

**Hon Dr Deborah Russell**  
Associate Minister of Justice

**Proactive release – Document relating to the Race Relations Commissioner**

Date of issue: 21 June 2023

The following document has been proactively released.

No.	Document	Comments
1	<b>Briefing from Ministry of Justice to Hon Dr Deborah Russell – Associate Minister of Justice</b> 12 June 2023	Information withheld under S9(2)(a). Legal privilege has been waived in relation to the legal advice in this briefing.



~~Confidential Legal Advice~~  
~~Subject to Legal Professional Privilege~~

Hon Dr Deborah Russell, Associate Minister of Justice

**Race Relations Commissioner**

Date	12 June 2023	File reference	
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Action Sought	Timeframe/Deadline
<p><b>Note</b> the following sequence of events:</p> <ul style="list-style-type: none"><li>(a) following receipt of the Board of the Human Rights Commission's final report into Commissioner Foon's conduct on 26 May 2023, you wrote to Commissioner Foon on 30 May 2023 asking that he confirm directly to you the accuracy of the Board's report and to make any comments he saw fit on the Board's findings.</li><li>(b) in your letter of 30 May 2023 you stated that the findings contained in the Board's report raise serious concerns for you and that you would decide what action you should take once you had received Commissioner Foon's response.</li><li>(c) you received Commissioner Foon's response on 7 June 2023. In his response, Commissioner Foon has changed his view that the Commission's findings are correct and now argues several errors were made.</li><li>(d) the Chief Commissioner replied to Commissioner Foon's response on 9 June 2023.</li></ul>	
<p><b>Note</b> that the Ministry considers that Commissioner Foon has breached several of his individual duties.</p>	
<p><b>Note</b> that we do not consider Commissioner Foon's response materially affects our view of his conduct in this matter.</p>	
<p><b>Decide</b> what action to take in respect of Commissioner Foon's breaches of his individual duties under the Crown Entities Act.</p>	<b>ASAP</b>

**Contacts for telephone discussion (if required)**

Name	Position	Telephone (work) (a/h)		1st contact
Andrew Kibblewhite	Secretary for Justice	Section (9)(2)(a)	Section (9)(2)(a)	
Jeff Orr	Chief Legal Counsel	04 494 9755	Section (9)(2)(a)	✓
Daniel Reid	General Manager, Governance and Assurance	Section (9)(2)(a)	Section (9)(2)(a)	

**Minister's office to complete**

☐ Noted      ☐ Approved      ☐ Overtaken by events

☐ Referred to: \_\_\_\_\_

☐ Seen      ☐ Withdrawn      ☐ Not seen by Minister

***Minister's office comments***

## Purpose

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1. This paper advises you on the response of Race Relations Commissioner Meng Foon to your letter of 30 May 2023. We consider that Commissioner Foon has breached his individual duties under the Crown Entities Act 2004 (the Act) and seek your decision on what action you will take in respect of Commissioner Foon.

## Background

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2. As you are aware, following media reports of Commissioner Foon's political donations, the Commission commenced an inquiry into his interests and disclosures. On 12 May 2023 the Chief Commissioner wrote to you advising that in addition to his undisclosed political donations, Commissioner Foon had received substantial undisclosed Government payments for the provision of emergency housing. The Chief Commissioner said the Board of the Human Rights Commission would inquire into whether Commissioner Foon's conduct with respect to these matters breached his individual duties under the Act.
3. Specifically, the interests which Commissioner Foon had failed to disclose related to:
  - (a) monetary donations (\$1500) made to Kiritapu Allan MP for her 2020 General Election campaign<sup>1</sup> and rental subsidies (\$9185.04) for Ms Allan's electoral campaign office (political donations); and
  - (b) his company (MY Gold Investments Ltd)<sup>2</sup> receiving more than \$2.0 million in payments (which are continuing) under grants for the provision of emergency housing with MSD's New Zealand Income and Support Services (NZISS), since he came into office in 2019 (Government payments).
4. On 17 May 2023 the Board put its preliminary views to Commissioner Foon, who responded on 24 May that they were "a fair and a correct reflection of the facts". The Board then adopted as its findings the report's preliminary views on 26 May 2023.
5. On 26 May 2023, the Chief Commissioner wrote to you advising that the Board had completed its inquiry into Commissioner Foon's conduct. They found that Commissioner Foon had made previously undisclosed political donations and received previously undisclosed Government payments and therefore had breached the individual duties he owed to the Commission and the Minister under the Act.
6. In particular, the Board found that Commissioner Foon had breached s 56 of the Act (duty to act with reasonable care, diligence and skill) by making political donations and by failing to disclose conflicts of interest arising from those donations and from the Government payments received. By failing to disclose conflicts of interest with respect to the political donations and Government payments in contravention of s 63 of the Act, he also contravened his individual duty in s 53 not to contravene the Act.
7. In a cover letter to the Board's report dated 26 May 2023, the Chief Commissioner noted the importance of Board members being, and being perceived to be, "politically neutral, independent and acting with integrity". He noted that when Commissioner Foon's undisclosed political donations and Government payments came to light he "acknowledged his error of judgement, apologised to the Board and gave an assurance

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<sup>1</sup> Commissioner Foon also made donations to the National (\$1000) and Green (\$50) Party candidates.

<sup>2</sup> Commissioner Foon and his wife were the sole directors and shareholders (50% each) of MY Gold Investments. Commissioner Foon's two sons manage the business.

of non-repetition". He has also taken steps to better understand and manage his conflicts of interest. He further provided evidence from his accountant that he had not obtained any personal benefit from the Government payments received by his company. And, finally, the Chief Commissioner noted that Commissioner Foon acted in the way he did due to errors of judgement and without any bad faith, but that his actions "carry significant consequences for the Commission".

8. After receiving and reviewing the Chief Commissioner's letter and the Board's findings, you wrote to Commissioner Foon on 30 May 2023 asking him to confirm his agreement to the Board's findings and asking for any comments he might have on those findings. He was asked to respond by 2 June 2023, and you advised that you would be considering what action, if any, to take as a consequence of breaches of his individual duties, including the possibility of his removal from office.

### **Commissioner Foon's response to the Board's findings**

9. You received Commissioner Foon's response on 7 June 2023 (you had previously agreed to an extension of the 2 June deadline). Contrary to his earlier response of 24 May 2023 (that the findings were "a fair and a correct reflection of the facts"), Commissioner Foon said there were a number of errors in the Board's findings, as set out below.

#### *Government payments*

- (a) Commissioner Foon acknowledges not disclosing his Government payments to the Board at the time of the Housing Inquiry, but says that he did declare interests that MY Gold Investments held in MSD grants for the provision of emergency housing at the time of his appointment. He says that he made this disclosure by sending a register of interests, including the entry "My Gold Investments MSD emergency housing", to the Commission and to the Ministry.<sup>3</sup> He believes the Commission altered his entry in the register by removing the reference to "MSD emergency housing". He acknowledges he declared his directorship in MY Gold but not his shareholding. He further acknowledges that he should have declared his shareholding and has now updated the register.
- (b) The Housing Inquiry was adopted as an inquiry at the end of June 2021 and the report was issued on 12 December 2022. Commissioner Foon noted that the inquiry appeared twice on the Board's agenda, when it was adopted as an inquiry and when the final report was accepted. He noted that if his full disclosure of his conflict of interest was on the agenda for the Housing Inquiry it would have triggered in his mind to declare his interest or a member could have raised it. In the event, he did not declare his interest at either Board meeting.
- (c) Commissioner Foon states that he "acted unbiasedly throughout the housing inquiry. I fully support the housing inquiry. Even if I had declared an interest HRC didn't know the revenue as this was not required in the HRC policy". He does admit though that he "did not declare a perceived conflict of interest at the time of the board paper". He apologised for the oversight, but claimed he had no pecuniary interest in the inquiry.

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<sup>3</sup> The Ministry conducted an extensive search of its records and could find no evidence that it had received Commissioner Foon's register of interests.

- (d) He states he was honest in disclosing his interest in emergency housing when asked by the Chief Commissioner on 23 April 2023 and also confirming his political donations when the news broke.
- (e) In response to allegations he breached the Crown Entities Act by not disclosing his interest in the Housing Inquiry, he states that “I did disclose fully MYG MSD emergency housing in 2019, but not at the time of the housing inquiry in June 2021. He did acknowledge that he “could have been more diligent”.
- (f) Commissioner Foon considers that in terms of the s 62 requirement to disclose interests, he did not have to disclose because he derived no financial benefit from the inquiry. Indeed, he noted that if the inquiry was successful in building more social housing there would be less need for emergency housing.

#### *Political Donations*

- (g) Commissioner Foon advised that he generally donated evenly amongst the main parties – \$1500 to the Labour candidate (Hon Kiri Allan), \$1000 to the National candidate and \$50 to the Greens.
- (h) He acknowledges there was a perceived conflict of interest that he should have declared before the news broke in April 2023. He apologised for not declaring his conflict sooner, which was an “oversight” or “judgment of error”, but that he acted politically neutrally.
- (i) As a final note, Commissioner Foon asserts he can act independently and continues “to lobby the government on many topics without fear or favour for our community, even with Kiri as Minister of Justice”.

#### **Commission’s reply to Commissioner Foon’s Response**

10. On 9 June 2023, you received the Commission’s reply to Commissioner Foon’s response to the Board’s findings. In that letter the Chief Commissioner confirmed that, following a search of the Commission’s records, Commissioner Foon’s register of interests was located on his personnel file with other information (eg, bank account and IRD numbers) he submitted on 26 July 2019 to set up his remuneration prior to his commencement in office in August 2019.<sup>4</sup> After acknowledging that discovery, the Chief Commissioner stated:

*Minister, on 18 September 2019, Commissioner Foon subsequently completed and signed the Commission’s Declaration of Interest form, which is the formal declaration all Commissioners and staff make when joining the Commission as part of standard procedure. In his Declaration, Commissioner Foon refers to MY Gold Investments in the section regarding remuneration from directorships and partnerships. However, he does not refer anywhere in the Declaration to MSD Emergency Housing or any other government payments. With respect to his declaration regarding assets and other financial interests relevant to his activities with the Human Rights Commission, Commissioner Foon indicated “nil”. Regarding*

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<sup>4</sup> The Chief Commissioner noted that “[t]he statement ‘MSD Emergency Housing’ was not carried over to the conflicts of interest register nor the list of Board member interests that informs the standing agenda item at all Board and programme committee meetings regarding Board member conflicts of interest.

*the section on his shareholdings, Commissioner Foon did not declare his shareholding in MY Gold.*

*Commissioners are also asked at every Board and programme committee meeting to confirm or update their declaration of interests. I note that, in his letter of 7 June 2023, Commissioner Foon accepts that he did not declare his interest arising from MY Gold's receipt of MSD housing payments at the time the Commission's housing inquiry was considered by the eliminating poverty programme committee and acknowledges that this gave rise to a perceived conflict of interest. More generally, Commissioners and staff also receive, from time to time, a request to update their formal declaration form if their interests have changed.*

*Based on the information provided by his accountant during the Commission's inquiries into the matter, I note that the quantum of payments received by MY Gold from MSD-NZISS for provision of housing appears to have significantly increased during Commissioner Foon's tenure as Race Relations Commissioner (see paragraph 27 of the Board's preliminary views). I further note that Commissioner Foon informed the Commission during its recent inquiries into the matter that the MSD-NZISS payments were for emergency and permanent housing, as well as other things (see paragraph 28 of the Board's preliminary views).*

## **Discussion**

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11. Now that you have received the Board's findings, Commissioner Foon's response and the Commission's reply, we consider you are in a position to assess Commissioner Foon's conduct and decide what action, if any, to take against him.
12. On 29 May 2023, the Ministry briefed you on Commissioner Foon's conduct and on the various actions you could take in response:
  - (a) do nothing, or
  - (b) issue a warning letter or a letter of expectations, or
  - (c) recommend his removal from office.
13. We advised that removal from office (the only available statutory disciplinary action) would require "just cause" (s 39 of the Act) in the form of a finding of misconduct or a serious breach of his individual duties owed to the Board and the Minister under the Act. We ruled out a finding of misconduct since there was no evidence Commissioner Foon had acted in bad faith or with wrongful intent.<sup>5</sup> The Board found he had committed errors of judgment only.
14. Accordingly, we advised that removal would require finding a serious breach of his individual duties under the Act. The relevant duties are to not contravene the Act (s 53) and to act with reasonable care, diligence and skill when acting as a member (s 56). In terms of contravening the Act the relevant issue was whether Commissioner Foon had breached his duty to disclose interests in matters.
15. Section 62 of the Act specifies what interests a member must disclose. In particular, the member must disclose interests in "matters" relating to the entity's performance of

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<sup>5</sup> We remain of that view although we note that the extent and nature of the non-disclosure is significant.

its functions from which the member might derive a financial benefit, or in which the member is otherwise directly or indirectly interested.

16. Commissioner Foon has acknowledged that he should have been more diligent and should have disclosed to the Board his political donations and his Government payments at the time of the Housing Inquiry. We consider that in those circumstances Commissioner Foon breached his duty to exercise the care, diligence, and skill that a reasonable person would exercise in the same circumstances (s 56). In our view, the very act of making political donations after coming into office breached his s 56 duty. The Commission must act independently from individual politicians and the Government. (s 19, Human Rights Act).
17. While Commissioner Foon acknowledges he *should* have disclosed his interests, because of the perceived conflicts of interest, the issue becomes whether he was *required* to disclose his interests under the Act. Our view is that his political donations fall outside the ambit of what is required to be disclosed by s 62 of the Act (ie, they are not a “matter” for the purposes of s 62). However, we consider that his Government payments for the provision of emergency housing were interests related to a function of the Commission – the Housing Inquiry – that were required to be disclosed. This is even if, as he maintains, he obtained no personal financial benefit from the payments and from the results of the Inquiry. Sections 62(2)(f) and 63 require disclosure if the member is directly or indirectly interested in the matter relating to the entity’s functions.
18. Here, Commissioner Foon was providing emergency housing when that was a focus of the Commission’s Housing Inquiry. He had a direct (or at least, indirect) interest in the Housing Inquiry through his substantial interest in emergency housing provider MY Gold Investments. Moreover, we note that s 62(2)(b) requires disclosure if the member’s spouse and in this case sons, could derive a financial benefit from the matter.
19. Commissioner Foon originally agreed that he had not disclosed his Government payments, but in his latest submission of 7 June 2023 he says he did disclose his interests, which has now been verified by the Commission. In our view, that disclosure was insufficient and did not provide all the details required by the Act (s 65). The disclosure must be made to the Chairperson of the entity and contain a description of the nature of the interest and the value. His disclosure at the time of his appointment was sent to the Commission on an excel spreadsheet along with other information to obtain his remuneration. The disclosure merely stated “MY Gold Investments--- Director—MSD Emergency Housing”. It was not clear on the nature nor the value of the interest, and the fact he was a shareholder not just a director.
20. On the actual declaration of interest form he completed on joining the Commission, Commissioner Foon did not mention any Government payments. Neither did he take the opportunity to update his declaration of interests (ie, to include political donations), despite being reminded to do so with the other members at various Board and committee meetings.
21. In any event, Commissioner Foon should have updated his disclosure when the payments his company received for providing emergency housing increased dramatically and the Commission commenced its Housing Inquiry. Even if his interests register provided for payroll purposes counted as an initial disclosure it would have ceased to have effect (s 63(3) of the Act) when the extent of his interest materially



increased and the Housing Inquiry commenced. Commissioner Foon acknowledges his lapse of diligence by not updating his interest when the inquiry began.

22. We note that the public disclosure of his company's receipt of substantial Government payments, like the public disclosure of his political donations, will likely damage the Commission's reputation for independence and impartiality, and may also damage the credibility of the Commission's findings in their Housing Inquiry.

### **Summary of Commissioner Foon's breaches of his individual duties under the Act**

23. By making political donations after coming into office, we consider that Commissioner Foon breached his duty to act with reasonable care, diligence and skill (s 56).
24. By failing to disclose his company's interest in the provision of housing at the time the Commission was inquiring into housing in New Zealand we consider that Commissioner Foon contravened s 63 of the Act (obligation to disclose interest) and thereby his individual duty in s 53 (not to contravene the Act). By failing to disclose his interests, he also breached his duty to act with reasonable care, diligence and skill (s 56).

### **Conclusion**

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25. Commissioner Foon has breached his individual duties owed to the Commission and the Minister. You must now exercise your judgment to decide whether any of his breaches are "serious" for the purposes of finding just cause for removal. We consider that a finding of seriousness is open to you with either or both of his breaches, set out in paragraphs 23 and 24 above.
26. However, even if you decide that one or both of his breaches were serious you are not required to go down the removal path and may decide to follow one of the other options set out in paragraph 12.
27. If you do decide to commence the removal process, the next step would be for you to give notice to Commissioner Foon of your intentions and set out your reasons for your proposed decision. Officials would draft an appropriate letter for you.

### **Recommendations**

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28. We recommend that you:
  1. **Note** the following sequence of events:
    - 1.1. following receipt of the Board of the Human Rights Commission's final report into Commissioner Foon's conduct on 26 May 2023, you wrote to Commissioner Foon on 30 May 2023 asking that he confirm directly to you the accuracy of the Board's report and to make any comments he saw fit on the Board's findings.
    - 1.2. in your letter of 30 May 2023 you stated that the findings contained in the Board's report raise serious concerns for you and that you would decide what action you should take once you had received Commissioner Foon's response.

- 1.3. you received Commissioner Foon's response on 7 June 2023.  
In his response, Commissioner Foon has changed his view that the Commission's findings are correct and now argues several errors were made.
- 1.4. the Chief Commissioner replied to Commissioner Foon's response on 9 June 2023.
2. **Note** that we consider that by making political donations and not disclosing Government payments Commissioner Foon has breached several of his individual duties.
3. **Note** that we do not consider Commissioner Foon's response materially affects our view of his conduct in this matter.
4. **Note** that we consider it is open to you to find one or both these breaches are "serious" for the purposes of finding just cause for removal.
5. **Decide** what action to take in respect of Commissioner Foon's breaches of his individual duties under the Crown Entities Act:
- 5.1. do nothing YES / NO  
or
- 5.2. issue a warning letter or a letter of expectations YES / NO  
or
- 5.3. recommend his removal from office YES / NO



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Jeff Orr  
**Chief Legal Counsel**

APPROVED / SEEN / NOT AGREED

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Hon Dr Deborah Russell  
**Associate Minister of Justice**  
Date:     /     /