

Hon Kris Faafoi

Minister for Broadcasting and Media

AIDE MEMOIRE: OUTSTANDING ISSUES FOLLOWING LEG COMMITTEE

Date:	10 June 2022	Priority:	High
Security classification:	In Confidence	Reference:	AM2022/289
Contact	Liz Stewart, Director Strong Public Media, 9(2)(a) [REDACTED]		

Purpose

- 1 This aide memoire summarises outstanding issues following the Cabinet Legislation Committee's (LEG's) consideration of the ANZPM Cabinet paper and bill on 9 June 2022.
- 2 It also re-attaches updates to recommendations 8.1 and 9.4 of the LEG paper that will need to be tabled at Cabinet on 13 June 2022, given LEG's deferral of decisions to Cabinet.

Issues arising from LEG Committee

Exemption from s 165 of the Crown Entities Act

- 3 Section 165 of the Crown Entities Act enables the Minister of Finance to require a Crown entity to pay to the Crown a sum equal to the whole or any part of a net surplus (including an annual profit and/or an accumulated surplus), subject to consultation with other Ministers and the Crown entity itself.
- 4 On 2 June, after Treasury expressed concerns about the proposal to exempt ANZPM from this requirement, you confirmed your view that the current exemption granted to RNZ/TVNZ should continue to apply to the new entity (BR2022-278 refers).

Treasury's view

- 5 Treasury has subsequently provided advice to the Minister of Finance providing more detail on its position. Our understanding of its position is that it believes ANZPM should not have a section 165 exemption (as RNZ and TVNZ currently do) because:

- 9(2)(b)(ii) [REDACTED]
- providing an exemption would compromise the long-term sustainability of the entity, as there would be an incentive for it to spend its surpluses in early years leaving it with limited capability to manage any potential loss of commercial revenue in the future

- when the power to exempt Crown entities from section 165 was first introduced, it was intended to be applied only in limited cases
- RNZ and TVNZ's current section 165 exemptions reflect the fact that, as Crown entity companies, both entities can be required to return surpluses as dividends; and Te Māngai Pāho and the Broadcasting Commission do not have this exemption.

Manatū Taonga comment

6 Manatū Taonga's view remains that, while there are arguments for not exempting ANZPM from section 165, providing such an exemption and developing non-legislative mechanisms to deal with any surpluses is more consistent with the broad intent of the business case and previous Cabinet decisions.

7 In agreeing to establish a new public media entity, Cabinet:

- noted the entity would be expected to seek commercial revenue to supplement its core baseline funding and to re-invest in public media outcomes (recommendation 19)
- agreed the entity's operating model should include expectations to prevent the entity from building up excessive cash reserves and agreed non-Crown revenue would primarily be invested in public media outcomes (recommendation 22.2)

8 Providing an exemption from section 165 would:

- underline Cabinet's intent that the entity is a not-for-profit entity
- help protect the entity's ability to re-invest surpluses in public media outcomes, and would therefore likely act as an incentive to earn commercial revenues in the first place
- manage a perception that future Finance Ministers could exercise a section 165 requirement in way that compromises the entity's funding sustainability and/or ability to reinvest in public media outcomes.

9 In addition, Cabinet noted that the development of a mechanism to prevent the entity from building up excessive cash surpluses would be designed through the establishment phase as part of the entity's financial model – i.e., that non-legislative mechanisms would be developed. Work to develop the entity's detailed financial model is at an early stage, but possible options would include letters of expectation, funding agreements, and directions in the House. This work will also look at how 'surpluses' would be defined and managed.

10 9(2)(f)(iv)

[REDACTED]

Promotion and protection of Pacific languages

- 11 Hon David Parker has requested further information about the wording change of clause 12(2)(b) regarding Pacific languages that you sought LEG's agreement to.
- 12 Cabinet agreed that, rather than replicating the requirement currently in RNZ's legislation to provide an international service to the South Pacific, the entity would instead have a statutory function *to deliver content, or support the delivery of content and services, that recognise New Zealand's international obligations including the promotion and protection of Pacific languages* (recommendation 12.4). It also agreed that the responsible Minister should direct the entity to provide an international service to the South Pacific in both English and Pacific languages, once it is operational (recommendation 15).
- 13 This approach was intended to avoid committing the entity in legislation to deliver a particular service or function (or use a particular platform), strengthening the entity's ability to respond to technological, demographic or other changes, while still reflecting the importance of supporting New Zealand's relationships with Pacific Island countries.
- 14 During the development of the bill, the Ministry of Foreign Affairs and Trade (MFAT) advised Manatū Taonga that the description of the entity's function should be clarified to *New Zealand's strong and enduring relationships with Pacific Island countries (and New Zealand's interest in promoting and protecting Pacific languages)* (clause 12(2)(b)).
- 15 This clarification was made because, while New Zealand does have an interest promoting and protecting Pacific languages (including through its constitutional relationships with the Cook Islands, Niue, and Tokelau), it does not have specific obligations under international law or agreements to do so. As such, the initial wording overstates New Zealand's duty and responsibilities, and MFAT was concerned that, if this language was included in the Bill, there would be a risk of binding New Zealand to this domestically.
- 16 In Manatū Taonga's view, this change does not weaken the requirement placed on the entity in relation to Pacific content/content in Pacific languages.
- 17 Additionally, Budget 2022 provided \$4.4million in capital investment for a new transmitter for RNZ Pacific. This investment further emphasises the commitment that has been made to ensure the continuation of the service.
- 18 We recommend you forward this information to Hon David Parker for his consideration.

Updates to table at Cabinet

- 19 As Cabinet Legislation Committee deferred decisions on the Legislation paper to Cabinet on 13 June [LEG-22-MIN-0103], the proposed changes to two recommendations will need to be tabled at Cabinet. The two changes are:

Updated rec 8.1: enable iwi, hapū and Māori entities access to content by and about themselves

Updated:	one of ANZPM's functions should be amended to require ANZPM to enable iwi, hapū and Māori entities to have access to content by and about themselves
Previous:	one of ANZPM's functions should be amended to require ANZPM to enable iwi and hapū to have access to content by and about themselves

Updated rec 9.4: free access to content

Updated:	the bill should include a requirement to ensure ANZPM broadcasts its content predominantly free of charge
Previous:	the bill should include a requirement to ensure ANZPM broadcasts some or all of its content free of charge

20 **Appendix One** sets out the background from your LEG talking points to support discussion of these updates at Cabinet.

Liz Stewart
Programme Director
Strong Public Media

Hon Kris Faafoi
Minister for Broadcasting and Media

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Appendix 1: Background information regarding updates to table at Cabinet

Reflection of Crown's responsibility to give effect to Treaty principles

- 21 Based on advice from Te Arawhiti, Te Puni Kōkiri and PCO, the bill has been developed to reflect a strong commitment to the principles of the Treaty of Waitangi, while ensuring the entity maintains the ability to make independent decisions on editorial matters.
- 22 The approach taken is to include a specific Treaty clause in the bill that summarises the ways in which the entity will reflect the Crown's responsibilities in relation to Treaty principles as previously agreed by Cabinet – for instance by engaging on strategies and policies and through consulting the Minister for Māori Development on board appointments
- 23 This approach has been informed by recently released Te Arawhiti guidelines *Providing for the Treaty of Waitangi in legislation and supporting policy design*, that were not published when policy decisions were previously sought from Cabinet.

Agreement to amend recommendation 8.1: access to content by and about themselves for iwi and hapū

- 24 Recommendation 8.1 in the LEG paper currently seeks agreement that one of ANZPM's functions be amended to require ANZPM to enable iwi and hapū to have access to content by and about themselves (currently provided for in the draft bill as cl 12 (1)(a)(ii)).
- 25 Minister Jackson has proposed a slight amendment to this recommendation that would include an explicit recognition of Māori entities who are not iwi/hapū based but who will still have a strong interest in accessing content for and about them (for example, urban Māori entities such as the National Urban Māori Authority).
- 26 Manatū Taonga considers that this change gives full effect to the policy intent of the clause – to ensure that, where content is by/about particular Māori people or groups, ANZPM should facilitate access to that content.
- 27 We therefore recommend that you seek agreement to update rec 8.1 of the LEG paper to reflect this approach.
- 28 The updated rec 8.1 would read:
- 8.1 one of ANZPM's functions should be amended to require ANZPM to enable iwi, hapū and Māori entities to have access to content by and about themselves.

Free access to content

- 29 Based on feedback from the Strong Public Media Establishment Board and through ministerial consultation, policy thinking has been further developed to ensure the bill does not unduly limit the commercial opportunities available to the entity, while ensuring all New Zealanders can access public media content.
- 30 The proposed approach would require the entity to ensure its content is broadcast predominantly free of charge but does not limit it to *only* providing content free of charge.

31 This would occur by:

- not including a specific requirement that content is broadcast free of charge on first transmission
- including a requirement that content is predominately free of charge.

32 The charter also sets a strong obligation on the entity to maximise New Zealanders' overall access to content by requiring the entity to provide content that is *freely available and accessible* (clause 12).

33 This approach sets a clear expectation that content should generally be provided free of charge, except in some, limited circumstances.

34 If the entity did decide to charge for some content, it would likely need to be able to show how this contributed to the overall availability and accessibility of public media content, to ensure consistency with its charter.

35 This strengthens the approach currently provided for in the Television New Zealand Act that requires TVNZ to *include the provision of channels that are free of charge and available to audiences throughout New Zealand* – but does not prevent ANZPM from charging for some content or services.

36 We recommend you seek agreement to update rec 9.4 of the LEG paper to reflect the approach, including seeking agreement for not including a specific requirement that content is broadcast free of charge on first transmission.

37 The approach outlined above differs from the wording that is currently set out in rec 9.4 of the paper. To reflect your feedback [AM2022-268-refers] the recommendation has been strengthened to reflect an expectation that providing content free of charge should be a priority for the entity.

38 On this basis, we recommend you seek agreement to update rec 9.4 to read:

- 9.4 the bill should include a requirement to ensure ANZPM broadcasts its content predominately free of charge.