

Reference: 20180163

24 May 2018

David Lawson  
fyi-request-7723-9b6ce1ea@requests.fyi.org.nz

Dear David Lawson

Thank you for your Official Information Act request, received on 26 April 2018. You requested the following:

*"... the provision of all official information that the Treasury holds in respect of the sale of the previously owned Crown Entity FairWay Resolution Limited, into private ownership, lead by the FairWay Resolution Limited Management team. I welcome your provision to me of all official information, including advice provided by, and or to the Treasury to and from any and all parties associated with the sale of FairWay Resolution Limited out of crown ownership that both proceeded the sale and or came into existence following the sale of FairWay Resolution Limited.*

*I would expect that such information will be sourced from, but not solely limited to the official information generated from Treasury's dealings with FairWay Resolution Limited, The Minister/s for ACC, the Finance Ministers and MBIE, together with all other parties which I may not mentioned and for which official information in relation to the sale of FairWay Resolution Limited applies and is held by Treasury.*

*I would also appreciate you providing to me within my request a copy of Treasury's "Cost Benefit Analysis associated directly with the proposed sale of Crown Owned FairWay Resolution Limited, inclusive of Treasury's suggested/indicated sale premium for the purchase" that was completed prior to the sale of the Crown Owned FairWay Resolution Limited into private ownership for which any and all advice was provided by Treasury to any and all third parties associated with, or affected by the sale of FairWay Resolution Limited into privacy ownership.*

*I would also welcome confirmation as to whether the Treasury factored into any advice upon the sale of FairWay Resolution Limited any social and natural justice rights of what ACC claimants stood to gain and or lose from the removal of FairWay Resolution Limited from Crown Ownership, including whether Treasury was aware that as a consequence of the sale of FairWay off the government books that FairWay Resolution Limited would claim that they no longer answerable to the statutory obligations of the Official Information Act 1982, for which they were required to comply with prior to the sale of the entity to a non crown owned private interest."*

The Treasury understands that you made a similar request under the Official Information Act for information concerning FairWay Resolution Ltd (FairWay) to the Minister of Finance, the Minister for ACC and the Ministry of Business, Innovation and Employment. As the Treasury was the agency responsible for monitoring FairWay and led the transaction process, we have agreed that the Treasury will accept the transfer of the requests and this reply addresses all four requests for information.

In addition, on 8 May 2018 Treasury officials attempted to contact you to clarify the scope of your request as it potentially captured a large number of documents which may have required a lengthy time extension. In order to provide you with the substantive information within a reasonable timeframe we proposed to provide you with "the substantive advice on the topic that was provided to Ministers". As we did not receive a reply to this correspondence we have proceeded on the basis described above.

### Information Being Released

Please find enclosed the following documents:

| Item | Date             | Document Description  |
|------|------------------|---|
| 1.   | 15 April 2016    | Aide Memoire: FairWay Resolution Limited – Ownership Discussion                               |
| 2.   | 30 June 2016     | Treasury Report: Fairway Resolution Limited – Miriam Dean Review and Future Ownership         |
| 3.   | 17 November 2016 | Treasury Report: Fairway Resolution Limited – Ownership Proposal                              |
| 4.   | 6 April 2017     | Treasury Report: Fairway Resolution Limited - Ownership Considerations                        |
| 5.   | 12 April 2017    | Aide Memoire: Meeting with Treasury Regarding Fairway Resolution Ltd                          |
| 6.   | 30 May 2017      | Treasury Report: Fairway Resolution Limited: Ownership  |
| 7.   | 22 June 2017     | Treasury Report: Fairway Resolution Ltd - Sale and Purchase Agreement                         |
| 8.   | 20 July 2017     | Treasury Report: Removal of Fairway Resolution Ltd from Schedule 4A of the Public Finance Act |
| 9.   | 16 February 2018 | Aide Memoire: Fairway Resolution - Background Information                                     |

We have decided to release the documents listed above, subject to information being withheld under one or more of the following sections of the Official Information Act, as applicable:

- personal contact details of officials, under section 9(2)(a) – to protect the privacy of natural persons, including that of deceased natural persons,
- direct dial phone numbers of officials, under section 9(2)(k) – to prevent the disclosure of information for improper gain or improper advantage.
- legal advice, under section 9(2)(h) – to maintain legal professional privilege, and
- commercially sensitive information, under section 9(2)(b)(ii) – to protect the commercial position of the person who supplied the information, or who is the subject of the information.

Direct dial phone numbers of officials have been redacted in order to reduce the possibility of staff being exposed to phishing and other scams. This is because information released under the OIA may end up in the public domain, for example, on websites including Treasury's website.

Please note that this letter (with your personal details removed) and enclosed documents may be published on the Treasury website.

This reply addresses the information you requested. You have the right to ask the Ombudsman to investigate and review my decision.

Yours sincerely



Shelley Hollingsworth  
**Acting Manager, Commercial Operations – Strategy and Policy**

# OIA 20180163

## Information for Release

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|    |   |    |
|----|---|----|
| 1. | <u>Aide Memoire Fairway Alternative Ownership Options</u>                           | 1  |
| 2. | <u>Fairway Resolution Limited - Ownership</u>                                       | 3  |
| 3. | <u>Fairway Resolution Limited - Ownership Proposal</u>                              | 11 |
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THE TREASURY  
Kaitohutohu Kaupapa Rawa

Reference: T2016/659

CM-1-3-110

Date: 15 April 2016

To: Minister of Finance  
(Hon Bill English)

Minister for ACC  
(Hon Nikki Kaye)

Deadline: None

**Aide Memoire: FairWay Resolution Limited - Ownership Discussion**

On 31 March 2016, the Treasury met with Fairway's Chair and CEO. The purpose of the meeting was:

- i. to formally establish Fairway's appetite to consider any alternative ownership options, given earlier indications from Fairway that this is something of interest, and
- ii. to discuss what any next steps would be.

The Chair and CEO both indicated they were interested in pursuing alternative ownership structures, citing possible benefits for the company, the Crown and the disputes resolution industry. Fairway have subsequently confirmed in writing their desire to proceed with an evaluation proposal.

FairWay have sought initial advice from consultants MartinJenkins and are soon to engage them to assist in the development of an evaluation proposal. MartinJenkins have proposed a three step approach to this:

- i. Refine and test the proposal
- ii. Make a compelling case for change
- iii. Develop the investment proposal in detail

Fairway will await a confirmed reporting timetable from MartinJenkins before providing further information and possible timeframes.

The Treasury is supportive of these developments and, in principal, believes there is a strong case for divestment. s9(2)(b)(ii)

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s9(2)(b)(ii) Our initial legal advice is that there are no statutory restrictions on the sale of Crown shares in a Schedule 4A company.

Recommended Action

We recommend that you:

1. **note** that Fairway are working to identify key considerations to any changes in current ownership and that the Treasury intend to work with them in this process; and
2. **provide** feedback on any selected issues that should be considered as part of this work.

Oliver Martin, Analyst, Commercial Operations - Strategy and Policy,  
Craig Weise, Manager, Commercial Operations - Strategy and Policy

s9(2)(k)

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**Treasury Report:** Fairway Resolution Limited - Miriam Dean Review and Future Ownership

|              |              |                     |            |
|--------------|--------------|---------------------|------------|
| <b>Date:</b> | 30 June 2016 | <b>Report No:</b>   | T2016/1167 |
|              |              | <b>File Number:</b> | CM-1-3-110 |

**Action Sought**

|   | <b>Action Sought</b>   | <b>Deadline</b>        |
|---|--|------------------------|
| Minister of Finance<br>(Hon Bill English) | Agree FairWay engage professional services to assist in evaluating alternative ownership options | Thursday, 14 July 2016 |
| Minister for ACC<br>(Hon Nikki Kaye)      | Agree FairWay engage professional services to assist in evaluating alternative ownership options | Thursday, 14 July 2016 |

**Contact for Telephone Discussion (if required)**

| <b>Name</b>   | <b>Position</b>                                     | <b>Telephone</b> | <b>1st Contact</b> |
|---------------|---|------------------|--------------------|
| Oliver Martin | Analyst, Strategy and Policy, Commercial Operations | s9(2)(k)         | ✓                  |
| Craig Weise   | Manager, Strategy and Policy, Commercial Operations |                  |                    |

**Actions for the Minister's Office Staff**

Return the signed report to Treasury.

Note any feedback on the quality of the report

**Enclosure:** No

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**Treasury Report: Fairway Resolution Limited - Miriam Dean Review  
and Future Ownership**

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**Executive Summary**

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An independent review of the ACC disputes resolution process was recently conducted by Miriam Dean QC. The review was in response to a report by Acclaim Otago which identified problems with ACC's dispute resolution process.

A central theme of the review was the question of independence of FairWay Resolution Limited (FairWay), who provide dispute resolution services to ACC. Although the review stresses that concerns about impartiality are perceived rather than real, independence is recognised as integral to any dispute resolution scheme.

In addressing the issue of independence, the review broadly outlines three possible alternative structures – making some practical modifications to the status quo, inserting a third party into the contractual relationship between FairWay and ACC, or changing existing ownership through Crown divestment. Of these, the Treasury recommends further exploratory work into the option of divestment.

Independent to the review, the Treasury believes FairWay is an appropriate asset for consideration of divestment. FairWay is a commercial company operating in a competitive market with low barriers to entry. Although it is important to ensure that ACC can maintain access to suitable service providers, there is no strong reason for the provider to be Crown owned. It is a low value asset and it is not evident that the costs and risks of ownership are, or ever will be, rewarded.

FairWay are proposing to engage consultants MartinJenkins to assist in evaluating alternative ownership, including employee or industry ownership. The Treasury is supportive of these developments and seek Ministerial support for FairWay to pursue this initiative.



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**Recommended Action**

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We recommend that you:

1. **note** the above findings from the independent review into the ACC dispute resolution process conducted by Miriam Dean QC
2. **agree** to FairWay Resolution Limited engaging professional services to assist in developing an evaluation proposal for a potential change in ownership

*Agree/disagree.*  
Minister of Finance

*Agree/disagree*  
Minister for ACC

Craig Weise  
**Manager, Strategy and Policy – Commercial Operations**

Hon Bill English  
**Minister of Finance**

Hon Nikki Kaye  
**Minister for ACC**

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**Treasury Report: Fairway Resolution Limited - Miriam Dean Review  
and Future Ownership**

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**FairWay Resolution Limited**

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1. FairWay is an independent crown-owned company, providing specialist conflict management and dispute resolution services between organisations and the people they come into contact with. Prior to 2011 it had been a subsidiary of ACC where it was established to provide dispute resolution services. The company has approximately ~100 FTEs and 150 contractors throughout NZ, handling ~12,000 disputes per year.
2. FairWay provides services across the public and private sectors in industries including medical, insurance, financial services, telecommunications, real estate, local government and family (Ministry of Justice Family Court).  
s9(2)(b)(ii)
3. For FY 2015/16 FairWay are projecting net profit after tax of \$652,000. It has a commercial valuation of \$3.8 million (as at 2013) and since 2011 has delivered two \$200,000 dividend payments to the Crown.

**Independent Review of the ACC Dispute Resolution Process**

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4. In July 2015 a report by Acclaim Otago (Inc)<sup>1</sup> identified four broad "themes", or problem areas, with ACC's dispute resolution processes:
  - Access to law – inadequate access to legal resources.
  - Access to evidence – limited access to evidence, particularly medical.
  - Being heard – claimants feeling their stories are not genuinely heard.
  - Access to representation – limited access to experienced lawyers.
5. A review of the issues raised in the Acclaim Otago Report was carried out by Miriam Dean QC. The task of the review was to examine the validity of Acclaim's four themes and recommend changes in response to any of the report's findings deemed to be substantive.
6. In the review, 'being heard' was cited in many respects as the most important theme and more attention was devoted to it than any other. Central to this was reference to problems with Fairway's review process. Problems identified included insufficient hearing time and some reviewers being inadequately prepared for the hearing.
7. The review acknowledged that FairWay is taking steps to remedy many of these problems but considered more improvement is required to meet best practise dispute resolution principles. FairWay openly acknowledges the need for change and has begun implementing improvements to processes.

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<sup>1</sup> Acclaim Otago (Inc) is a support group for injured New Zealanders and their families. It is an independent body and a member of the Advocates and Representatives Group. They provide input into policy and strategy at ACC, as well as identifying issues that relate to current policies and legislation.

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8. However, a central theme of the review (and falling outside of any existing process improvement work streams) is the issue of FairWay's independence. In 2014 Acclaim Otago conducted a survey of 600 injured people as part of its report and the survey strongly highlighted respondents' perception that reviewers are not independent of ACC. Of the respondents to the review questions, 64% felt the reviewer was not independent, 15% felt the reviewer was somewhat independent and just 17% felt the reviewer was independent.<sup>2</sup>
9. Comments to the Miriam Dean review echoed this viewpoint. Given that ACC funds its reviews, claimants struggle to comprehend how FairWay can be independent.
10. FairWay themselves recognise the perception of bias towards ACC is very real. There is a commonly expressed perception amongst claimants that FairWay is not truly independent of ACC, and that its reviewers are biased in favour of ACC.
11. Although the review stresses that concerns about partiality are perceived rather than real, independence (real or perceived) is recognised as integral to any dispute resolution scheme.

### Alternative Options

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12. In addressing the issue of independence, the review broadly outlines three possible alternative structures:
  - Maintain the status quo, whilst making some practical modifications to the current system.
  - Insert a third party into the contractual relationship between FairWay and ACC.
  - A change to existing ownership.
13. The review does not directly recommend any specific course of action, noting this is a matter for the Government, not the review.

### Evaluation of Options

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14. Status Quo Option  
The review identified five relatively simple modifications that FairWay could make that might help lessen concerns about their independence. These include such actions as making key performance measures public and reformatting the review application to look less like a standard ACC document (it's currently an ACC-branded form). These modifications could be easily implemented and avoid delays associated with contractual (or potentially statutory) change.
15. *Treasury's View:* Whilst these reforms may help lessen concerns about FairWay's independence generally, the Treasury views these reforms as an intermediary step only. The changes would not resolve any perceptions of bias that arise due to common ownership of ACC and FairWay.

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<sup>2</sup> Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014.

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16. Third Party Option  
Some participants in the review suggested inserting a third party into the contractual relationship between FairWay and ACC as a means to enhance independence. The Ministry of Business, Innovation and Employment (MBIE) and Ministry of Justice were cited as possible candidates. Funding could be via the selected ministry or directly, as at present, but FairWay and ACC would no longer be contractually linked.
17. ACC believes the current arrangement adequately ensures FairWay's independence and consider it unnecessary to insert a third party into its contractual relationship.
18. *Treasury's View:* The Treasury believe any third party would ultimately be acting only as an intermediary between FairWay and ACC. This would create inefficiencies and additional costs with little impact on perceptions of independence arising from common ownership. Furthermore, there could be a loss of interaction between the two agencies, lessening constructive feedback and communication. This would be to the detriment of the dispute resolution process.
19. Transfer of Ownership Option  
A third option identified by the review was a change of ownership. FairWay considers its current 100 percent Government ownership to be a constraint to its ability to promote its independence from ACC and the Crown. The Board and management believe a change of ownership would "provide a much needed perception of independence, and would serve to enhance the reputation of ACC, FairWay and Government as a whole".
20. *Treasury's View:* It is not clear to what extent perceptions of bias are caused by ACC and FairWay having the same owner, versus the fact that one entity significantly contracts with the other. However the Treasury does consider common ownership a factor and is broadly sympathetic to the view that Crown ownership is a constraint in FairWay being able to promote its independence.

**Additional Considerations**

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21. Further to the issue of independence there are other factors relevant to any proposed divestment. FairWay is a commercial company operating in a competitive market (see Appendix 1) with low barriers to entry. It provides paid services to customers in the public and private sector. There is no strong argument to say that these services can only be carried out in a Crown-owned organisation, and there is no logic to suggest that a Crown organisation has any natural advantage to provide these services better than private sector operators.
22. FairWay's Board and management are continuing to pursue expansion and diversification strategies. These are necessary if FairWay is to prosper beyond its current narrow customer base. However such strategies are potentially inconsistent with Government directive, with different ambitions and risk appetites.
23. Further considerations regarding Government ownership relate to the benefits and burdens of ownership. The costs associated with Crown ownership (for both the Crown and FairWay) are not insignificant, particularly relative to the value of the company. In addition, there appears to be limited upside due to the size of the potential available market, whereas there is sizeable reputational and financial downside risk. The Government has expressed a strong desire for efficient use of capital and has received only \$400,000 in dividends over four years from a c.\$4 million asset.

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**Next Steps**

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24. There have been some informal discussions between FairWay and the Treasury regarding the possibility of divestment. FairWay have confirmed this is something they wish to pursue further and have recently provided the Treasury with a draft internal discussion paper originally prepared in November 2013 for its Board. The paper outlined possible frameworks for employee ownership of FairWay and how this might be progressed.
25. FairWay has sought initial advice from consultants MartinJenkins and wish to engage them to assist in the development of an evaluation proposal.
26. The Treasury is supportive of these developments and are seeking Ministerial support for FairWay to pursue this initiative.

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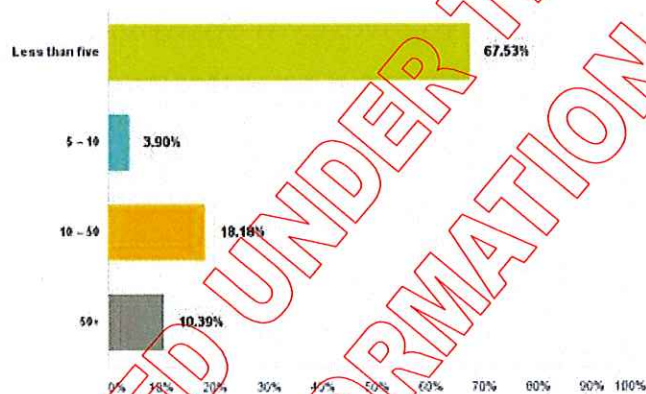
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Appendix 1

**Disputes Resolution Market**

There are two large players in the industry in NZ, FairWay and MBIE's Government Centre for Disputes Resolution (GCDR), plus a large number of small local providers. GCDR recently surveyed independent providers of dispute resolution services and received 117 responses. Whilst there are likely to be more than 117 providers, it does provide some indication of the market. Just over two-thirds of respondents worked in firms with less than five employees (including sole operators). Other providers may well be law firms that have greater than 10 FTEs but this is not their core role.

Dispute Resolution Providers – Number of Employees



Source MBIE: Independent dispute resolution providers in NZ: a 2015 snapshot

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**Treasury Report: Fairway Resolution Limited - Ownership Proposal**

|       |                  |              |            |
|-------|------------------|--------------|------------|
| Date: | 17 November 2016 | Report No:   | T2016/2197 |
|       |                  | File Number: | CM-1-3-110 |

**Action Sought**

|   | Action Sought  | Deadline                   |
|---|--|----------------------------|
| Minister of Finance<br>(Hon Bill English)   | agree to the Treasury engaging an external advisor to provide an independent valuation of FairWay Resolution Limited | Thursday, 24 November 2016 |
| Acting Minister for ACC<br>(Hon Nathan Guy) | agree to the Treasury engaging an external advisor to provide an independent valuation of FairWay Resolution Limited | Thursday, 24 November 2016 |

**Contact for Telephone Discussion (if required)**

| Name          | Position                     | Telephone | 1st Contact |
|---------------|------------------------------|-----------|-------------|
| Oliver Martin | Analyst, Strategy and Policy | s9(2)(k)  | ✓           |
| Craig Weise   | Manager, Strategy and Policy |           |             |

**Actions for the Minister's Office Staff**

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: No

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## Treasury Report: Fairway Resolution Limited - Ownership Proposal

### Purpose of Report

1. This report provides an update on the ownership review of FairWay Resolution Limited (FairWay) and seeks Ministerial agreement to advance the process to the next stage - obtaining an independent valuation. We are seeking Ministerial agreement for this as appointing a valuer has potentially significant implications, including cost, possibility of public disclosure and a strong signal that the Crown is willing to divest this asset.

### Background

2. An independent review of the ACC disputes resolution process was recently conducted by Miriam Dean QC. A central theme of the review was the question of independence of FairWay, who provide dispute resolution services to ACC. Although the review stressed that concerns about impartiality are perceived rather than real, independence is recognised as integral to any dispute resolution scheme. The review recommended stakeholders consider how best to address this perception and cited a change in ownership as a possible solution.
3. Independent to the review, the Treasury believes FairWay is an appropriate asset for divestment. FairWay is a commercial company operating in a competitive market that has low barriers to entry. Although it is important to ensure that ACC can maintain access to suitable service providers, there is no strong reason for the provider to be Crown owned. It is a low value asset and it is not evident that the costs and risks of Crown ownership are, or ever will be, rewarded.
4. FairWay commissioned consultants MartinJenkins to prepare an indicative business case reviewing the case for divestment by the Crown [T2016/1167 refers]. Using the Better Business Case framework MartinJenkins provided the Board advice on the strategic and economic case for change and FairWay subsequently prepared internally the financial, commercial and management cases. The Treasury has received copies of these documents and we broadly agree with their findings and recommendations.

### FairWay's Proposed Ownership Structure

5. **Ownership Structure:** FairWay's preferred way forward is a transition from Crown ownership to employee ownership. Their proposed transaction would initially see 100 percent of shares held in a Trust, of which the employees would be the beneficiaries. This shareholding could then be sold down to qualifying employees as they become eligible to acquire shares and thus become direct shareholders. Individual employees have yet to be extensively canvassed to gauge interest in becoming shareholders and a process would need to be run to clarify this.
6. **Financing:** The Trust would seek debt financing to fund the purchase. FairWay have identified their current bank Westpac as being the logical first party to approach. Future FairWay profits would be distributed as loan repayments to the lender and dividends to direct shareholders and the Trust.




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7. Whilst FairWay believe the Trust would likely be able to borrow sufficient funds to meet the full purchase price, the Treasury consider this to be unlikely and that any debt provider will require employees contribute a layer of equity. To what extent FairWay's employees are willing and able to do this is unclear and largely dependent on valuation. The ability to obtain suitable finance and the willingness of employees to provide equity present transaction risks.

Process

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8. **Protocols:** Both parties recognise that the Crown divesting a Crown-owned company to its employees is a transaction that requires an additional layer of probity. Given the prospect of employee ownership and possible participation of board members in this, we have established a set of protocols that will govern all aspects of the transaction process. FairWay's Board has appointed a sub-committee to represent Fairway in further discussions.  
s9(2)(a) 
9. The sub-committee will act as FairWay's representative until terms are proposed, at which time negotiations will begin with an appropriate party – likely to be an employee representing the Trust.
10. **Valuation:** Of central importance to a transparent fair transaction is an independent valuation of FairWay. The Treasury would appoint, instruct and pay an independent valuer for this work. Any buyers would reimburse 50 percent of this cost should a transaction proceed, or FairWay would reimburse 100 percent if it does not. To this extent we have met with representatives of PwC and Deloitte and consider either party to be capable of providing a suitably robust valuation. It is recognised that given the nature of any transaction, the process would be more rigorous than may typically be the case for a transaction of this size
11. Appointment of the valuers by Treasury represents a significant step. At this point it will become necessary to engage with a wider set of stakeholders and advisors, increasing risk of public disclosure. Whilst steps can be taken to help mitigate this risk, it cannot be eliminated. Further, advancing the transaction process will incur the costs of valuation as well as legal, tax and other professional advice.

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**Next Steps**

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Both PwC and Deloitte have confirmed they can provide proposals by 16 November and a final valuation before the Christmas recess. The Treasury and FairWay would then have time to consider whether the price is an acceptable one. If the price is accepted by both parties the next step would be to negotiate terms and make an announcement with the aim of settlement prior to June. The proposed timeframe is as follows:

|                        |  |
|------------------------|--|
| Approximate Timeframe: |  |
| 17 November            | PwC and Deloitte submit proposals for valuation work                         |
| 24 November            | Ministerial agreement for an independent valuation                           |
| 25 November            | The Treasury appoint valuer  |
| 16 December            | Valuation provided to the Treasury   |
| End of January         | Treasury Report to Ministers seeking agreement to proceed with a transaction |
| End of March           | Terms agreed and announced   |
| May                    | Settlement of transaction  |

**Recommended Action**

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We recommend that you:

- a **agree** to the Treasury engaging the services of an external advisor to provide an independent valuation of FairWay Resolution Limited

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Acting Minister for ACC

- b **note** the proposed timeline for progressing this work

Craig Weise  
**Manager, Strategy and Policy**

Hon Bill English  
**Minister of Finance**

Hon Nathan Guy  
**Acting Minister for ACC**

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**Treasury Report: Fairway Resolution Limited - Ownership Considerations**

|       |              |              |            |
|-------|--------------|--------------|------------|
| Date: | 6 April 2017 | Report No:   | T2017/410  |
|       |              | File Number: | CM-1-3-110 |

**Action Sought**

|   | Action Sought  | Deadline                |
|---|--|-------------------------|
| Minister of Finance<br>(Hon Steven Joyce)   | agree in principal to the divestment of Fairway Resolution OR<br><br>meet with the Treasury to discuss this report | Thursday, 20 April 2017 |
| Minister for ACC<br>(Hon Michael Woodhouse) | agree in principal to the divestment of Fairway Resolution OR<br><br>meet with the Treasury to discuss this report | Thursday, 20 April 2017 |

**Contact for Telephone Discussion (if required)**

| Name          | Position   | Telephone | 1st Contact |
|---------------|--|-----------|-------------|
| Oliver Martin | Analyst, Commercial Operations – Strategy and Policy | s9(2)(k)  | N/A         |
| Craig Weise   | Manager, Commercial Operations – Strategy and Policy | s9(2)(a)  |             |

**Actions for the Minister's Office Staff (if required)**

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: No

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**Treasury Report: Fairway Resolution Limited - Ownership Considerations**

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**Purpose of Report**

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1. This report provides an update on the work stream relating to the ownership of Fairway Resolution Limited (Fairway). It assesses key considerations of a change in ownership seeks the support (in principal) from shareholding Ministers for the divestment of the company to an employee buyer group.

**Background**

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2. Fairway (then DRSL) was originally a wholly owned subsidiary of ACC established to manage reviews of ACC decisions. In 2011, to increase the independence of the review process, ownership of the company was removed from ACC and it became a Crown-owned company listed in Schedule 4A of the Public Finance Act 1989.
3. In December 2015 the Minister for ACC requested the Ministry of Business, Innovation and Employment (MBIE) commission an Independent Review of the ACC dispute resolution process. This followed a report by advocacy group Acclaim Otago which highlighted a number of concerns with the process.
4. The Review was conducted by Miriam Dean QC and contained a number of recommendations for Fairway and ACC. One of the most substantive of these was consideration of how Fairway should address perceptions of its independence, which many claimants believe is compromised by common ownership of ACC and Fairway. The review recommended consideration as to how best to address this problem and cited a change in ownership as possible solution.
5. Subsequently Fairway's Board approached the Treasury expressing an interest in employee ownership. The Treasury supported this development and with Ministerial support appointed Deloitte to provide an independent valuation of the company [T2016/2197 refers].

**Fairway Business**

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6. Fairway provides contracted dispute resolution services across the public and private sectors in industries including medical, financial services, telecommunications, local government and family (Ministry of Justice (MoJ) Family Court). ACC and MoJ are the company's two core customers, with their two contracts comprising 83% of revenues (68% and 15% respectively). The ACC contract runs to June 2019 and the MoJ contract runs to June 2018.
7. For 2015/16 Fairway delivered Net Profit after Tax of \$720,000 on revenues of \$17m. A dividend payment of \$400,000 was paid in relation to 2015/16, generating 8% Return on Equity. Fairway has delivered two other \$200,000 dividends to the Crown since its establishment as a Crown entity.

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8. Fairway's Board and management have pursued a programme of expansion and diversification to help broaden its narrow customer base. These have had some success, with non-ACC revenues rising from 11% of total revenues to 32% over the past three years. Net Profit after Tax is forecast to be \$1.3m for the 2016/17 year.

### Fairway Offer

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9. Fairway have established a Buyer Group representing a group of Fairway employees and directors interested in ownership of the company. Negotiations between the Treasury and the Buyer Group have concluded and the Treasury is now able to provide the terms of a transaction which has the support of both parties. These are outlined below:

- Transaction price of **\$6.5 million**, paid as follows:
  - \$5.5 million paid on settlement (30 June 2017).
  - An unconditional \$1.0 million payment on settlement plus 1 year (30 June 2018).
- Proposed conditions of the transaction are as follows:
  - Subject to approval of change in ownership granted by ACC and MoJ with no conditions.
  - Subject to finance being confirmed by Fairway.
- Additional terms of the transaction are as follows:
  - Transaction costs to be split evenly, with the Crown's contribution capped at \$100,000.
  - Sale and purchase of shares.
  - Settlement 30 June 2017

### Fairway Valuation

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10. In assessing the offer made by the Fairway Buyer Group we have considered a number of relevant valuation indicators. We summarise these below:
- Equity Value \$4.9m – this is Fairway's equity value on the Crown's balance sheet.
  - Commercial Valuation \$5.2m – Crown-owned entities are required to submit a commercial valuation to the Treasury annually. This was provided by Fairway in 2016, prior to any change of ownership discussions.
  - Fairway Business Case \$3m - \$7m – As part of work to assess the affordability and financial sustainability of employee ownership, Fairway worked with independent advisors MartinJenkins and provided this as an indicative value range. A "mid scenario" of \$5 million was offered and considered to be a "realistic" representation of future business growth.

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- Deloitte Valuation \$6.5m - 8.5m – Deloitte considered a variety of Discount Cash Flow valuation scenarios in their assessment and cross checked these with capitalisation of earnings valuations.

**Valuation Assessment**

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11. Excluding that of Deloitte's, the valuation indicators listed above lie in a relatively tight range around \$5 million. These offer useful secondary data points and provide a cross check against Deloitte's valuation.
12. The independent valuation provided by Deloitte is the most robust of the valuation indicators and provided the basis for negotiations between Fairway and the Treasury. However Deloitte stresses its valuation is sensitive to a number of assumptions, not the least of which includes the probability of key contracts being renewed. Deloitte also believes there are other factors that need to be taken into account. In particular the difficulty associated with the sale of a relatively small scale, specialised business and the significant return the financiers of any transaction would expect. Deloitte's valuation has factored in an allowance for these considerations.
13. Underpinning Deloitte's valuation was an assumption that Fairway would not completely lose either the ACC and/or MoJ contracts. In reaching their valuation range Deloitte's worst case scenario was a 10 percent loss of revenue relating to the ACC scheme upon contract renewal and no change to the MoJ contract. Our view is that this significantly under-prices the risk that one or both of the contracts will not be renewed.
14. The MoJ contract in particular has been a challenging one. The contract was unprofitable until revised contract terms were agreed upon following protracted negotiations in late 2016. It has only recently reached a small margin of profit (2-3%). The contract runs through to June 2018, with the relative short term nature reflective of some policy instability in this area.  
  
In a scenario whereby the MoJ contract is *not* renewed, Deloitte considers an appropriate valuation to be \$3.8m (using management expense assumptions) or \$6.7m (using their own expense assumptions). A scenario in which the ACC contract is not renewed is considered to equate to a wind down of the company, with a valuation of \$250K.
15. Valuations always contain a certain amount of subjectivity. Our internal view (undisclosed to stakeholders) prior to any valuation work having been undertaken was that an actual negotiated transaction value for Fairway would likely fall between \$5m and \$6m. Our overall view of the Deloitte valuation is that it acknowledges this possibility while striking a slightly higher [equity value] range due to the initial weight in the report given to the cost of capital utilised in its discounted cash flow approach and initial use of "comparable" companies that are not fully appropriate given Fairway's size, industry, unlisted nature, and customer concentration risk. More complex are issues unaddressed by the valuation regarding the company's cash position. There is certainly some excess cash on the company's balance sheet (as would be reflected by the payment of an increased dividend on a going forward basis), however, we are of the view that at a \$6.5m transaction price, any adjustment for cash would still place the equity value of the company in the \$5m to \$6m range.

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Offer Assessment

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16. We believe the proposed conditions and price of the transaction are favourable and likely exceed those which a third party might offer. This is not uncommon in a management buyout, where managers are often more optimistic about their company's future performance than external parties<sup>1</sup>. The buyer group is very close to the business and best placed to assess value and price risk. In this situation the buyer group considers there is a high likelihood of key contracts being renewed and has offered terms and a price reflective of this. We consider this to be very attractive from the Crown's perspective. With a services company with such a high proportion of revenues tied to two key contracts, we would ordinarily expect terms to more closely align significant payments with contract renewal.
17. *Conditions:* The proposed conditions offer the Crown a 'clean break' with no ongoing association with the company. A commercial player would likely require payment terms linked to successful renewal of key contracts. In this scenario, the Crown's interest in the company could foreseeably continue until the end of the current ACC contract in 2019. In Fairway's offer there are no conditions attached to the \$1 million payment a year from settlement.
18. *Price:* Similarly, we believe Fairway's reliance on two key contracts would likely depress the price an independent party might pay below that of what current management are willing to pay.
19. In this offer, almost all of the value is realised on settlement and generates a net present value of \$6.44m, close to the headline sale price. We have considered alternative proposals from the buyer group whereby a higher headline price is achieved, some of which is paid at a future date. In modelling such scenarios, the net present values offered were consistently very close to that of the current offer and generally carried a higher degree of risk, based upon future earnings and/or contract renewal.
20. *Post-settlement risks:* We note that there is no provision for any portion of the settlement proceeds to be held in escrow or otherwise be exposed to future warranty claims. This is something we expect a market buyer would require and is an additional attractive quality of this offer. Furthermore, the Crown is in a stronger position via-a-vis employees who have knowledge (compared to those who may not) when negotiating representations and warranties generally, which we would expect to be extremely limited under the circumstances.

Other Considerations

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21. A primary consideration of divesting Fairway is how it would impact the dispute resolution market and how it may affect ACC and MoJ's ability to procure services fairly into the future. Key determinants of this are 1) the scale and depth of the existing market and 2), ease of which new and existing participants could compete with Fairway. These factors are considered below.

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<sup>1</sup> Kaplan, "A Summary of Sources of Value in Management Buyouts"  
T2017/410 : Fairway Resolution Limited - Ownership Considerations

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***Disputes Resolution Market***

22. Government has dominated provision in several significant areas of dispute resolution activity. This has occurred through provision of services by Fairway and the Government Centre of Dispute Resolution (GCDR) unit in MBIE (in employment, tenancy, weathertightness and unit titles). MBIE is the biggest employer of mediation professionals in New Zealand.
23. There are a large number of small local providers. GCDR recently surveyed independent providers of dispute resolution services and received 117 responses. Whilst there are likely to be more than 117 providers, it does provide some indication of the market. Approximately a third of respondents worked in firms with five or more employees.
24. There are a number of organisations specifically providing dispute resolution services on a nationwide basis including mediation, arbitration, conciliation, and conflict management services. A selection of these relevant to Fairway's participation in the market includes:
- New Zealand Dispute Resolution Centre
  - AMINZ
  - Resolution Institute
  - Family Works
  - GCDR
  - Financial Services Complaints Limited
  - Utilities Complaints Limited
- By way of example, Family Works provides approximately half of all family dispute mediations for the Ministry of Justice, with Fairway delivering the remaining 2,200 cases.
25. There are a range of dispute resolution providers operating in the financial services sector. These include Financial Services Complaints Limited, the Banking Ombudsman and the Financial Services Ombudsman. For context, the latter has 4,300 members and responded to 3,193 complaints in 2016.
26. There are two competing accreditation agencies for dispute resolution practitioners in New Zealand; the Arbitrators and Mediators Institute of New Zealand (+400 members) and the Resolution Institute (+500 members in New Zealand).
27. In addition to those organisations for whom disputes resolution is a core business, a number of professions and agencies are also regularly engaged in dispute resolution activity. For example, legal firms and individual lawyers are actual or potential dispute resolution providers. The New Zealand Law Society has over 13,100 members. In addition, accounting and engineering firms are often engaged in dispute resolution activity at various levels.
28. The law firm Gresson Dorman & Co is contracted to deliver ACC reviews in Timaru and receives approximately 100 review applications a year (versus Fairway's ~6,000)



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### *Ease of which new and existing participants could compete with Fairway*

29. Both Fairway and GCDR rely heavily on external contractors to address gaps in their own service coverage, so there exists overlap between providers. Fairway contracts around 200 mediators nationwide. Anecdotally, there is fluid labour movement and low barriers to entry for both practitioners and businesses.
30. The market has demonstrated its ability to respond to the demands of purchasers where these are clearly stated. For example, the Ministry of Justice recently shortlisted six entities which met its criteria (which included scale) to become family dispute resolution providers.
31. ACC's current contract with Fairway runs until June 2019, providing ACC an opportunity to explore alternative procurement models for dispute resolution services. For example, other jurisdictions have adopted a model whereby claimants are able to select a mediation provider from an accredited panel.

### Impacted Parties

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32. Below we consider the divestment of Fairway with respect to relevant stakeholders of the company – the Crown, claimants, ACC and MoJ, and Fairway itself.
33. **Crown** - Divestment of Fairway is consistent with the Crown's investment intentions, which include improving alignment between investment and governments' long-term priorities and recycling capital to meet changing demands and priorities<sup>2</sup>. Fairway's expansion and diversification strategies are potentially inconsistent with Government directive, with different ambitions and risk appetites.
34. Treasury has previously stated that to meet the Government's overall goals, the Government should focus ownership on where it has a clear advantage in providing goods and services directly and should own commercial assets only where there is a strong economic justification [T2010/2513 refers]. The Treasury also noted that growing the portfolio of commercial assets was not a priority for this Government in the future, and there were limited grounds for further public funding of growth, which would constrain the future performance of these entities.
35. **Claimants** – The service levels provided by Fairway to ACC are supported by a range of KPIs stipulated in their contract. We do not consider a marked shift in service levels a likely result of a change in ownership.
36. Where we do consider an ownership change may be evident is the perception of independence. As cited in the Miriam Dean review, there remains a perception, commonly expressed by ACC claimants, that Fairway is not truly independent of ACC, and that its reviewers are biased in favour of ACC<sup>3</sup>. Independence is an integral attribute of any dispute resolution scheme and a shift from Crown ownership would help improve perceptions.
37. We note however, it is not clear to what extent perceptions of bias are caused by ACC and Fairway having the same owner, versus the fact that one entity significantly contracts with the other. However the Treasury does consider common ownership a factor and is broadly sympathetic Fairway's view that Crown ownership is a constraint in being able to promote its independence.

<sup>2</sup> Investment Statement: Managing the Crown's Balance Sheet, March 2014.

<sup>3</sup> In 2014 Acclaim Otago conducted a survey of 600 injured people as part of its report. Of the respondents to the review questions, 64% felt the reviewer was not independent, 15% felt the reviewer was somewhat independent and just 17% felt the reviewer was independent

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38. **ACC and MoJ** – The services that Fairway provides ACC and MoJ entities (who collectively account for ~83% of Fairway revenues) are important social services and it is crucial that those organisations can have confidence that the service provider(s) are credible, independent, stable and maintain high standards of ethical behaviour and security of personal information. However it is not evident that Crown ownership is the only way, or the best way, for those factors to be assured. Nor is it essential that those services are provided by a single, national provider.
39. Further, private delivery could potentially introduce competition to the market and drive down costs. Given more freedom to innovate and evolve, Fairway has potential to become an exemplar in the marketplace and lift overall standards.
40. **Fairway** – Under private ownership, Fairway expect to intensify their current diversification strategy. For example, by participating in (borderless) on-line dispute resolution initiatives that they believe could involve significant volumes of disputes. In this way, overhead type costs currently borne proportionally by the ACC scheme could be spread increasingly widely, allowing for increased efficiency in the delivery of services to ACC.
41. The Treasury has historically placed a high importance on dividend payments over reinvestment within the Crown's portfolio of companies. With appropriate capital investment, Fairway's diversification strategies could prosper beyond current projections.

**Sales Process**

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42. The Treasury has given consideration to running a contestable market process as part of a possible sale. However, we are of the view that the costs of running such a process would be disproportionate to the low value of the asset. We believe a sale to existing management whom are familiar with the business is the most pragmatic way forward – minimising disruption, cost and risk for both parties. The strength of the terms of the employee offer, whereby there is no risk tied to contract renewal, strengthen our view of this.
43. Fairway is listed in Schedule 4A of the Public Finance Act 1989 as an independent Crown-owned company wholly owned by the New Zealand Government. There are no statutory restrictions on the sale of Crown shares in a Schedule 4A company. Once the Crown's shareholding drops to 50% or less, the government needs to make an Order in Council removing the name of the company from schedule 4A (and has the power to do so).
44. Shareholding Ministers have the power to approve sale of the shares in Fairway. However you may wish to first obtain Cabinet approval of the sales transaction, having regard to the guidance given by 5.11 and 5.12 of Cabinet Manual. Cabinet approval could be sought through a formal Cabinet Paper (in which case you may consider first going through the appropriate Cabinet committee) or as an oral item. Following any decision to approve a sale of the company, the execution of the agreement for sale and purchase, and the transfer of the shares to the purchaser, an Order-in Council for the removal of Fairway from Schedule 4A would need to be approved by the Cabinet Legislation Committee in order to ensure compliance with section 3 AB of the Public Finance Act 1989.

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**Conclusion**

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45. We see no strong policy or commercial grounds for continued ownership of Fairway. It is a relatively low value asset of which ownership brings commercial and reputational risk and costs. It is not evident that these risks and costs are, or ever will be, appropriately rewarded. It is not a strategic Crown asset and there are alternative potential providers, one of which is Crown owned. The independent review considered that the focus of any reform must be to "get Fairway more independent from ACC". A shift from Crown ownership would achieve this and would be the logical final step in Fairway's journey from ACC ownership to independence.

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**Recommended Action**

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We recommend that you:

- a. **agree** in principal to the divestment of Fairway Resolution Ltd to an employee buyer group

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister of ACC

OR

- b. **meet** with the Treasury to discuss this report

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister of ACC

- c. **agree** for the Treasury to prepare a Cabinet paper

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister of ACC

OR

- d. **agree** to for the Treasury to prepare an oral item for Cabinet

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister of ACC

Craig Weise  
**Manager, Commercial Operations – Strategy and Policy**

Steven Joyce  
**Minister of Finance**

Hon Michael Woodhouse  
**Minister of ACC**

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THE TREASURY  
Kaitohutohu Kaupapa Rawa

Reference: T2017/1007

CM-1-3-110

Date: 12 April 2017

To: Minister for ACC  
(Hon Michael Woodhouse)

Deadline: None

**Aide Memoire: Meeting with Treasury Regarding Fairway Resolution Ltd**

You are meeting with Treasury officials on 13 April to discuss some questions you have raised relating to the proposed management buyout of Fairway Resolution Ltd (Fairway). Our initial responses to these questions are below:

***ROI/ROE current projections/actual PoL***

The table below shows Fairway's Net Profit after Tax, historical dividend streams and the Crown's resulting Return on Equity.

|                                |             | <i>Forecast</i> |             |
|--------------------------------|-------------|-----------------|-------------|
|                                | <b>2015</b> | <b>2016</b>     | <b>2017</b> |
| NPAT                           | 334,000     | 720,000         | 1,512,000   |
| Dividend returned to the Crown | 200,000     | 500,000         | 650,000     |
| Shareholders' Funds            | 4,672,000   | 5,193,000       | 6,106,000   |
| Crown's ROE                    | 4%          | 10%             | 11%         |

***Amount of FairWay costs (debt/capital change) in FairWay's last PoL***

Under the Crown Entitles Act Fairway is restricted in its ability to borrow and has no debt.

***More detail about what management expects ACC/MoJ to commit to contract renewal/exclusivity***

The term of the ACC contract is until June 2019 with a renewal of two years to June 2021 being available to ACC at their option. Similarly, the terms of the MoJ contract is until June 2018 with a renewal of one year to June 2019 being available to MoJ at their option. Management are aiming to secure participation in the procurement processes

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and to be successful in being selected to contract for the delivery of services for both ACC and MoJ.

Neither contract provides for exclusivity or volume guarantees in favour of FairWay. It is not a condition of the Buyer Group that such guarantees are made available.

We note that each contract includes a requirement that FairWay must separately obtain the prior approval of ACC and MoJ to a change in ownership so as to not trigger a right of termination by either ACC or MoJ. As such the Buyer's Group offer is subject to approval of change in ownership granted by ACC and MoJ with no conditions.

s9(2)(b)(ii)

***Any requirements/guidelines to a more open market process***

There are no formal rules or guidelines for disposing of assets. For example, the Government Rules of Sourcing, for procurement, do not apply to divestments.

We have instead been guided by the consideration "what evidence could we give the Auditor-General, if he ever enquired, to show how we formed a view the divestment provided fair value for the asset". In the absence of a competitive bidding process, we have used an independent valuation [and other steps].

Oliver Martin, Analyst, Commercial Operations - Strategy and Policy,  
Craig Weise, Manager, Commercial Operations - Strategy and Policy

s9(2)(k)

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**Treasury Report: Fairway Resolution Limited: Ownership**

|       |             |              |            |
|-------|-------------|--------------|------------|
| Date: | 30 May 2017 | Report No:   | T2017/1150 |
|       |             | File Number: | CM-1-3-110 |

**Action Sought**

|   | Action Sought   | Deadline                   |
|---|---|----------------------------|
| Minister of Finance<br>(Hon Steven Joyce)   | submit to Cabinet Office the attached EGI paper which notifies Cabinet of the intended sale of the Crown's shares in FairWay Resolution Limited | 10am Thursday, 1 June 2017 |
| Minister for ACC<br>(Hon Michael Woodhouse) | submit to Cabinet Office the attached EGI paper which notifies Cabinet of the intended sale of the Crown's shares in FairWay Resolution Limited | 10am Thursday, 1 June 2017 |

**Contact for Telephone Discussion (if required)**

| Name          | Position   | Telephone | 1st Contact |
|---------------|--|-----------|-------------|
| Oliver Martin | Analyst, Commercial Operations – Strategy and Policy | s9(2)(k)  | N/A         |
| Craig Weise   | Manager, Commercial Operations – Strategy and Policy | s9(2)(a)  |             |

**Actions for the Minister's Office Staff (if required)**

- Return the signed report to Treasury.
- Submit the attached EGI paper to Cabinet Office

Note any feedback on the quality of the report

**Enclosure:** (Yes) attached

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**Treasury Report: Fairway Resolution Limited: Ownership**

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**Purpose of Report**

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1. The purpose of this report is to provide you with a draft Economic Growth and Infrastructure Committee (EGI) paper for your consideration and submission to Cabinet Office. The paper notifies Cabinet of the intended sale of the Crown's shares in FairWay Resolution Limited (Fairway) to an employee buyer group.
2. The draft Cabinet paper is attached and has been uploaded to CabNet. We recommend you submit the paper to Cabinet Office by 10am Thursday 1 June 2017 for consideration at the EGI Committee meeting on 7 June 2017 or provide feedback as necessary.

**Background**

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3. You have agreed in principle to the divestment of Fairway [T2017/410 refers] and requested the Treasury prepare a Cabinet paper advising Cabinet of the sale. Subsequent to our most recent advice we have met with representatives of Fairway's Buyer Group and can provide the updates below.
4. A term sheet has been prepared and agreed by representatives of the Buyer Group and the Treasury. Key points are as follows:
  - Purchaser to acquire 100% of the shares in Fairway with effect from 1 July 2017.
  - Transaction price of \$6.5 million, \$5.5 million to be paid on settlement and a further \$1 million 12 months after settlement.
  - Collective transaction costs are to be split evenly between Fairway and the Crown, with Treasury reimbursements to Fairway to be capped at \$100,000.
  - Two conditions were stipulated by the Buyer Group. Their current status is as follows:
    - *Financing* – the Buyer Group has received committed terms sheets from two banks.
    - *Approval of change in ownership granted by ACC and MoJ* – the Buyer Group has not yet had formal discussions with either party but remain confident that approval will be approved.

**Developments**

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5. Subsequent to our most recent advice we bring to your attention two new matters we have considered. One relating to the treatment of post transaction liabilities, and the other to s9(2)(h) [REDACTED]

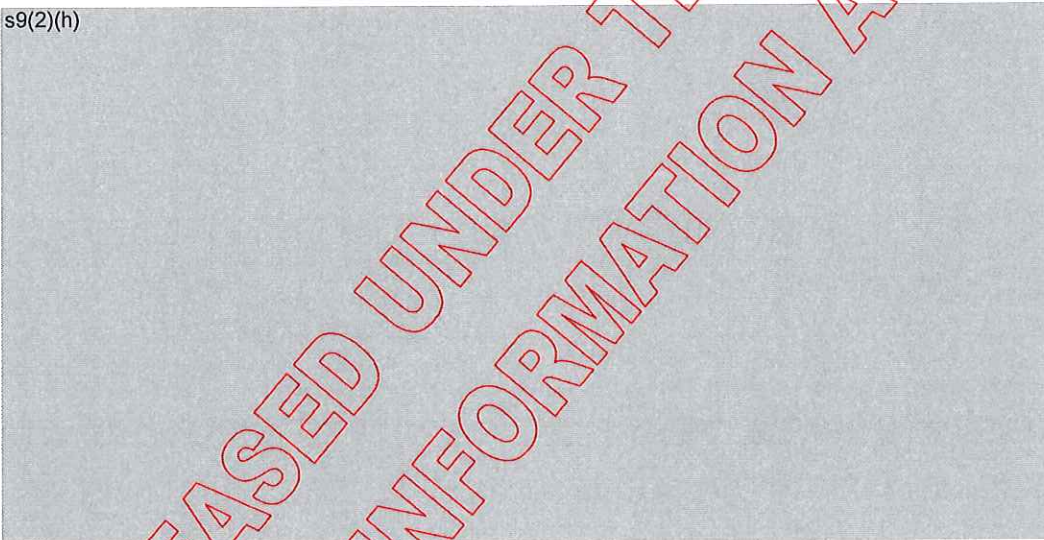


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6. Currently Fairway meets the costs of dealing with any judicial review of decisions made by Fairway's adjudicators and does not seek reimbursement from ACC or MoJ, regardless of whether Fairway is proven to have acted appropriately. In this respect costs that might otherwise be borne by ACC and MoJ are borne by Fairway, and ultimately the Crown (in the form of a reduced dividend from Fairway). This could be seen as appropriate where the Crown is the owner of Fairway, but could be considered an unusual commercial arrangement. To resolve this, the Treasury has agreed to contribute towards costs associated with judicial reviews that are underway at settlement date, or which commence within 12 months of settlement date, up to a maximum of \$100,000 (for context, recent experience would indicate 1 – 3 judicial review cases per annum costing \$60,000 - \$80,000 each). Such an arrangement would meet with historic protocols with respect to Crown divestments.

7. s9(2)(h)

8.



Process

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9. Both parties anticipate a relatively straightforward sale and purchase agreement, to be completed in the coming weeks.
10. The Buyer Group has provided the attached draft communications plan detailing how they propose the ownership change communications are managed. The Treasury will liaise with your offices and the Company to coordinate delivery of this. The proposed plan is summarised as follows:
- a. *Pre-Brief (Day before announcement, under embargo):* Fairway informs employees, key agencies (ACC, MoJ, MoE and MBIE) and PSA Union.
  - b. *Announcement (E.g. 12pm):* The Buyer Group proposes that the Minister of Finance, Minister for ACC and/or Treasury release the Government's announcement of the ownership change, possibly through a Beehive press release. Following this announcement, Fairway would then release a prepared statement on its website and be prepared to comment or be interviewed.
  - c. *Follow Up (12:30 – 5:00pm):* Fairway informs contractors, partners, large clients, ACC stakeholders (e.g. advocates) and responds to media enquiries.

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11. The proposed timeframe for the next steps is as follows:

|                             |   |
|-----------------------------|---|
| By 10am Thursday 1 June     | EGL paper submitted to Cabinet Office   |
| Wednesday 7 June            | EGL Committee meeting   |
| Monday 12 June              | Cabinet meeting   |
| Between 12 June and 30 June | Sale and purchase agreement completed and signed and public announcement of transaction |
| 30 June 2017                | Settlement of transaction   |

**Recommended Action**

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We recommend that you:

- a **submit** the attached draft EGL paper to Cabinet Office by 10am 1 June, for consideration at EGL Committee meeting on 7 June 2017 and Cabinet on 12 June 2017.

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister for ACC

- b **advise** the Treasury of the intended process for Ministers to announce the transaction, so that we can liaise with Fairway to coordinate delivery of communications plan.

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister for ACC

Craig Weise  
**Manager, Commercial Operations – Strategy and Policy**

Steven Joyce  
**Minister of Finance**

Hon Michael Woodhouse  
**Minister for ACC**

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**Treasury Report: Fairway Resolution Ltd - Sale and Purchase Agreement**

|       |              |              |            |
|-------|--------------|--------------|------------|
| Date: | 22 June 2017 | Report No:   | T2017/1655 |
|       |              | File Number: | CM-1-3-110 |

**Action Sought**

|   | Action Sought  | Deadline             |
|---|--|----------------------|
| Minister of Finance<br>(Hon Steven Joyce)   | <p><b>Note</b> that Chapman Tripp has confirmed that the transaction documents are in order for execution</p> <p><b>Agree</b> to sign (but not date) documents necessary to execute the transaction:</p> <ul style="list-style-type: none"> <li>the Sale and Purchase Agreement for the sale of the Crown's shares in Fairway Resolution Ltd</li> <li>the Security Agreement to secure the deferred capital payment due to the Crown</li> <li>the shareholder resolution and consent</li> </ul> <p><b>Agree</b> to execute documents necessary to effect certain aspects of the transaction under the Public Finance Act:</p> <ul style="list-style-type: none"> <li>provision of the described indemnity</li> <li>Cabinet approval for a non-departmental capital and other expense appropriations</li> </ul> | Monday, 26 June 2017 |
| Minister for ACC<br>(Hon Michael Woodhouse) | <p><b>Note</b> that Chapman Tripp has confirmed that the transaction documents are in order for execution</p> <p><b>Agree</b> to sign (but not date) documents necessary to execute the transaction:</p> <ul style="list-style-type: none"> <li>the Sale and Purchase Agreement for the sale of the Crown's shares in Fairway Resolution Ltd</li> <li>the Security Agreement to secure the deferred capital payment due to the Crown</li> <li>the shareholder resolution and consent</li> </ul>  | Monday, 26 June 2017 |

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**Contact for Telephone Discussion (if required)**

| Name          | Position   | Telephone | Telephone | 1st Contact |
|---------------|--|-----------|-----------|-------------|
| Oliver Martin | Analyst, Commercial Operations – Strategy and Policy | s9(2)(k)  | N/A       | ✓           |
| Craig Weise   | Manager, Commercial Operations – Strategy and Policy | s9(2)(k)  | s9(2)(a)  |             |

**Actions for the Minister’s Office Staff (if required)**

Return the signed report and documents to Treasury

Note any feedback on the quality of the report

**Enclosure:** Yes (attached)

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**Treasury Report: Fairway Resolution Ltd - Sale and Purchase Agreement**

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**Purpose of Report**

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1. The purpose of this report is to provide you with information pertaining to the documentation required to effect the sale of Fairway Resolution Limited (Fairway) to an employee buyer group.
2. The documents necessary to effect the transaction are:
  - the Sale and Purchase Agreement (SPA).
  - A security agreement (the Security Agreement) being an agreement to secure the debt due to the Crown arising from the deferred payment element of the sales transaction (see the second bullet point under paragraph 5 below).
  - A shareholders' resolution and consent, that we are advised is necessary to facilitate completion of the sales transaction.
3. The documents necessary to meet Public Finance Act requirements arising from the transaction are:
  - requests that Cabinet approval be obtained for an appropriation in respect of the deferred payment element of the sales transaction; and
  - seeks approval from the Minister of Finance for the Crown to give an indemnity for the reimbursement of certain legal costs incurred by the company (as discussed below).
4. We also provide you with an update as to various transaction related matters.

**The Sale and Purchase Agreement**

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5. In April 2017 you agreed in principal as Joint Shareholding Ministers to the divestment of Fairway to an employee buyer group and have advised Cabinet accordingly [EGI-17-MIN-0131].
6. The Treasury has commissioned Chapman Tripp to draw up the SPA and has subsequently met with representatives of the buyer group. The corporate vehicle being used by the buyers group to purchase the company is Fairway Resolution Holdings Limited (the Purchaser). We are advised that although the terms of these documents have now been agreed by the Purchaser, the Purchaser will not be in a position arrange execution of the SPA and the Security Agreement until early next week. In these circumstances and given considerations of Ministers availability, we propose lodging execution versions of the SPA and the Security Agreement once signed by both Shareholding Ministers, with Chapman Tripp, with instructions to hold these documents, pending execution of the two documents by the Purchaser and relevant associates who are also to be party to the documentation.

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7. The SPA being presented is largely consistent with what has been communicated with you to date and summarised as follows:
- Purchaser to acquire 100% of the shares in Fairway with effect from 1 July 2017.
  - The trust that owns the purchaser is an employee trust, the beneficiaries of which are all employees.
  - Transaction price of \$6.5 million. \$5.5 million to be paid on settlement and a further \$1 million 12 months after settlement.
  - Collective transaction costs are to be split evenly between Fairway and the Crown, with Treasury reimbursements to Fairway capped at \$100,000.
  - The Treasury will reimburse company legal costs associated with judicial reviews that are underway at settlement date, or which commence within 12 months of settlement date, up to a maximum of \$100,000.
8. Following negotiations the SPA also includes a payment adjustment mechanism to apply if the sales transaction does not complete by 31 July 2017, to compensate the Crown for earnings retained by the company but not reflected in the purchase price.
9. In addition we have now included provisions to ensure that the Crown continues to have access to the records of the company, to enable the Crown to continue to comply with statutory obligations. This is largely a transitional measure to deal with such matters as "in-flight" Official Information Requests.

**Appropriation**

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10. The mechanics of the Public Finance Act 1989 (the Act) do not perfectly capture one aspect of the transaction—the deferred receipt of a capital payment; however, we consider it prudent to apply the broad principles of the Act and have done so accordingly.
11. Section 65K of the Act states that the Crown must not lend money to a person or organisation, except as expressly authorised by any Act. The definition of "lend money" in the Act includes "deferring payment for any goods or services supplied..." s9(2)(h)
12. Under section 65L of the Act, the Minister of Finance may lend money to persons or organisations 'if it appears to the Minister to be necessary or expedient in the public interest to do so'. Further it states: 'The Minister may lend the money on any terms and conditions that the Minister thinks fit'.
13. Section 65P of the Act states that any lending under section 65L must be "made from a capital expenditure appropriation, or other authority, approved by Parliament for the purpose". s9(2)(h)
- 14.

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**Indemnity**

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15. As noted in our most recent advice to you (T2017/1150) it has been the practice of Fairway as a government owned entity to meet its own legal costs in dealing with any judicial review of adjudicator decisions as part of the arrangements it has in place with ACC and MoJ. These arrangements could be seen as uncommercial once Fairway ceases to be government owned. As such (and as noted above) it has been agreed as a transitional measure that the Crown would reimburse these costs for a limited time and subject to an overall cap.
16. s9(2)(h)
17. Under section 65ZD the Minister of Finance on behalf of the Crown may give an indemnity in writing on such terms as he thinks fit to any person if it appears to the Minister of Finance to be necessary or expedient in the public interest to do so.
18. We consider that it is necessary or expedient in the public interest that the Crown reimburse (and thereby indemnify) Fairway for legal costs incurred in connection to the judicial review of adjudicator decisions, such obligation being a transitional measure to facilitate the sale of the company, a sale being initiated by shareholding Ministers for the reasons set out in the Cabinet paper.
19. The risks associated with this indemnity are mitigated by the inclusion of a cap (\$100,000) and by being time limited (applying only in relation to legal costs incurred in relation to adjudications completed before the sale that are the subject of judicial reviews initiated no later than 12 months after the date of sale).
20. As this indemnity is limited to \$100,000 it is not necessary to present a statement to the House that the indemnity has been given.

**Shareholders Resolutions and Consent**

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21. The constitution of Fairway contains provisions requiring every share in the company to be held by a Minister of the Crown on behalf of the Crown. The attached shareholders resolutions provides that these constitutional restrictions on shareholding be removed, but this resolution only takes effect upon completion of the sales transaction. If the sales transaction does not proceed for any reason then the constitution of the company will still contain restrictions limiting its shareholding to Ministers of the Crown.
22. Although Fairway is the subject of the sales transaction and is not party to the SPA, the Purchaser is required to ensure that Fairway takes specific actions in order to complete the sales transaction, the most significant of which is registration of the change in shareholding in the company's share register. The directors of Fairway that are part of the buyer group would ordinarily be unable to vote on a resolution authorising changes in the company's share register if they have an interest in the relevant transaction (which they do), given restrictions on interested director voting in the company's constitution. The company's constitution does allow its shareholders to relax or suspend these restrictions. The attached shareholder resolution and consent authorises interested director voting, but only for the purposes of this sales transaction.

**COMMERCIAL-IN-CONFIDENCE**

Update Regarding Final Matters

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*Conditions*

23. There are two conditions which are still to be met by the Purchaser and as such present a risk to the transaction not proceeding, albeit at this stage, relatively minor. We provide an update on these below.
24. Change of control consent being provided by ACC and MoJ without materially adverse changes to these contracts
- The buyer group advise that discussions with these parties are well advanced and provide the following updates:
- ACC – Board approval is required and is in the process of being sought. Since initially advising of the potential ownership change with ACC's senior management, reaction and engagement has been positive. A decision is expected early next week.
- MoJ – Operationally are no concerns from MoJ and a letter providing consent is expected to be delivered later this week.
25. Purchaser financing being obtained
- Discussions with BNZ are well advanced with and the buyer group have a high degree of confidence the full required funding will be available by mid to late next week.

*Deferred payment*

26. There is also a risk that the \$1 million deferred payment due 12 months from settlement is not delivered to the Crown.
27. This risk is being mitigated in two ways. The trustee company for buyers' group trust that owns the Purchaser will guarantee the due and timely payment of the \$1 million deferred payment owed to the Crown. In addition the obligations incurred by the trustee company under the guarantee will be secured by security granted in the Crown's favour over all the shares (and related rights) that that trustee company holds in the Purchaser. The Security Agreement also secures debt obligations of the Purchaser under the SPA.

Communications

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28. We consider it likely that outstanding conditions will be met later next week, allowing for appropriate Ministerial announcements. At this time Fairway intend to make an internal announcement to all staff (all of whom become beneficiaries of the buyer's group trust).
29. The Treasury has liaised with your offices and the Company to coordinate delivery of the communications plan and will continue to do so.

Consultation

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31. In preparing this report we have consulted with relevant Treasury officials (in particular those in Legal and Finance) and incorporated their advice accordingly.



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**Final Step**

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32. Once the Crown's shareholding drops to 50% or less, an Order in Council needs to be made removing the name of the company from schedule 4A pursuant to section 3AB of the Public Finance Act 1989. The Order in Council requires recommendation by a shareholding Minister. Under the SPA this is required to occur as soon as reasonably practicable following completion. The Treasury will prepare a paper for submission at the Cabinet Legislation Committee that will effect this.

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OFFICIAL INFORMATION ACT

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**Recommended Action**

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We recommend that you:

- a. **Note** that, in the enclosed letter, Chapman Tripp (acting for the Crown) has confirmed that the transaction documents (the Sale and Purchase Agreement and the Security Agreement) are in order for execution.

- b. **Agree** to sign (but not date) the Sale and Purchase Agreement for the sale of the Crown's shares in Fairway Resolution Limited to an employee buyers group.

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister for ACC

- c. **Agree** to sign (but not date) the Security Agreement to secure the debt due to the Crown arising from the deferred payment element of the sales transaction.

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister for ACC

- d. **Agree** to sign (but not date) the attached shareholder resolution and consent in order to facilitate the completion of the sales transaction

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister for ACC

- e. **Agree** pursuant to section 65ZD of the Public Finance Act, the provision of the described indemnity.

*Agree/disagree.*  
Minister of Finance

- f. **Agree** to seek Cabinet approval for a non-departmental capital appropriation of \$1 million

*Agree/disagree.*  
Minister of Finance

- g. **Agree** to seek Cabinet approval for a non-departmental other expense appropriation of \$150,000

*Agree/disagree.*  
Minister of Finance

Craig Weise  
**Manager, Commercial Operations – Strategy and Policy**

Steven Joyce  
**Minister of Finance**

Hon Michael Woodhouse  
**Minister for ACC**

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**Treasury Report:** Removal of Fairway Resolution Ltd from Schedule 4A of the Public Finance Act

|       |              |              |            |
|-------|--------------|--------------|------------|
| Date: | 20 July 2017 | Report No:   | T2017/1938 |
|       |              | File Number: | CM-1-3-110 |

**Action Sought**

|   | Action Sought  | Deadline                    |
|---|--|-----------------------------|
| Minister of Finance<br>(Hon Steven Joyce) | <p><b>submit</b> to Cabinet Office the attached LEG paper which notifies Cabinet that an Order in Council is to be made to remove FairWay Resolution Limited from Schedule 4A of the Public Finance Act.</p> <p><b>agree</b> to seek Cabinet's approval to waive the 28-day rule</p> | 10am, Thursday 27 July 2017 |

**Contact for Telephone Discussion** (if required)

| Name          | Position   | Telephone | 1st Contact |
|---------------|--|-----------|-------------|
| Oliver Martin | Analyst, Commercial Operations – Strategy and Policy | s9(2)(k)  | ✓           |
| Craig Weise   | Manager, Commercial Operations – Strategy and Policy |           |             |

**Actions for the Minister's Office Staff** (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

**Enclosure:** Yes (attached)

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**Treasury Report: Removal of Fairway Resolution Ltd from Schedule 4A of the Public Finance Act**

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1. On 12 June 2017 Cabinet noted and confirmed the proposed sale of Fairway Resolution Limited (Fairway), to an employee buyer group. On 7 July the transaction was completed and the shareholding was transferred from the Crown. The Crown no longer has any ownership interest in Fairway.
2. Section 3AB(2)(b) of the Public Finance Act requires the Minister of Finance to recommend that an Order in Council be made to remove the name of a company from Schedule 4A if the Minister is satisfied that Ministers of the Crown no longer hold more than 50% of the issued ordinary shares in the capital of the company.
3. The draft Cabinet paper is attached. We recommend you submit the paper to Cabinet Office by 10am Thursday 27 July 2017 for consideration at the LEG Committee meeting on 2 August and Cabinet on 7 August 2017 or provide feedback as necessary.
4. The Cabinet Manual requires that regulations do not come into force until at least 28 days after they have been notified in the New Zealand Gazette unless a waiver is granted by Cabinet. We advise seeking a waiver of the 28-day rule on the grounds that the Order has little or no effect on the public and it is desirable that the ownership status of Fairway be clarified as soon as reasonably practicable.

**Recommended Action**

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We recommend that you:

- a **submit** the attached draft LEG paper to Cabinet Office by 10am 27 July, for consideration at LEG Committee meeting on 2 August 2017 and Cabinet on 7 August 2017.

*Agree/disagree.*

- b **agree** to recommend that Cabinet waive the 28-day rule on the ground that the Order has little or no effect on the public.

*Agree/disagree.*

Craig Weise  
**Manager, Commercial Operations – Strategy and Policy**

Steven Joyce  
**Minister of Finance**

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Reference: T2018/256

CM-1-3-110



Date: 16 February 2018

To: Minister for ACC (Hon Iain Lees-Galloway)

Deadline: None

### Aide Memoire: Fairway Resolution - Background Information

This briefing responds to your request for some background information on Fairway Resolution Limited (Fairway) and information on any oversight or control the Government has over the company.

#### *Background*

Fairway provides contracted dispute resolution services across the public and private sectors in industries including medical, financial services, telecommunications, local government and family. ACC and the Ministry of Justice (MoJ) are the company's two core customers, s9(2)(b)(ii)

). The company has approximately 100 FTEs and 150 contractors throughout New Zealand, handling approximately 12,000 disputes per year.

Formerly Dispute Resolution Services Ltd, Fairway was originally a wholly owned subsidiary of ACC, established to manage reviews of ACC decisions. In 2011, to safeguard the independence of the review process, ownership of the company was removed from ACC and it became a Crown-owned company listed in Schedule 4A of the Public Finance Act 1989. The Minister of Finance and the Minister for ACC each held one share (representing 50 percent) of the company.

In December 2015 the Minister for ACC requested that the Ministry of Business, Innovation and Employment (MBIE) commission an independent review of a report into the ACC dispute resolution process by advocacy group, Acclaim Otago, which highlighted a number of concerns with that process.

The review was conducted by Miriam Dean QC and contained a number of recommendations for Fairway, ACC and MBIE. One of the most substantive of these was consideration of how Fairway could address perceptions of its independence, which many claimants believed was compromised by common ownership of ACC and Fairway. While the independent review acknowledged that it was only a *perception* of bias, nevertheless the review considered how best to address this problem and cited a change in ownership as a possible solution.

Fairway's Board subsequently approached the Treasury expressing interest in employee ownership. The Treasury and shareholding Ministers were supportive of this and obtained an independent valuation which provided the basis for negotiations. In July 2017 the terms and conditions of a transaction were agreed by shareholding

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Ministers and all of the shares in the company were sold to an employee trust for \$6.5 million.

*Government Oversight / Control of Fairway*

The Crown, via ACC and MoJ, currently has commercial contracts for services with Fairway. Fairway's service agreement with ACC is on a non-exclusive basis and does not set out any case volume minimum or maximum. For a number of years ACC has contracted the law firm Gresson Dorman & Co to deliver ACC reviews in Timaru.

Fairway is now a privately owned company meaning that the Government no longer has control of the company and oversight is also limited. Fairway is no longer subject to the Official Information Act 1982 or Ombudsman Act 1975 (as was the case following its creation as a Crown-owned company in 2011). However, as with all agencies and companies that collect personal data, Fairway is subject to the Privacy Act 1993 and is obligated to provide personal information to individuals if requested.

Under the Accident Compensation Act 2001 (AC Act), Fairway must comply with statutory obligations while conducting ACC reviews. Reviewers have a duty to act independently, comply with the principles of natural justice (which includes ensuring that all parties have access to the same information) and exercise due diligence in decision-making. As part of the duty to act independently, the AC Act also requires reviewers to disclose any previous involvement with a claim other than as a reviewer with an additional obligation on ACC to secure the independence of the reviewer (e.g. a reviewer cannot be a person employed by ACC or employed by a subsidiary of ACC).

The AC Act sets out the general principles for reviews (as referred to above) as well more specific requirements around the conduct of a review and the substance of review decisions that ACC dispute resolution providers must comply with. This includes requirements for record keeping, the making of a decision within 28 days of the hearing finishing and directing the reviewer to put aside ACC's decision and look at the matter afresh on the basis of information provided at the review. These obligations apply to any provider of ACC dispute resolution services and are not limited to Fairway.

Oliver Martin, Analyst, Commercial Operations - Strategy and Policy, s9(2)(k)

Shelley Hollingsworth, Acting Manager, Commercial Operations - Strategy and Policy, s9(2)(k)