIVs under section 49A (i.e. to avoid any doubt that commercial transactions entered into by controlled entities cannot be challenged by the counterparty after the fact on the basis that they were *ultra vires).*