



ANALYSIS

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1998, No. 3

An Act to establish a Cook Islands Investment Corporation and to make provision for the control and management of statutory corporations and to manage and facilitate the disposal of assets

(18 March 1998)

BE IT ENACTED by the Parliament of the Cook Islands, in Session assembled, and by the authority of the same as follows:

1. Short Title - This Act may be cited as the Cook Islands Investment Corporation Act 1998.

2. Interpretation - (1) In this Act, unless the context otherwise requires:

"Assets" means Crown assets, shareholding interests and property vested in the Cook Islands Government Property Corporation;

"Board" means the board of the Corporation established under section 4(3);

"Cabinet" means the Cabinet of Ministers referred to in Article 13 of the Constitution.

"Corporation" means the Cook Islands Investment Corporation established under section 4(1);

"Crown" means the Crown in right of the Government of the Cook Islands;

"Crown assets" means any estate or interest in real property and personal property vested in the Crown and includes the Crown's ownership rights to any minerals and natural resources but does not include customary land as that term is defined in the Cook Islands Act 1915;

"Dispose" includes a transfer, sale, lease, licence and concession and "disposal" and "disposition" have a corresponding meaning;

"Government" means the Executive Government of the Cook Islands;

"Minister" means the Minister responsible for the Corporation;

"Shareholding Interest" means the shareholding which is vested in or held on behalf of the Crown in a company and every right and entitlement derived from that shareholding;

"Subsidiary" means a company with a shareholding interest and a statutory corporation coming within the control of the Corporation under section 8.

(2) For the purpose of this Act "14 Sitting days" means 14 consecutive sitting days of Parliament notwithstanding that those days are interrupted by an adjournment or successive Sessions of Parliament.

PART I PRELIMINARY

3. Act to bind Crown - This Act shall bind the Crown.

PART II COOK ISLANDS INVESTMENT CORPORATION

4. Cook Islands Investment Corporation - (1) There is established a corporation which shall be responsible to the Minister and called the Cook Islands Investment Corporation.

(2) The Corporation shall be a body corporate with perpetual succession and a common seal and shall be capable of acquiring, holding, and disposing of real and personal property, suing and being sued and, subject to the provisions of this Act, of doing and suffering all such other acts and things as body corporates may lawfully do and suffer.

(3) The Corporation will have a Board that will be responsible for making the executive decisions of the Corporation in compliance with the provisions of this Act.

5. Functions of Corporation - The functions of the Corporation shall be:

- (a) to administer and manage Crown assets and shareholding interests;
- (b) to control and manage the undertakings of statutory corporations;
- (c) to negotiate and facilitate the disposal of assets and any property or undertaking of a statutory corporation.

6. Objectives of Corporation - The principal objectives of the Corporation are:

- (a) the efficient, profitable and professional management of assets and statutory corporations; and
- (b) to recognise Government's social responsibility in the performance of its functions; and

- (c) not to compete or be engaged in trading activities unless private enterprise is unable or unwilling to do so; and
- (d) be a good employer as that term is defined in the Public Service Act 1995-96.

7. Control of interests in companies - Every person holding a shareholding interest in a company on behalf of the Crown and who may exercise any right, power or entitlement in consequence thereof shall on the passing of this Act, exercise that right, power or entitlement subject to the direction of the Corporation.

8. Control of statutory corporations (1) Every statutory corporation established before the coming into force of this Act shall be deemed to be a subsidiary of the Corporation and subject to the provisions of this Act accordingly.

(2) Every statutory corporation established for the purposes of performing a commercial undertaking after the coming into force of this Act shall be deemed to be a subsidiary of the Corporation and subject to the provisions of this Act accordingly.

PART III BOARD OF CORPORATION

9. Board - (1) The Board of the Corporation will comprise 3 members, one of whom shall be appointed Chairperson of the Board and all of whom shall be appointed by the Minister with the concurrence of Cabinet on such terms and conditions as Cabinet may approve.

(2) The members appointed to the Board shall be persons having substantial experience and skill in commercial undertakings.

(3) The Board shall regulate its own procedure as it sees fit.

(4) A member shall not vote or take part in the discussion of any matter before the Board in which he has directly or indirectly a pecuniary interest apart from any interest in common with the public.

(5) Where subsection (4) applies to a member, the Minister, with the concurrence of Cabinet, may appoint a temporary member to take the place of that member for the purposes of and for so long as it may take to dispose of that matter.

(6) No person who has been convicted of a criminal offence punishable by a term of imprisonment of 1 year or more or who is an undischarged bankrupt shall be appointed to, or remain as a member of, the Board.

10. Quorum - The Board shall have a quorum of 2 members.

11. Powers of Board - The Board may on behalf of the Corporation:

- (a) acquire, hold, improve, manage, develop, alter, extend, equip, furnish, repair and maintain assets; and
- (b) enter into any covenants or agreements in respect of the Corporation's functions; and
- (c) employ any person to assist the Corporation in the performance of its objectives, functions and powers; and
- (d) generally exercise any functions or rights and undertake and perform any act in respect of or in connection with any asset as if the Corporation were a natural person; and
- (e) borrow money for the purposes of the Corporation; and
- (f) declare a dividend in accordance with Section 14(3); and
- (g) notwithstanding any Act to the contrary establish and operate bank accounts consistent with the performance of the functions and powers of the Corporation; and
- (h) do all such other things as are incidental or conducive to the exercise of the powers of the Corporation.

PART IV ACCOUNTABILITY

12. Statement of financial position - (1) Within 3 months of the coming into force of this Act, the Board will deliver to the Minister, in accordance with generally accepted accounting practice, a statement of financial position of the Corporation that shall include the estimated value of assets and the estimated value of the Crown's investment in each subsidiary.

(2) The Minister shall within 14 sitting days after the statement of financial position is provided, lay a copy of it before Parliament.

13. Statement of corporate intent - (1) The Board will on behalf of the Corporation deliver to the Minister for Cabinet approval a statement of corporate intent of the Corporation not later than 1 month before the commencement of each financial year of the Corporation, the first statement to be delivered within 45 days of the date of this Act coming into force, or such other period as the Minister may allow.

(2) The Board shall cause a subsidiary where the Corporation has control or there is a controlling shareholding interest, to deliver to the Corporation a statement of corporate intent of the subsidiary in sufficient time to enable the Corporation to deliver its statement in accordance with subsection (1).

(3) The statement of corporate intent shall contain Government's policy as it affects the Corporation including asset management and in addition specify, in respect of the next financial year and each of the two immediately succeeding financial years, the following information:

- (a) the objectives of the Corporation; and
- (b) the nature and scope of the activity to be undertaken; and
- (c) estimates of the current commercial value of the Government's investment in the Corporation, its subsidiaries and assets and a statement of the manner in which the value was assessed; and
- (d) the accounting policies; and
- (e) the performance targets and other measures by which the performance of the Corporation and its subsidiaries may be judged in relation to their objectives; and
- (f) a statement of the principles adopted in determining the annual dividend of the Corporation together with an estimate of the amount that is to be paid to Government; and
- (g) the intention of the Corporation regarding the sale and purchase of assets having regard to the principles set out in section 26; and
- (h) where there is a departure from the principles set out in section 27, state the departure and the reasons for the departure and where relevant, the manner in which the Corporation will fulfill its obligations under section 27; and
- (i) the costs to the Corporation in recognising Government's social policy in the management and any proposed disposal of assets and what appropriation by Parliament is required; and
- (j) such other matters as are agreed by the Government and the Corporation.

(4) The statement of corporate intent shall be published within 14 days of being agreed with Cabinet and any member of the public may make a written submission to the Corporation on that statement.

14. Annual report - (1) Within 3 months after the end of each financial year the Board shall deliver to the Minister for Cabinet, in respect of the Corporation a report of the operations of the Corporation during the financial year including:

- (a) a statement of financial position;
- (b) a statement of financial performance;
- (c) a statement of cashflows;
- (d) a statement of borrowings;
- (e) a statement of commitments;
- (f) a statement of specific fiscal risks;

- (g) a statement of accounting policies;
- (h) other statements as are required to be consistent with generally accepted accounting practice;

(2) The annual report under subsection (1) shall state the information necessary to enable an informed assessment of the operations of the Corporation having regard to the matters set out in section 13(3) including a comparison of the performance of the Corporation with the statement of corporate intent.

(3) The annual report under subsection (1) shall state the dividend payable to Government by the Corporation for the financial year to which the report relates having due regard to the necessity to maintain adequate reserves and the principles referred to in section 13(3)(f) and the amount of the dividend payable to Government shall not be more than that amount estimated in the statement of corporate intent except as otherwise agreed to by the Board and Cabinet.

(4) Within 3 months after the end of each financial year each subsidiary in which the Corporation has control or there is a controlling shareholding interest shall deliver to the Corporation an annual report that includes the statements referred to in subsections (1) and (2) and state the dividend to be paid to the Corporation.

15. Fiscal updates - (1) The Corporation shall deliver to the Minister fiscal update reports in accordance with the Ministry of Finance and Economic Management Act 1995-96.

(2) The updates required by subsection (1) shall include those statements required under section 14(1).

(3) Each subsidiary in which the Corporation has control or there is a controlling shareholding interest shall deliver to the Corporation fiscal updates in accordance with subsections (1) and (2).

16. Information to be laid before Parliament - (1) In respect of each financial year of the Corporation the Minister shall lay before Parliament within 14 sitting days of receiving them, the following documents:

- (a) The annual report and audited financial statements of the Corporation; and
- (b) The auditors report.

(2) The fiscal update report delivered to the Minister for Cabinet under section 15, shall be laid before Parliament by the Minister within 14 sitting days of receipt.

17. Office of the Public Expenditure Review Committee and Audit to be auditor of the Corporation and subsidiaries - (1) The Office of the Public Expenditure Review Committee shall be the auditor of the Corporation and those subsidiaries in which it has control or there is controlling shareholding interest, and for the purposes of the Companies Act 1970-71 will have and may exercise the functions, duties and powers of an auditor appointed under that Act, and all such powers it has under the Public Expenditure Review Committee and Audit Act 1995-96.

(2) Notwithstanding subsection (1) the Board may, appoint a person or a firm that is qualified for appointment as an auditor of a company to be the auditor of the Corporation or the auditor of any subsidiary where the Corporation has control or there is a controlling shareholding interest.

18. Public Expenditure Review Committee - The Public Expenditure Review Committee established under the Public Expenditure Review Committee And Audit Act 1995-96 may review, in accordance with that Act, the activities of the Corporation in the performance of its functions under this Act.

19. Protection from disclosure of sensitive information - Nothing in this Act shall be construed as requiring the inclusion in any report required under this Act any information that could be properly withheld if it would otherwise damage the commercial interest of the Corporation or a subsidiary or is information that may be withheld under any Act in force concerning the disclosure of information.

PART V CHIEF EXECUTIVE OFFICER

20. Chief Executive Officer - (1) There shall be appointed by the Board a CEO who will be responsible for managing the Corporation and implementing the decisions of the Board.

(2) The CEO will be an ex-officio member of the Board.

(3) The Board may, in its discretion, contract out the functions and duties of the CEO to a professional person who shall not be the auditor of the Corporation or any of its subsidiaries.

21. Terms and conditions of appointment - (1) The CEO shall be appointed under a written contract with the Corporation.

(2) The remuneration of the CEO will be fixed by the Board.

PART VI
DIRECTORS

22. Directors - (1) On the coming into force of this Act the Board shall be responsible for the appointment, terms and conditions of employment and termination of appointment of all directors and board members of statutory corporations (other than the Cook Islands Government Property Corporation) and those directors or board members who represent the shareholding interest of the Crown in any company.

(2) Notwithstanding any Act to the contrary, every director and board member to whom subsection (1) applies shall be responsible to the Board in the performance of his functions and duties.

23. Direction of board - Every director or board member to whom section 22 applies shall comply with a direction of the Board consistent with the provisions of this Act.

24. This Part paramount - This Part shall, on the passing of this Act, take effect notwithstanding the provision of any Act to the contrary.

PART VII
DISPOSAL OF ASSETS

25. Corporation to conduct dispositions - (1) The Corporation shall be exclusively responsible for the conduct of negotiations for the disposal of assets and property or undertaking of a statutory corporation which shall be consistent with the Corporation's statement of corporate intent.

(2) Where the Corporation intends to dispose of an asset or any such property or undertaking and that disposition would be inconsistent with the statement of corporate intent the Corporation and Cabinet shall first agree upon a modified statement of corporate intent.

26. Principles of disposal - (1) The Corporation will ensure that every disposition is consistent with the statement of corporate intent and is a transparent, competitive process ensuring a maximum return.

(2) The Corporation may depart from the principles in subsection (1) where:

- (a) the asset to be sold provides essential public services; or
- (b) the asset to be sold is substantially a monopoly; or
- (c) the reason for the departure is disclosed in the statement of corporate intent of the Corporation.

27. Obligations of Corporation on disposal of certain assets

(1) Where the Corporation proposes to sell an asset that provides an essential public service or is substantially a monopoly the Corporation shall ensure that the:

(a) essential public services continue to be available notwithstanding discontinuance of the service for reasons of commercial failure or provision of the service ceasing to be financially viable; and

(b) essential public services are available at a socially acceptable cost.

(2) In compliance with the obligations under subsection (1) the Corporation shall:

(a) determine the level of tariffs and charges for which the essential public services are to be provided; and

(b) establish pricing mechanisms for fixing those tariffs and charges; and

(c) upon the disposal of the essential public service require the purchaser to bind itself to substantially similar obligations contained in this section; and

(d) contract that the services will be maintained, including uneconomic essential public services if those uneconomic essential public services are subsidised by the Government; and

(e) include in any sale of an asset a compulsory buy-back for essential public services which are unable to continue by reason that they are not commercially viable.

28. Corporation not to dispose - (1) Where the Corporation proposes the disposal of an asset or all or part of the principal undertaking of a statutory corporation, the terms and conditions upon which the transferor shall dispose of that asset or undertaking shall be negotiated for and on behalf of the transferor exclusively by the Corporation.

(2) The terms and conditions as negotiated by the Corporation shall be delivered by the Corporation to the Minister for Cabinet's consideration as to whether those terms and conditions are in Cabinet's opinion in the public interest.

(3) Where Cabinet approves of the terms and conditions as being in the public interest, no further approval of the transferor shall be required for the disposition to take effect.

(4) All monies being the proceeds from the disposal of an asset or all of the undertaking of a subsidiary shall be deposited in a bank account of the Corporation and shall without further appropriation than this section be expended at the direction of the Board in the performance of the Corporation's functions and powers under this Act.

PART VIII
MISCELLANEOUS

29. Liability of Corporation for subsidiary - Other than the Cook Islands Government Property Corporation the Corporation shall not assume or be liable for any liability of or provide a guarantee for or indemnify a subsidiary in any way.

30. Public servants employed by Corporation - Where, immediately prior to the employment of a person by the Corporation that person was a public servant, then the employment of that person by the Corporation or one of its subsidiaries shall not -

- (a) prevent that person from continuing to be a member of a superannuation scheme that the person was a member of when employed as a public servant;
- (b) affect that person's liability to continue contributions as may be required under that scheme;
- (c) in any way affect that person's entitlement to any benefit pursuant to that scheme;
- (d) interrupt that person's period of employment as a public servant if immediately after ceasing to be employed by the Corporation that person continues employment as a public servant.

31. Cook Islands Government Property Corporation - (1) For the avoidance of doubt all property vested in the Cook Islands Government Property Corporation pursuant to the Cook Islands Government Property Corporation Act 1969 shall take effect as if there were contained in that Act express provision binding the Crown.

(2) There shall be paid to the Corporation, without further appropriation than this section, all income and unexpended appropriated capital contributions of the Cook Islands Government Property Corporation which shall be deposited in a bank account of the Corporation and expended at the direction of the Board in the performance of the Corporation's functions and powers under this Act.

(3) Section 4 of the Cook Islands Government Property Corporation Act 1969 is repealed and the following section substituted:

"4. Management of Property - The property of the Corporation shall be managed by the Cook Island Investment Corporation and disposed of in accordance with the Cook Islands Investment Corporation Act 1998."

(4) Section 5(1) of the Cook Islands Government Property Corporation Act 1969 is amended by inserting after the words "all property" the words "other than customary land as that term is defined in the Cook Islands Act 1915".

(5) Subsection (4) of this section shall be deemed to have come into force on 12 September 1984.

32. Regulations - The Queen's Representative may by Order in Council make regulations necessary or expedient to give full effect to the provisions of this Act and for its due administration.

33. Repeals - The Cook Islands Government Property Corporation Amendment Act 1997 is repealed.

This Act shall be administered by the Cook Islands Investment Corporation