Crown Entities Act 2004

Explanation of Amendments in 2013

to provisions administered by the State Services Commission

Introduction

1 This paper provides a record of the main provisions in the Crown Entities Act 2004 (CEA) that are administered by the State Services Commission (SSC) and that were amended by the Crown Entities Amendment Act 2013. It is a companion paper to the paper on the SSC website *Amendments to the State Sector Act 1988: Explanation of the State Sector Amendment Act 2013*.

2 The SSC and Treasury jointly administer the CEA:

- the SSC administers Parts 1, 2, 3, and 5; this paper covers the substantive amendments in 2013 to these provisions
- the Treasury administers Part 4 and, in practice, is de facto administrator of other provisions relating to Crown entity companies and Crown entity subsidiaries. The amendments in 2013 to these provisions are outside the scope of this paper.

3 The main purpose of the paper is to explain the legislative changes, not to provide implementation guidance. The paper records the rationale for the legislative amendments, including the more significant shifts in thinking at various stages during the policy development, legislation drafting and parliamentary processes.

4 This paper primarily draws on:

- iterative drafts of an SSC discussion paper[1] that focussed predominantly on the future amendments to the State Sector Act 1988 (SSA) as well as including discussion on a small number of amendments to the CEA
- two of the seven "Better Public Services" (BPS) papers submitted to Cabinet in May 2012: BPS Paper Two – Better system leadership, and BPS Paper Seven – Amendments to the Crown Entities Act 2004
- the joint SSC-Treasury report to the Ministers of State Services and of Finance, July 2012, who were authorised by Cabinet to *"...issue drafting instructions .... to give effect to minor and technical matters that arise during the drafting process"* and to *"make decisions on minor policy decisions that arise during the drafting of the legislation"* [CAB Min (12) 16/10 paragraph 3 refers]
- Supplementary Order Paper No 168, December 2012, capturing some minor policy and technical amendments
- the joint SSC-Treasury Briefing, February 2013, to the Finance and Expenditure Committee (FEC) on the State Sector and Public Finance Reform Bill (the Bill). This was an omnibus Bill that would be divided at the end of the committee of the whole House stage into a State Sector Amendment Bill, a Public Finance Amendment Bill and a Crown Entities Amendment Bill. The purpose of the omnibus Bill was to support the BPS work programme and the administrative changes needed to reshape the State services so that they are fit-for-purpose, not just for the present but for the next decade or more

[1] SSC internal doc #1712787, versions 1-6

- the joint SSC-Treasury Departmental Report on the State Sector and Public Finance Reform Bill, March 2013; and two sets of Responses to Information Requests from FEC, April 2013.

5 Key dates leading to the changes to the CEA include:

- SSC commences an internal review of the SSA, including a small number of provisions in the CEA: September 2009
- Government establishes the Better Public Services Advisory Group (BPSAG): May 2011. It provided recommendations to Government in December 2011
- Cabinet: 14 May 2012
- Bill introduced: 30 August 2012
- First reading: 29 November 2012
- Select Committee (Finance and Expenditure) report: 23 May 2013
- Third reading: 10 July 2013
- Royal assent: 17 July 2013

6 In this paper, all references to sections in the CEA relate to the principal Act, ie the Crown Entities Act 2004, not the amending legislation passed in 2013.

7 This paper follows the sequence of the CEA. Each part of the Act is introduced with a statement of the important matters under review, and an indication where applicable of ancillary or second order matters. Each issue is then discussed in order of its location within the CEA.

8 Drafting the legislative provisions involved a collaborative and iterative process between the Parliamentary Counsel Office (PCO) and the SSC and Treasury, for which the SSC wishes to record its appreciation to PCO and Treasury.

Part 1: Preliminary Provisions

9 Part 1 of the CEA has preliminary provisions that set out: the purpose and outline of the Act itself; how the CEA interacts with other entities' Acts; and defines key terms including the five categories of Crown entity.

10 The only issue for review within the SSC's scope of administration involved inserting a definition of the "monitor" of a Crown entity.

Meaning: "monitor"

The Act

11 The principal Act made no provision for monitoring departments or other Crown entity monitoring agents.

Commentary

12 The discussion that follows in relation to Part 2 of the CEA covers the role of Crown entity monitors and the development of a package of proposals to make legislative provision for them.

Cabinet and Legislation drafting processes

13 BPS Cabinet paper seven sought to clarify the role of monitors, their various responsibilities and the extent of ministerial delegations to them. While the paper noted that the Tertiary Education Commission (TEC) is the "monitoring department" for Tertiary Education Institutions (TEIs) even though it is a Crown agent, not a department, the paper fell short of proposing a definition of "monitor" or "monitoring department".

14 During the preparation of the Bill, and as a matter of legislation drafting consistent with the policy proposals submitted to Cabinet, a definition of "monitor" was formulated. The definition in the Bill as introduced to the House made it clear that a "monitor" may be either a department or a Crown entity that performs the role described in the relevant sections in Part 2 of the CEA.

Select Committee process

15 Throughout this paper, phrases relating to 'changes to the Bill during the Select Committee process' technically refer to the Committee's recommended amendments as reflected in the Revision Tracked version of the Bill that accompanies the Committee's report to the House.

16 The FEC did not discuss the definition of "monitor", and no amendment was made.

Part 2: Establishment and Governance of Crown Entities

17 Part 2 of the CEA deals with the establishment of statutory entities [Crown agents; autonomous Crown entities (ACEs); independent Crown entities (ICEs)] and with the formation and shareholding of Crown entity companies and of Crown entity subsidiaries. It covers: the role of Ministers; the role and accountability of board members; provisions for the appointment, removal and duties of board members; conflict of interest rules applying to members of statutory entities; and delegation provisions.

18 Matters for review within scope of this paper included:

- clarifying the role and functions of monitoring agents, including consequential amendments to the delegation powers of responsible and shareholding Ministers
- promoting in statutory entities a culture of collaboration with other public entities
- making technical amendments to the conflict of interest disclosure rules.

19 In addition, consequential technical amendments were made to ensure consistent use of terminology. As part of amendments made in Part 4 of the CEA, technical changes were made to the language in:

- s27(1)(f) and s88(1)(d) concerning the role of responsible and shareholding Ministers respectively
- the heading to, and text in, s49 and s92 setting out a collective duty of the board of statutory entities and Crown entity companies.

Monitor's role and ministerial powers of delegation

The Act

20 There was no provision in the CEA for monitoring agents.

Commentary

21 Every statutory Crown entity has a responsible Minister and every Crown entity company has two or more shareholding Ministers (one of whom must be the Minister of Finance). Sections 27 and 88 of the CEA set out the roles of responsible and shareholding Ministers respectively, including functions and powers principally in relation to: appointing and removing board members; reviewing operations and performance; requesting information; participating in the process of setting strategic direction and performance expectations, and monitoring the entity's or company's performance.

22 Ministers generally have an agent or agents to advise and help them to exercise their responsibilities, functions and powers over the Crown entities in their portfolio(s). An agent may be anyone whom the Minister engages or appoints for that purpose; in practice, the agent normally will be the department in the same portfolio as the entity or entities. They are referred to as a 'monitoring department'. It is possible for one department to monitor more than one Crown entity, for example the Ministry of Health monitors the 20 District Health Boards (DHBs) as well as 6 other Crown entities in the Health portfolio. The TEC

provides a notable exception to the norm, in so far as it monitors TEIs and is itself a Crown agent, not a department.

23 The quality of monitoring is an important conduit to help the Minister make informed decisions in respect of any of the Minister's responsibilities, functions and powers in relation to an entity.

24 The Treasury's role in monitoring financial institutions (State-owned enterprises, Crown entity companies, the Reserve Bank, and a small number of other companies and entities) was well established and uncontested. This role is supported by the power of the Secretary to the Treasury to require an organisation in the government reporting entity (synonymous with organisations comprising the 'State sector') to provide any information that is needed to enable the preparation of the Estimates and other specified purposes [s19 of the Public Finance Act 1989 (PFA)].

25 Departments had well recognised roles affecting Crown entities, principally to administer appropriations and legislation, and to provide advice to the Minister. But monitoring departments had no statutory basis explicitly establishing their role as a monitor in support of the Minister. They could be seen as 'lacking teeth' or authority when requesting a Crown entity to provide information about its operations and performance. Without the provision of adequate and timely information by an entity, the quality of departmental monitoring and advice to the Minister could be sub-optimal.

26 The SSC and Treasury considered that there should be provision in the CEA for the role of monitoring agents, with a corresponding duty on a Crown entity to collaborate in the provision of information. An early draft of the SSC discussion paper referred to in paragraph 4 suggested the legislative regime could provide that:

- a responsible Minister (or shareholding Ministers) may appoint a "monitoring agent" to assist the Minister(s) to discharge their responsibilities, functions and powers in relation to a Crown entity or entities
- a monitoring agent may be any person or persons appointed by the Minister(s) in writing, and may include a department designated in writing by the Minister(s)
- the Minister(s) may appoint a monitoring agent either generally or for a specific purpose relating to their role, functions and powers, including for a specific period as stipulated in the written notice of appointment to the monitoring agent. The Minister(s) would notify the appointment in the Gazette because of the powers that would apply to a monitoring agent
- a monitoring agent would have the power to require a Crown entity to supply:
    - information about the entity's operations and performance
    - any other information that relates to the Minister(s)' role, functions and powers in relation to the entity
- a Crown entity must comply with a monitoring agent's request for information (except that the provision in s134 would continue to apply, whereby an entity may refuse a request for certain information).

Recommendations to Cabinet

27 BPS Cabinet paper seven did not include all the detail outlined in the previous paragraph. Ministers are, and always will be, free to engage any person to perform a monitoring role in relation to a Crown entity. For the purposes of the CEA, the policy and legislative proposals focussed on departments that monitor Crown entities: what their functions and powers should be.

28 The paper noted that a monitoring department's role is not limited to monitoring the performance of an entity. The paper noted that, where applicable, departments already had legal responsibilities to administer appropriations (under the PFA), administer relevant legislation, and to be able to provide policy advice to the government (under the SSA). The paper recommended that the CEA should:

- refer explicitly to these legal responsibilities as functions of a department in relation to any Crown entity monitored by the department
- provide also that the monitor's role is to assist the Minister to undertake their roles under s27 (for statutory Crown entities) and s88 (for Crown entity companies).

29 BPS Cabinet paper seven was also careful to ensure that only an appropriate range of powers would be delegated by the Minister to a monitoring department. Section 28 of the State Sector Act enables a Minister to delegate any of the Minister's statutory functions and powers to a department. But it was never envisaged that a Minister would be able to delegate all of the Minister's various powers under the CEA to a department, eg the power to appoint or remove board members, or to issue policy directions to an entity. These powers should always remain with Ministers. Therefore, a recommendation was made to clarify that s28 of the SSA does not apply to a Ministers' powers under the CEA. Instead, the CEA itself should enable the Minister to delegate a single, necessary power to a monitoring department: the power in s133 to request information relating to an entity's operations and performance.

Legislation drafting processes

30 The Bill was drafted to include an additional specification enabling the chief executive of a monitor to subdelegate the power in CEA s133 to an employee of the monitor or to an individual working for the monitor as a contractor in relation to a function, duty, or power of the monitor. This was consistent with the delegations regime concurrently proposed for Public Service chief executives by way of amendments to the SSA.

31 As mentioned in paragraph 14, the Bill defined a "monitor" to include both a department and another Crown entity that performs the role described in the relevant sections in Part 2 of the CEA. This scope caters for TEC's role in relation to TEIs.

Select Committee process

32 Very few submissions to FEC commented on these provisions in the Bill. No changes were made during the Select Committee process.

Collaboration with other entities

The Act

33 There was no provision in the Act equivalent to the type of provision that was concurrently proposed to be inserted into the SSA placing a responsibility on Public Service chief executives for the department's responsiveness on matters relating to the collective interests of government.

Commentary

34 Core features of the Crown entity model include the legal existence of every entity as a body corporate in its own right, therefore legally separate from the Crown. An entity operates at arms-length from the responsible or shareholder Ministers, and is governed by a board which has formal responsibility and legal authority to exercise the powers and functions of the entity.

35 Crown entities are also part of the State services (except TEIs). By definition, the State services are *"instruments of the Crown in respect of the Government of New Zealand"*[2]. Primarily in this regard, the BPSAG Report had implications for Crown entities, notably in terms of how to bring them within the influence of 'sectoral leadership' and within the mandate of 'functional leaders'. The issue was how to ensure Crown entities are aligned with wider government priorities, or that sector or system-wide interests or approaches are within an entity's 'line of sight'.

36 Officials sought to strike an appropriate balance between a Crown entity's autonomy under a governance board while also requiring Crown entity recognition and participation in initiatives, policies or standards where sector or system-wide interests are at stake. Various levers were considered, including:

- expanding the scope of a direction that a responsible Minister may issue to a Crown agent under s103 (the entity must give effect) or to an autonomous Crown entity under s104 (the entity must have regard). These are policy directions that must relate to an entity's functions or objectives. The option was to consider expanding the scope of such directions so that an entity, in performing its functions, must play its part under any strategy developed for the sector to which the entity belongs
- inserting a new collective duty on the board to ensure the entity has regard for whole of government interests in the general management of the entity's activities
- expanding the existing collective duty of the board in s50 along the lines indicated by the words underlined: "*The board of a statutory entity must ensure the statutory entity performs its functions efficiently and effectively and in a manner consistent with the spirit of service to the public –*
    - o *and consistent with the broader interests of the sector*; [or]
    - o *and in collaboration with other public entities where practicable".*

[2] State Sector Act 1988, s2

Cabinet and Legislation drafting processes

37 BPS Cabinet paper seven advanced the proposal to expand the existing collective duty on the board in s50. The paper noted that requiring consistency with "*the broader interests of the sector"* would be problematic as it could undermine statutory independence and because entities such as the Accident Compensation Corporation (ACC) are in multiple overlapping sectors. Accordingly the paper recommended expanding the duty in s50 to include *"collaboration with other public entities where practicable"*.

38 The addition of the words *"where practicable"* acknowledges that the final decisions on how an entity performs its functions rests with the board. Recognising that many Crown entities already collaborated and consulted effectively, the proposed amendment amounted to a light-handed approach to formalising the need to ensure system-wide interests or approaches are within an entity's 'line of sight'.

39 The Bill specified that *"public entity"* has the meaning of that term in the Public Audit Act 2001. This includes local government bodies as well as central government.

40 There were separate, specific proposals relating to functional leadership and how Crown entities could be made to play their part in that regard. These proposals are set out in the discussion relating to Part 3 of the Act.

Select Committee process

41 Very few submissions to FEC commented on this amendment in the Bill and no change was made during the Select Committee process.

Conflict of interest disclosure rules

The Act

42 Sections 62 to 72 of the CEA have detailed conflict of interest provisions, including what constitutes a person being *"interested in a matter"* [s62(2)] and also what does not constitute being interested in a matter [s62(3)].

Commentary

43 Two technical matters came to light after the suite of seven BPS papers was submitted to Cabinet on 14 May 2012:

- the need to clarify what does not constitute being interested in a matter
- the need to correct a drafting error relating to temporary deputy chairpersons.

44 Both matters were included in the joint SSC-Treasury report to the Ministers of Finance and of State Services, July 2012 (paragraph 4 refers).

Cabinet and Legislation drafting processes

Interest in a matter

45 After the suite of 7 BPS papers was submitted to Cabinet on 14 May 2012, there was a short and successful process of engagement with Crown entities and organisations listed on Schedule 4 of the PFA on how the Cabinet decisions would operate in practice.

46 Some Crown entity board members expressed concern that their previous experience in relation to some part of a market or industry could be construed as a conflict of interest under the existing wording of the legislation. In practice, it is relatively common that a person is appointed to a Crown entity board precisely because of the sector or industry knowledge, skills and experience that he or she brings to the role of board member. Sometimes, such representation is required by an entity's own Act. This practice is to be expected, especially in the context of the New Zealand state sector where there is a relatively high number of boards and only a certain number of people qualified to serve on Crown entity boards.

47 Officials recommended that the Bill include a new subclause in CEA s62(3) to clarify that a person is not interested in a matter *"only because he or she has past or current involvement in the relevant sector, industry, or practice"*.

Temporary Deputy Chairperson

48 Section 64 sets out the persons to whom a board member must disclose interests. The section referred incorrectly to a *"temporary chairperson"*, when in fact there is no such thing: there is provision only for a *"temporary deputy chairperson"*, as correctly provided for in Schedule 5, cl5(2).

49 The same drafting error was also corrected in s68 which sets out the range of persons who may grant a board member permission to act despite being interested in a matter.

Select Committee process

50 No submissions to FEC commented on these amendments and no change was made to the Bill during the Select Committee process.

Part 3: Operation of Crown Entities

51 Part 3 of the CEA deals with the operation of Crown entities. It covers: directions on government policy; directions to support a whole of government approach; ministerial powers to review operations and request information; employee related provisions; protections from liability; and provisions relating to dealing with third parties.

52 Substantive matters for review included:

- how to bring Crown entities within the influence and mandate of functional leadership
- giving the Minister of State Services the power to request certain types of information.

53 More minor amendments were made to:

- apply good regulatory management principles to ministerial directions by amending the procedure for revoking directions and requiring a mandatory review of directions
- correct a drafting error in the indemnity provisions
- clarify what is meant by attorneys who may enter deeds on behalf of an entity
- clarify the coverage of certain sections of the Crimes Act 1961.

54 This paper sets out these issues according to the sequence of the relevant provisions of the CEA.

How to extend functional leadership to Crown entities

The Act

55 Section 107 of the CEA provided for "whole of government directions"[3]. Such directions could be issued by the Ministers of State Services and of Finance acting jointly, setting out specified requirements that aimed to fulfil two purposes: supporting a whole of government approach; and improving public services directly or indirectly. As soon as such a direction came into force, every Crown entity subject to the direction was obliged to give effect to it[4].

56 Detailed provisions in CEA ss108-114 set out the process for giving directions under s107 and the obligation on entities to comply, while also protecting the independence of Crown entities.

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[3] See also paragraph 67

[4] Except Crown Research Institutes (CRIs), which are required to have regard to such directions [Crown Research Institutes Act 1992, s7(6)]. In the case of Crown entity subsidiaries, the parent entity is obliged to ensure, to the extent of its powers, that each of its Crown entity subsidiaries complies with a direction given to the parent (to the extent that it relates to the subsidiary). There is no provision to issue whole of government directions to TEIs.

Commentary

57 As mentioned in relation to Part 2 of the CEA, the BPSAG Report had implications for Crown entities in terms of how to bring them within the influence of 'sectoral leadership' and within the mandate of 'functional leaders'. The amendment in s50 to the collective duty of the board of a statutory entity focussed primarily on the sector-wide dimension. Separate proposals were developed in relation to functional leadership.

58 BPS Cabinet paper two defined functional leadership as "leadership on a cross-agency or cross-system basis, of an aspect of business activity and aimed at securing economies or efficiencies across departments, improving services or service delivery, developing expertise and capability across departments, and ensuring business continuity" (paragraph 2, bullet 2). A functional leader's role might include functions such as setting standards, granting approvals, issuing guidelines, and monitoring and assurance activities. The paper noted that functional leadership had operated on the basis of relatively 'soft' mandates, characterised as those that do not change the existing distribution of decision rights in the system.

59 The BPSAG Report considered it may be appropriate, in certain cases, for agencies to be required to operate within standards or processes established by a functional leader. This may be needed where there are major potential gains to be made from a cross-agency approach, but these are unlikely to be made, or unlikely to be made in a timely manner, if individual agencies can choose not to participate.

60 In the case of departments, a functional leader does not have the authority to impose mandatory obligations on any separate department: formal Cabinet approval is needed, and is sufficient. In the case of Crown entities, legislative authority is needed to impose mandatory requirements. The model of the Minister-board relationship specifically provides for Ministers to have powers of direction over the board, but not for officials to have this power.

61 Proposals were developed to enable directions under CEA s107 to be used as the mechanism for extending the influence of functional leaders to Crown entities. The key point to the regime was to ensure that the specified requirements would be issued to Crown entities by way of ministerial direction, not directly by the functional leaders themselves. In this structure, the role of the functional leader would be to:

- ensure (by way of advice to Ministers) that the content of the directions would meet the intended functional leadership objectives
- advise entities, assist and manage the implementation of the directions as required.

62 To provide for such a regime, proposals were developed to amend CEA s107 in two key dimensions:

- by expanding the reasons for issuing s107 directions to match the objectives of functional leadership, ie to secure economies or efficiencies, to develop expertise and capability, or to ensure business continuity
- by increasing flexibility so that directions could be issued to small, coherent groupings of Crown entities, if that was sufficient to achieve the intended

objectives. The ability to issue directions to small groups would overcome the heavy-handed approach that existed in s107 whereby a direction had to be issued to an entire category of Crown entity (eg all Crown entity companies) or to an entire type of statutory entity (eg all Crown agents). It was proposed that directions should be able to apply to clusters of at least five parent Crown entities that have two significant attributes in common (including inter alia size, significant holdings of financial asset, regional presence).

Cabinet and Legislation drafting processes

63 Cabinet agreed with the proposals outlined in the previous paragraph.

64 In the process of drafting the legislation, officials' thinking shifted on the matter of how directions to support a whole-of-government approach would apply to clusters of entities. Officials considered it would be desirable to provide further flexibility to ensure that directions could be targeted to where they are most useful for supporting a whole-of-government approach. A proposal was formulated to enable such directions to be given to groups of at least three entities sharing at least one common characteristic relating to the direction. Following approval by the Ministers of State Services and of Finance, as authorised by Cabinet, the proposal was included in the Bill.

65 Concurrently, Cabinet agreed with a suite of proposals prepared by the Treasury to apply more of the CEA governance and reporting provisions to companies listed in Schedule 4 to the PFA. The package of provisions included the ability to apply directions under CEA s107 to these companies. The full list of provisions in the package was included in the joint SSC-Treasury report to the Ministers of State Services and of Finance, July 2012, which sought agreement to minor policy and technical matters. Accordingly, the Bill included amendments to both the PFA [s45OA(1)(j)] and CEA [new s107(2A)] to ensure that directions under CEA s107 could be issued to companies named in a new Schedule 4A to the PFA.

Select Committee process

66 Very few submissions commented on these provisions in the Bill and no substantive changes were made.

67 In the departmental report, advisers proposed a minor technical amendment to the title of s107 from "Whole of government directions" to "Directions to support a whole of government approach". This amendment would ensure consistency between the heading and the text in the section.

Revocation, review, and expiry of directions

The Act

68 Section 115(3) provided for a ministerial direction to be *"amended, revoked, or replaced in the same way as it may be given"* (the section applied to policy directions, not directions issued under s107).

69 Although CEA s115(3) referred to the procedure for amending or replacing a direction, there was no explicit provision relating to the expiry of directions or specifically requiring Ministers to review directions they have issued.

Commentary

70 For reasons of consistency with regulatory management principles, and with good practice stewardship of the stock of legislation-based instruments, officials proposed two minor amendments to s115 dealing with procedures for ministerial directions. The proposals aimed to:

- facilitate the revocation of directions
- ensure that the stock of directions is kept under review.

Revocation of directions

71 The requirement that a direction may be revoked "*in the same way as it may be given"* made the revocation of directions excessively difficult. The Minister was required to consult on and present the repealed direction to the House.

72 Officials considered this was inconsistent with good regulatory management principles and practice which require the stock of directions to be actively managed in order to keep them up to date. Accordingly, officials proposed to streamline the procedure so that the revocation of a direction only needed to be in writing and gazetted.

Review of directions

73 Officials considered that a direction which does not specify an expiry date should be subject to review within a specified timeframe. They proposed a new provision that any direction without an explicit expiry date would have a formal requirement for review after five years.

Cabinet and Legislation drafting processes

74 The proposals were included in the joint SSC-Treasury report to the Ministers of State Services and of Finance, July 2012, which sought agreement to minor policy and technical matters. Accordingly:

- s115(3) was amended to delete reference to *"revoked"* and new subsection (3A) was inserted: *"A Minister who is entitled to give a direction to a Crown entity is also entitled to revoke it by notice in writing to the entity, and, as soon as practicable after doing so, the Minister must publish that notice in the Gazette"*
- new s115A was inserted incorporating the following details relating to the review of directions:

- it would be mandatory for the Minister to review a direction 5 years after it was given (or, in the case of directions that had already been issued, 5 years after the commencement of the new provision in the CEA)
- the Minister must consult the entity or entities to which the direction applies as well as representatives of the interests of people likely to be substantially affected by the direction
- the Minister must notify the outcome of the review to the entities and other persons consulted, as soon as practicable after completing the review
- this new requirement in the CEA would apply broadly, ie it would apply to any ministerial direction to a Crown entity given under any Act, except if the other Act contains a procedure for reviewing directions.

Select Committee process

75 No submissions to FEC commented on these amendments.

76 In the version of the Bill prepared for the consideration of the Select Committee, the Parliamentary Counsel Office amended new s115A to refer to Ministers in the plural, because the new review provisions also apply to directions under s107 which are issued jointly by the Ministers of State Services and of Finance.

Indemnity provisions

The Act

77 Section 122 provided that –

> *(1) A statutory entity may only indemnify a member, office holder, or employee in respect of an excluded act or omission*[5]
>
> *(2) An indemnity under subsection (1) is limited to –*
>
> *(a) liability for conduct; and*
>
> *(b) costs incurred in defending or settling any claim or proceeding relating to that liability.*

Commentary

78 The inclusion of s122(2)(a) was a drafting error. The straightforward policy intention was that statutory entities may indemnify members, office holders, and employees in respect of an act or omission in good faith and in performance or intended performance of the entity's functions.

Cabinet and Legislation drafting processes

79 The drafting error in s122(2)(a) came to light during the legislation drafting process. The Parliamentary Counsel Office corrected it as a purely technical drafting matter by replacing s122 with a new s122 that reads –

> *"A statutory entity may only indemnify a member, an office holder, or an employee in respect of an excluded act or omission (including costs incurred in defending or settling any claim or proceeding relating to that excluded act or omission)"*.

Select Committee process

80 No submissions to FEC commented on this change, and no amendments were made during the Select Committee process.

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[5] Defined in s126 as "*an act or omission by the member, office holder, or employee in good faith and in performance or intended performance of the entity's functions*"

Method of contracting: meaning of attorney

The Act

81 Sections 127 to 130 cover dealings with third parties by statutory entities. Section 127(2) referred to deeds entered into on behalf of a statutory entity, signed under the name of the entity –

> *"(a) by 2 or more of its members or, if the entity is a corporation sole, by the sole member; or*
>
> *(b) by 1 or more attorneys appointed by the entity in accordance with this Part".*

82 Section 129 made provision for attorneys. Subsection (1) provided –

> *"A statutory entity may, by an instrument in writing executed in accordance with section 127(2), appoint a person as its attorney either generally or in relation to a specified matter".*

Commentary

83 The requirement in s127(2) to have 2 members available to sign or to have a power of attorney in place had proved difficult in practice. The SSC considered that the Companies Act 1993 provides a useful model that simplifies the method of signing contracts by allowing signing by persons or classes of persons (if provided for in the constitution).

Cabinet and Legislation drafting processes

84 The joint SSC-Treasury report to the Ministers of State Services and of Finance, July 2012, which sought agreement to minor policy and technical matters proposed an amendment to enable signing by persons or classes of persons approved in writing by the Minister.

85 During discussions with the Parliamentary Counsel Office, officials agreed that a more straightforward solution was to clarify what is meant by attorneys who are enabled by s127(2)(b) to enter into deeds on behalf of a statutory entity. In section 127(2)(b) the words *"in accordance with this Part"* were simply replaced with *"under section 129(1)"*.

Select Committee process

86 No submissions to FEC commented on this change, and no amendments were made during the Select Committee process.

Power of Minister of State Services to request information

The Act

87 Section 133 of the CEA requires the board of a Crown entity to supply to:

- its responsible Minister any information that the Minister requests relating to the entity's operations and performance
- the Minister of Finance any information he or she requests in connection with the exercise of his or her powers under Part 4 of the CEA.

88 There are grounds in s134 for withholding certain information, notably to protect the privacy of a person, or when the entity acts judicially or carries out statutorily independent functions.

89 The CEA had no provision for the Minister of State Services to request certain types of information from Crown entities.

Commentary

90 New Zealand's public management system requires public entities to supply various types of information under numerous statutes for a wide variety of purposes. Collectively, these requirements support a transparent and accountable public sector. The obligations in CEA s133 are part of this landscape, as is the power of the Secretary to the Treasury under PFA s19 to require certain information tied to matters in the Finance portfolio.

91 During the policy development phase that led to the passage of the Crown Entities Act 2004, successive Cabinets at the time –

> *"2jj noted that on 14 July 1999 the previous Government gave the Minister of State Services ongoing responsibility for general oversight of the governance and accountability regime to apply to Crown entities [STR (99) M 17/4a]*
>
> *6n agreed that the Minister of State Services be consulted before Cabinet considers any proposal to establish a trust, or any non-departmental, non-SOE entity that could be within the Crown financial reporting entity"* [CAB (00) M 19/1I(1)]

92 The portfolio interests of the Minister of State Services clearly include the matters referred to in the Cabinet Minutes in 1999 and 2000. In addition, paragraph 5.14 in the Cabinet Manual specifically requires Ministers to consult the Minister of State Services on machinery of government issues, as a matter of portfolio interest.

93 While the scope of the State Services portfolio is not a statutory matter, there are aspects of the role that could benefit from an associated power to request information for purposes relating to the portfolio. For example, in addition to the particular matters mentioned in the Cabinet Minutes and Cabinet Manual, the Minister's interests in the Crown entity sector include strategic alignment and capability matters (including workforce and employment relations).

94 Early in the SSC's review of the SSA and parts of the CEA, the SSC developed a proposal that the Minister of State Services should have a power similar to that of the Minister of Finance, ie the power to require the supply of any information in

connection with the exercise of the Minister's portfolio responsibilities. The same grounds in s134 for withholding the information would apply.

Cabinet and Legislation drafting processes

95 BPS Cabinet paper seven refined the proposal above to focus on the Minister of State Services' portfolio interests in system-wide capability (including workforce and employment relations) and sector wide performance. The proposal was careful to ensure the power of the Minister to collect system-wide or sector information would not be unfettered. Specifically, the power to request information could not be applied to a single entity.

96 Clause 168 in the Bill was drafted so that the Minister of State Services may request information only:

- for the purpose of assessing the capability and performance of the State services
- from a group of at least three Crown entities with at least one significant characteristic in common relating to the information requested.

97 Further, the information must not be used for assessing the operations and performance of an entity or the group of Crown entities.

Select Committee process

98 The submissions to FEC did not comment on this amendment and no change was made to the Bill during the Select Committee process.

Coverage of certain sections of the Crimes Act 1961

The Act

99 Section 135 of the CEA defines the persons who are an "official" for certain purposes of the Crimes Act 1961. These persons are members, office holders and employees of different categories of Crown entities as described in CEA s135(1).

Commentary

100 It is clear that reducing corruption and protecting the security of information are important to ensure confidence in Crown entities, particularly those that deal regularly with sensitive commercial or personal information. It is appropriate that ss105 and 105A of the Crimes Act 1961 apply, dealing with the corruption and bribery of officials and the corrupt use of official information.

101 CEA s135 applied the provisions in the Crimes Act to current Crown entity board members, office holders and employees. Officials considered the Crimes Act provisions should apply more broadly to include:

- former board members, office holders and employees, on the basis that they could still be susceptible to corruption and bribery or to the corrupt use or disclosure of official information
- individuals working for a Crown entity as a contractor or secondee, for the same reason.

Cabinet and Legislation drafting processes

102 The proposal in the previous paragraph was included in the joint SSC-Treasury report to the Ministers of State Services and of Finance, July 2012, which sought agreement to minor policy and technical matters.

103 The Bill was drafted to specify that:

- a contractor or secondee is someone working for the entity in relation to a function, duty, or power of the entity (a similar specification was made in certain provisions in the State Sector Act, distinguishing these contractors and secondees from, say, an electrician or plumber carrying out repairs within an entity's premises)
- former contractors and secondees (as well as former Crown entity board members, office holders, and employees) would also be an official under the relevant provisions in the Crimes Act
- the extension to former Crown entity board members, office holders, employees, contractors and secondees applies to acts, omissions or decisions made while that person was in that capacity with the entity, and only after the commencement of this new provision in the CEA.

Select Committee process

104 The submissions to FEC did not comment on this amendment and no change was made to the Bill during the Select Committee process.

Schedule 5: Appointment of Chairperson, Etc, and Board Procedure

105 Schedule 5 to the CEA has 15 clauses with detailed provisions relating to boards of statutory entities (other than corporations sole). The provisions relate to the chairperson and deputy chairperson of the board, and to board procedures.

106 One minor policy issue concerned the tenure of office of the chairperson and deputy chairperson.

107 Two minor technical issues related to the procedures of the board.

Tenure of office of chairperson and deputy chairperson

The Act

108 Section 32(3) of the CEA has a 'roll-over' provision for board members of statutory entities to the effect that they continue in office despite the expiry of their term of office. They continue to hold the office of board member until:

> *"(a) the member is reappointed; or*
>
> *(b) the member's successor is appointed; or*
>
> *(c) the appointor informs the member by written notice (with a copy to the entity) that the member is not to be reappointed and no successor is to be appointed at that time."*

109 Schedule 5 cl2 deals with the term of appointment of the chairperson and the deputy chairperson. They each held that office until:

> *"(a) he or she resigns from that office; or*
>
> *(b) he or she is removed from it by the responsible Minister or the Governor-General, as the case may be; or*
>
> *(c) he or she ceases to hold office as a member; or*
>
> *(d) the term of office that may have been specified on appointment expires, unless the member is reappointed for a further term."*

Commentary

110 Schedule 5 cl2(d) had the potential to be problematic for Ministers and monitoring departments from a practical administrative perspective, in relation to the timing of appointments or reappointments. The wording that the *"appointment expires, unless the member is reappointed for another term"* could cause an issue because it did not specifically provide for the role of chairperson (and deputy chairperson) to continue while that person, as a member, might be on 'roll-over'. In practice, for example, it could have been deemed technically possible for an entity not to have a chairperson if his or her specified term of appointment expired, but he or she was on 'roll-over' as a member and willing and available to continue as chairperson.

111 Officials considered it would be useful to clarify that the role of chairperson (and deputy chairperson) does not expire if he or she continues to hold office as a member under s32(3), i.e. while on 'roll-over' pending reappointment, or appointment of a successor, or being notified of no reappointment and no successor appointment. The straightforward solution was to ensure the

chairperson (and deputy chairperson) can roll-over both in that office and as member until the next appointment event happens.

Cabinet, legislation drafting and select committee processes

112 The amendment to Schedule 5 cl2(d) progressed via Supplementary Order Paper No 168, December 2012, capturing some minor policy and technical amendments.

113 The amendment was incorporated in the version of the Bill prepared for the Select Committee's consideration.

Board procedures

The Act

114 Schedule 5 cl7 deals with board procedures relating to notices of meetings. Clause 7(4)(c) provided that a notice of a meeting *"must be sent to the member's last known address in New Zealand"*.

115 Schedule 5 cl13 deals with board procedures relating to unanimous written resolutions. Clause 13(1) provided that *"A resolution signed or assented to in writing (whether sent by post, delivery, or electronic communication) by all members is as valid and effectual as if it had been passed at a meeting of the board duly called and constituted"*.

Commentary

116 A minor technical amendment to each of these clauses was desirable for reasons of administrative or procedural simplicity and certainty.

117 The requirement in cl7 for a meeting notice to be sent to a New Zealand address was impractical for board members who live overseas. The more practical and modern solution was to replace cl7(4)(c) with a requirement for meeting notices to be *"given or sent to each member's current postal or electronic address"*.

118 Clause 13 could be misinterpreted to mean that, if a member has a conflict and is not able to vote, the board cannot use a unanimous resolution and would need to call a special meeting. The straightforward solution was to expand cl13 so that a resolution signed *"by all members"* refers to all members *"who are entitled to vote on the matter"*.

Cabinet, legislation drafting and select committee processes

119 The proposals were included in the joint SSC-Treasury report to the Ministers of State Services and of Finance, July 2012, which sought agreement to minor policy and technical matters.

120 No submissions to FEC commented on these changes, and no amendments were made during the Select Committee process.

List of Abbreviations and Acronyms

Advisers	Departmental advisers to FEC on the Bill
ACC	Accident Compensation Corporation
ACE	Autonomous Crown Entity
Bill	State Sector and Public Finance Reform Bill
BPS	Better Public Services
BPSAG	Better Public Services Advisory Group
CAB Min	Cabinet Minute
CEA	Crown Entities Act 2004
“cl”	Reference to a particular clause of a Bill
Commissioner	State Services Commissioner
CRI	Crown Research Institute
Csser	Commissioner
Deputy Commissioner	Deputy State Services Commissioner
DHB	District Health Board
eg	*exempli gratia*, ‘for example’
FEC	Finance and Expenditure Committee
House	House of Representatives
ICE	Independent Crown Entity
ie	*id est*, ‘that is’
LEG	Cabinet Legislation Committee
MOSS	Minister of State Services
OIA	Official Information Act 1982
OIC	Order in Council
PCO	Parliamentary Counsel Office
PFA	Public Finance Act 1989
PSA	New Zealand Public Service Association
“s”, “ss”	Reference to a particular section (“s”) or sections (“ss”) of an Act
SSA	State Sector Act 1988
SSC	State Services Commission
SSCer	State Services Commissioner
TEI	Tertiary Education Institution