Cabinet Office Circular

CO (06) 5

22 August 2006

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Ministers' Roles and Responsibilities in Relation to Crown Entities

A. Introduction

1 In recent years the Government has sought better results from the State sector and effective coordination and collaboration between State agencies. The passage of the Crown Entities Act 2004 ('the Act') and amendment of the State Sector Act 1988 have created new opportunities to improve governance, strategy delivery and performance across the State sector. The Crown Entities Act has also enhanced the ability of Ministers to inform and, in some cases, direct the results (specific impacts, outcomes or objectives) that entities will work to achieve.

2 This circular updates and replaces Cabinet Office Circular CO(99)13, *Ministers' roles and responsibilities in relation to Crown entities*, following the passing of the Crown Entities Act 2004. This circular also provides information about the support that Ministers with Crown entities in their portfolios can expect from Crown entity boards and monitoring departments[1].

3 The circular also covers the roles of the Minister of State Services and the Minister of Finance in relation to statutory entities and Crown entity companies.

4 Ministers should ensure that existing Chairs of the Crown entities in their portfolios, and new Chairs on their appointment, are made aware of this Circular. Chief Executives should ensure that all staff whose work relates to Crown entities are made aware of this Circular.

B. Background

5 Crown entities are instruments of the Crown and Ministers play a key role in their governance. Ministers are responsible to Parliament for overseeing and managing the Crown's interests in, and relationships with, the Crown entities in their portfolios.

6 However, Crown entities are legal entities in their own right, separate from the Crown. A decision to assign a government activity or function to a Crown entity reflects Government's view that the function should be carried out 'at arm's length' from government[2].

7 The Review of the Centre[3] found problems in the way some Crown entities were governed and monitored. Before the Act came into force, each Crown entity's governance and accountability arrangements were set out in its own, specific, enabling legislation and in the Public Finance Act 1989. Differences in the enabling legislation for different entities led to some confusion about the roles and responsibilities of the various players involved in Crown entity governance.

8 The Act addressed this problem by applying consistent governance and accountability provisions to Crown entities, tailored to different categories and types of Crown entity. The Act defines five broad categories of Crown entity[4]:

- statutory entities;
- Crown entity companies;
- Crown entity subsidiaries;
- school Boards of Trustees;
- tertiary education institutions.

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1 In most cases departments monitor Crown entities and provide support services to Ministers. Technically Ministers can sometimes opt for alternative monitoring arrangements but the term 'monitoring departments' in this document is intended to apply to all monitoring arrangements.

2 Such a decision may also reflect benefits from the function being implemented by a Crown entity with a limited range of other functions that might otherwise distract from the function.

3 See http://www.ssc.govt/roc.

4 A guide to New Zealand's State Services, including the categories and types of Crown entity, can be found at http://www.ssc.govt.nz, by clicking on the term "State Services".

9 This circular gives advice on the first two categories only. Therefore, in this circular the term 'Crown entities' means statutory entities and Crown entity companies. Where provisions only relate to statutory entities or Crown entity companies alone, they will be referred to separately.

10 Statutory entities are of three types: Crown agents, autonomous Crown entities (ACEs) and independent Crown entities (ICEs). While in many respects the Act treats statutory entities and Crown entity companies in the same way, there are some specific differences in the way each is treated. These differences are described in section I of this circular, along with a number of provisions specific to Crown Research Institutes, which are a particular type of Crown entity company.

11 Crown entities are subject to both their enabling legislation and the Act. If there is a conflict between a Crown entity's own enabling legislation and the Act, the Act prevails unless the Crown entity's enabling legislation specifically provides otherwise (s 4(2))[5]. In general, monitoring departments should tell their Ministers if and how the governance of their Crown entity differs from the core arrangements in the Act.

C. Overview of Ministers', boards' and monitoring departments' responsibilities

Ministers

12 Ministers oversee and manage the Crown's interests in and relationships with the Crown entities in their portfolio, and carry out any statutory responsibilities conferred on them.[6]

13 Overall, the Minister's roles and responsibilities are to:

- make sure an effective board is in place to govern the Crown entity through the appointment, reappointment, and removal of board members;
- participate in setting the direction of Crown entities, which may include setting the direction for multiple agencies in a sector (for example, the transport sector);
- monitor and review Crown entity performance and results;
- manage risks on behalf of the Crown.

Crown entity boards[7]

14 The board governs the Crown entity, exercises its powers and carries out its functions as specified by the entity's enabling legislation, makes decisions about its operations, and appoints its chief executive (where applicable)[8]. The board's actions must be consistent with the Crown entity's objectives, functions, Statement of Intent (SOI) and output agreement (if any)[9].

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5 All section references in this circular relate to the Crown Entities Act 2004, unless otherwise specified.

6 These roles and responsibilities are defined under s 27 for statutory entities and s 88 for Crown entity companies.

7 Note that references to Boards here and elsewhere in this circular should be read as applying to the member of a corporation sole.

8 The chief executive manages the Crown entity, including exercising the powers and performance of entity functions delegated to them *on behalf of the board.*

9 See s 49 of the Act for statutory entities and s 92 for Crown entity companies.

15 The board should maintain open communication with the Minister and his or her monitoring agent (usually a department). The Minister has a strong interest in the board:

- clearly setting the direction of the Crown entity;
- achieving the desired results;
- managing any risks to the Crown.

Monitoring departments

16 Unless directed otherwise, the monitoring department works on the Minister's behalf with the Crown entity to:

- make sure the Crown entity has identified the intended results for New Zealanders along with the Crown's output and fiscal results;
- monitor performance against expected results and outputs;
- promote coordination of Crown entities within the Minister's portfolio;
- advise the Minister on the Crown entity's capability to achieve its results (e.g. by giving advice on major business cases);
- advise the Minister on the merit of Crown entity budget initiatives;
- manage risks, and keep the Minister informed of these risks.

17 The monitoring department also gives advice and support to Ministers and Crown entities about board member appointments and induction, Crown entities' strategic direction, planning processes and output agreements (if any).

D. Ministerial control over Crown entities

18 The extent of control that the Minister has over a Crown entity depends on its category, type and its degree of independence. Table 1 highlights ministerial powers around appointment and removal of board members and powers of direction for statutory entities.

Table 1: Ministerial powers of appointment, removal and direction on policy[10]

	Type of Statutory entity		
	Crown agent	**Autonomous Crown entity**	**Independent Crown entity**
Power to appoint board members	Yes	Yes	No, Governor General appoints on recommendation of Minister
Power to remove board members	Yes, at Minister's discretion	Yes, by Minister, for justifiable reason in Minister's opinion	No, by Governor General, for just cause, on Minister's advice, Attorney-General consulted
Power to direct on government policy of the day	Must "give effect to" policy if directed by Minister	Must "have regard to" policy if directed by Minister	No, unless specifically provided for in another Act
Whole of government direction [11]	Must "give effect to" if directed by Minister of State Services and Minister of Finance	Must "give effect to" if directed by Minister of State Services and Minister of Finance	Must "give effect to" if directed by Minister of State Services and Minister of Finance

19 Ministers may want to direct a Crown agent or an autonomous Crown entity (ACE); for example, when:

- they want to provide clarity or consistency of strategic and/or policy direction;
- a board asks for clarification or a ministerial mandate before implementing a policy;
- Crown entities and departments need to work together to achieve goals[12].

20 Ministers can direct a Crown entity of any category or type to amend parts of the SOI covering the nature and scope of its activities, its statement of service performance, its performance measures, and other matters (s 147).[13] Ministers' input into the SOI provides the key opportunity for them to articulate the specific impacts, outcomes or objectives for the entity to contribute towards or achieve (s 141).

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[10] The table is based on ss 28(1)(a), 28(1)(b), 36, 37, 39, 103, 104, 105 and 107 of the Act. This table expresses the most general state of affairs under the Act; variations may be provided for expressly in a particular entity's Act. There are some differences for different types of boards, such as school boards where board members are elected rather than appointed.

[11] See Cabinet Office Circular CO (06) 6, which provides a fuller description of the whole of government power of direction, and the process for its use.

[12] Directions can only be given after consultation with the Crown entity. The direction must also be published in the *Gazette* and presented to the House. The ability to direct Crown Agents and ACEs is provided for under ss 103, 104 and 114, subject to the procedure described in s 115 of the Act.

[13] These provisions do not apply to Crown Research Institutes or 'CRIs' and a few Crown entity companies where legislation provides otherwise.

21 Ministers do not have the power to direct an ICE or a Crown entity company on policy matters unless the entity's own Act specifically allows this[14]. The Act specifically sets out ICEs' obligations to act independently in performing their statutory functions and duties, and in using their statutory powers, unless provided otherwise (see, for example, s 2 of the Commerce Act 1986).

22 Ministers cannot give directions on a statutorily independent function of any Crown entity, nor direct a Crown entity to bring about a certain result for a particular person [s 113].

23 Sometimes the provisions of a Crown entity's statute may make it more, or less, subject to ministerial direction than its category or type would suggest.

24 The Ministers of Finance and State Services may jointly direct all Crown entities within specified categories or types (s 107). To invoke this power, the direction must both support a 'whole of government approach' and directly or indirectly improve public services. The process for whole of government directions includes:

- a statutory requirement to consult with Crown entities affected by a direction 'to the extent that Ministers consider necessary in the circumstances' (s 108);
- consulting Crown entities that the Minister thinks are likely to be most affected by the proposed direction.

25 Powers of direction are likely to be used infrequently. This is because Ministers tend to prefer voluntary compliance with expectations and because other tools (including letters of expectation) work well in conveying Ministers' expectations.

E. Appointing and maintaining effective boards

Appointments and reappointments

26 Ministers are responsible for board appointments and reappointments, either directly or through recommendations to the Governor General[15]. These decisions often have a considerable impact on board performance, so are some of the most important decisions that Ministers will make for Crown entities.

27 Ministers must make sure that appropriate appointment procedures are followed and that boards have the range of skills needed to meet their obligations. Ministers decide, in light of the Crown entity's strategic direction and other considerations, whether members should be reappointed or replaced as their terms expire. They also decide, more rarely, whether members should be removed before the expiry of their terms.

28 All appointments should be discussed first by the Cabinet Appointment and Honours Committee[16].

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14 The 'Guidance to Departments in Relation to Crown Entities', available at http://www.crownentities.ssc.govt.nz advises departments to ensure Ministers are advised not to act in any way that could imply a direction to an independent Crown entity.

15 Board members can also be appointed under some Crown entities' Acts by election, co-option, or designation under s33 of the Act or provisions contained in their own Acts.

16 See Chapter 6 in the Cabinet Office Step by Step Guide to Cabinet and Cabinet Committee processes and http://www.dpmc.govt.nz/cabinet/committees/aph.html.

29 The Act[17] requires Ministers to appoint or recommend to Crown entity boards only people who have:

- in the Minister's opinion, the appropriate knowledge, skills and experience to help the Crown entity to achieve its objectives and perform its functions;
- consented in writing to act as members[18];
- certified that they are not disqualified (for example, undischarged bankrupts);
- disclosed any interests they have, or are likely to have, that relate to the Crown entity.

30 Ministers are also required to 'take into account the desirability of promoting diversity in the membership of Crown entities'[19]. This includes, for example, considering the composition of the board in the context in which the board operates.

31 Details of appointment and reappointment processes are available in the Board Appointment and Induction Guidelines available at www.crownentities.ssc.govt.nz.

Removal of board members

32 Ministers' powers to remove board members of a statutory entity vary according to its type[20]: these are summarised in Table 1 above. The provisions for removing board members of Crown entity companies are described in section I below. Legal advice should be sought before starting a board member's removal, because of the potentially wider consequences of this action and because of specific legal requirements.

Managing interests

33 It is important for board members, monitoring departments and Ministers to have a clear understanding of how to deal with board member 'interests' with respect to a Crown entity. This is because the existence, or perception of, undisclosed interests (e.g. board members making personal gain from involvement on a Crown entity board) could have a substantial impact on a board's standing and public trust in the institutions of government.

34 A person is interested in a matter[21] if he or she –

- may derive a financial benefit from the matter;
- is the spouse, de facto partner (whether of the same or different sex), child or parent of a person who may derive a financial benefit from the matter;
- may have a financial interest in a person to whom the matter relates;

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17 See ss 29 and 31 of the Act for statutory entities and ss 89 and 90 for Crown entity companies.

18 The requirement to consent in writing only applies for statutory entities.

19 See s 29 of the Act for statutory entities and s 89(2)(b) for Crown entity companies.

20 See ss 36-40 for statutory entities.

21 Technically, a 'matter' under s 62 means the Crown entity's performance of its functions or exercise of its powers or an arrangement, agreement or contract made, entered into, or proposed to be entered into, by the Crown entity.

- is a partner, director, officer, board member, or trustee of a person who may have a financial interest in a person to whom the matter relates;
- may be interested in the matter because the entity's Act so provides;
- is otherwise directly or indirectly interested in the matter.

35 A person is not 'interested' in the matter if the issue relates to something so remote or insignificant that it cannot be reasonably regarded as likely to influence the member in carrying out responsibilities under the Act.

36 There are three times when Ministers will become aware of board member interests. The first is during the board member appointment process. Candidates for appointment as Crown entity board members are required, among other things, to disclose to the Minister the nature and extent of any interests that they have, or are likely to have, in relation to the Crown entity[22]. In determining whether or not they have an interest, the candidate is expected to have actively exercised "care, diligence and skill that a reasonable person would exercise in the same circumstances, being a duty required of board members."[23]

37 Once a candidate's interest has been disclosed, the Minister then has the role of deciding whether or not still to appoint the member. If appointed to a statutory entity, the member:

- must not vote or take part in any discussion or decision of the board relating to the matter or otherwise participate in any activity of the entity that relates to the matter;
- must not sign any document relating to the matter;
- must be disregarded for the purpose of forming a quorum for any part of a meeting of the board relating to the matter[24].

38 The only exception to these requirements is when the chairperson of the board is satisfied that it is in the public interest to allow a member with a "specified class of interest" to act despite their interest in a matter (s 68). In order to allow this, the chairperson must give prior written notice to the board, and the exception must be published in the annual report[25]. The Minister may give this permission if the chairperson, deputy or temporary chairperson is unavailable or themselves interested.

39 Identifying and dealing with all potential or actual board member interests prior to appointment is ideal since Cabinet requires Ministers to certify that:

- appropriate appointment processes have been followed;
- Ministers have identified all interests that could reasonably have been identified;

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22 Section 31 of the Act describes this requirement to disclose all possible or current interests that a potential board member has in a statutory entity, and s 90 applies the same requirements to potential board members of Crown entity companies.

23 Section 56 of the Crown Entities Act applies the duty to exercise care, diligence and skill on board members of statutory entities and ss 131 and 137 of the Companies Act 1993 apply the same duties to a Crown entity company.

24 These restrictions only apply to statutory entities. A member of a Crown entity company board who has disclosed an interest may undertake these functions since they operate under s 144 of the Companies Act 1993 in this regard. Furthermore, there are special provisions for District Health Boards, which operate under their own separate legislation.

25 This entry in the annual report would state who gave the permission and any conditions – i.e. any permission to act when 'interested' is very openly reported.

- Ministers have proposed an appropriate way of dealing with any interest[26].

40 The second time that a Minister will become aware of the interests of a board member is when a board member needs to disclose an interest in relation to the Crown entity subsequent to appointment and:

- there is neither a chairperson nor a deputy or temporary chairperson; or
- both the chairperson and the deputy or temporary chairperson are unavailable; or
- both the chairperson and the deputy or temporary chairperson are themselves interested.

In these instances, the Minister is to be advised of any board member interests. This provision only applies for statutory entities (s 64) since Crown entity companies must always notify the shareholding Minister of any interests (s 90).

41 The third time that a Minister will become aware of the interests of a board member is if the board itself discloses the actual or perceived interest. If the board of an entity becomes aware of a board member's interest which has not been disclosed, then the board must notify the Minister as soon as practicable. A board member failing to disclose a known interest is likely to breach the duties to act in good faith, to act honestly, and with care, diligence and skill. Such a breach of duty is a basis for removing a member. The same considerations as articulated in paragraphs 36, 37 and 38 above apply in this instance.

Induction and training

42 Monitoring departments share responsibility for the induction of new board members with Crown entity boards. The monitoring department should give new board members an introductory briefing on the Crown entity environment and the expectations of Ministers. The training for board members from monitoring departments might also cover:

- the strategic direction for the Crown entity and any areas of sensitivity or high risk;
- the importance of declaring interests in relation to the entity;
- the individual duties of board members;
- the duties of board members for which the whole board is responsible rather than individual members (collective duties);
- promoting good relationships with key parties such as Ministers, the chief executive, other board members and monitoring departments.

43 Board chairs should brief members about the board's specific environment. This briefing could include:

- information on the Crown entity's business (including operation site visits where relevant);
- the structure of the board and its procedures (sub-committees, workload and time demands, governance and management issues);
- responsibilities to the chair and to board colleagues;
- relationships with the Minister and Parliament.

[26] See Chapter 6 of the Cabinet Office Step by Step Guide

44 Further information on board appointments and induction is available in the Board Appointment and Induction Guidelines available at www.crownentities.ssc.govt.nz.

Holding board members accountable for performing their duties

45 One of the purposes of the Act is to clarify accountability relationships between Crown entities, their board members, and their Ministers on behalf of the Crown and Parliament (s 3). In particular, the board members of Crown entities are specifically accountable to the Minister[27] for complying with:

- the board's collective duties[28];
- their individual duties as members (these duties are also owed to the Crown entity)[29];
- any directions applicable to the Crown entity (under subpart 1, part 3).

F. Setting strategic direction

46 Ministers are responsible for keeping boards well informed about Government policies and the Government's expectations for Crown entities' strategic direction. These expectations may include collaboration between government agencies, and contributions to sector strategies. Ministers are encouraged to keep boards informed through annual 'letters of expectation'[30] combined with ongoing communications such as regular meetings.

47 Monitoring departments should advise Ministers on the results expected from the Crown entities' activities. Ministers are also encouraged to meet with board chairs in 'strategic conversations' – discussions on the Ministers' priorities for the Crown entities' planning, and the results required.

48 The Act requires that Ministers be given the opportunity to review and comment on a draft SOI (s 146)[31]. Ministers are encouraged to engage with the board in relation to the Crown entity's strategic direction well before the Crown entity submits a draft SOI for the Minister's consideration. While powers of direction exist in the Act in relation to some of the content of the SOI[32], Ministers can expect Crown entities to voluntarily reflect Government objectives for the sector and for individual Crown entities in their SOIs.

49 When participating in strategic conversations with Crown entities, Ministers should make sure that the proposed strategic direction of the Crown entity:

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27 Statutory entity board members are accountable under s 26 and Crown entity company board members are accountable under s 87 of the Act.

28 See ss 49-52 and s 58 of the Act for statutory entities and ss 92-94 for Crown entity companies.

29 See ss 53-57 and s 59 of the Act for statutory entities and s 95 for Crown entity companies.

30 Letters of expectation canvas Ministers' expectations for Crown entities' strategic direction, the Crown entities' governance and performance and Ministers' specific priorities for the planning period. Letters of expectation are likely to be sent annually before boards start preparing their Statement of Intent.

31 Further detail about this aspect of engagement can be found in *Guidance and Requirements for Crown Entities: Preparing the 2006/07 Statement of Intent*, www.crownentities.ssc.govt.nz.

32 However s 113 of the Act prevents Ministers giving directions that affect statutorily independent functions (see paragraph 22 above). When a direction may impinge on statutorily independent functions, Ministers should seek legal advice before a direction is issued.

- adequately reflects the Crown's interests, including the Crown's interest in sector results;
- presents an acceptable balance between opportunities and risks;
- is achievable by the Crown entity and its board.

50 Ministers must also consider whether the proposed strategic direction:

- will require any change to the statutory and policy framework under which the Crown entity operates;
- will require direction of the Crown entity on some policy.

G. Monitoring Crown entity performance

51 Boards have the primary responsibility for monitoring and reporting their Crown entity's performance. The role of the monitoring department is to:

- make sure the Crown entity's approach is consistent with the Government's goals;
- provide Ministers quality assurance around delivery and results;
- assess and notify the Minister of any risks.

52 Departments monitor Crown entities for which their Minister is responsible, unless the Minister directs otherwise and identifies who will undertake monitoring instead. Ministers should have explicit agreements in place with departments setting out their monitoring responsibilities (for example, the department's output plan should reflect these responsibilities).

53 Monitoring departments should focus monitoring activity on major opportunities and risks. Monitoring should be proportionate to:

- the Minister's needs;
- the scale of investment in, and spending on, Crown entities;
- the risk posed by Crown entities;
- opportunities that could be realised across the Minister's area of responsibility.

Monitoring against the strategic direction

54 The Act provides for Ministers to participate in the process of monitoring Crown entity performance against their agreed strategic direction[33]. Ministers have the power to require Crown entities to supply a wide range of information (s 133) subject to certain limitations (s 134). The SOI can be used to specify the kind of information Ministers require.

55 Monitoring departments will provide Ministers with information, analysis and advice about the effectiveness, efficiency and financial performance of the Crown entity. In particular, the monitoring department should:

- advise Ministers whether the Crown entity's strategic direction complements Government and sector goals;

[33] Section 27 applies this provision for statutory entities and s 88 applies it for Crown entity companies.

- advise on the performance of the Crown entity, using performance measures agreed by the Crown entity and the Minister;
- undertake credible risk assessment and management to underpin monitoring. This involves informing Ministers of emerging issues in the sector that could create potential risks for the government and which may require government intervention; and providing advice to Ministers on the management of such risks[34].

56 Ministers, monitoring departments and Crown entities should work together to identify upfront the most appropriate measures and standards to support understanding and judgements about the Crown entity's performance and its progress against the strategic direction. These measures and standards should be included in the SOI as required under s 141(f). Output agreements can identify additional measures that may not get published in Annual Reports.

57 Ministers have a formal power to review Crown entities' operations and performance at any time. Where Ministers contemplate such a review, they must consult the Crown entity, and consider any submission it may make on the review (s 132(3)). Crown entities must take all reasonable steps to cooperate with the review (s 132(4)).

Monitoring and output agreements

58 Ministers with a Crown entity in their portfolio can require the Crown entity to have an output agreement setting out its production of services and goods to be produced that are paid for either by the Crown in accordance with an appropriation; or by compulsory fees or charges set under legislation (s 170).

59 It is good practice for Ministers to be clear about what services and goods are to be provided with the money paid to Crown entities. In the absence of such an agreement, Ministers would be exposed to the risk that what is delivered does not meet the Minister's implicit expectations. An output agreement provides clarity and a basis for assessing actual delivery of outputs or reprioritising expenditure.

60 An output agreement for the Crown entity should be established where there is funding from the Crown, unless there is another agreement or document that serves the purpose. For example:

- the Minister and the Crown entity may agree that the specification of output classes in the SOI is sufficient for the purpose, and a separate output agreement is not required;
- there is a Crown funding agreement with a publicly owned health and disability organisation under s 10 of the New Zealand Public Health and Disability Act 2000, in which case a separate output agreement is not necessary (and cannot be required).

61 The Act allows considerable flexibility in relation to output agreements – they do not have to be contracts (and typically would not be) and do not have to follow any particular format. A memorandum of understanding may serve as an output agreement.

62 In some circumstances Ministers may require an output agreement to cover Crown entity services paid for by fees and levies. This might be important where:

- Crown entities receive considerable funding from both Crown and non-Crown sources;

[34] Boards also have a role in identifying potential risks to the Crown's interests and informing the Minister accordingly.

- Ministers want a basis for agreement about what services are to be provided;
- Ministers want a clear basis for setting or assessing the level of the fees to be charged.

63 Ministers should make sure that the proposed volume and supply of outputs is acceptable. Ministers should also ensure that performance standards are specified clearly enough to allow the Crown entity's actual performance to be assessed. These outputs will usually be set out in an output agreement.

Ensuring financially responsible management

64 Crown entities must 'operate in a financially responsible manner'. This means they must:

- manage their assets and liabilities prudently;
- endeavour to ensure their long-term viability;
- be successful 'going concerns'[35].

65 Unless exempted by the Minister of Finance, Crown entities (excluding CRIs) must include a statement of forecast service performance in their SOI. This statement must include 'measures and forecast standards of output delivery performance' (s 142(2))[36]. Ministers should assess the service performance information when they review a Crown entity's draft SOI. If it is not adequate they can, in some circumstances[37], direct the Crown entity to make changes.

66 Ministers are responsible for ensuring that Crown entities' other funding issues are appropriately dealt with. This could involve requiring that any application from a Crown entity:

- to adjust statutory fees or levies is made early enough to be completed in time for the adjustment to apply from the intended date;
- for additional operating funding, or for a capital injection from the Crown, is fully specified and submitted as per the budget timetable.

67 To help ensure all Crown entity funding issues are appropriately managed, Ministers can expect their monitoring departments to:

- distribute budget round information (timetables, templates, etc) to Crown entities;
- work with Crown entities to align planning and budget processes;
- work with Crown entities to understand, improve and critically assess proposals;
- rank budget bids against other bids from the sector on value-for-money criteria;

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35 Section 51 applies the requirement for financial responsibility to statutory entities, and the general provisions of the Companies Act 1993 apply to directors of Crown entity companies, in accordance with section 87(3) of the Crown Entities Act 2004.

36 This includes Crown entity companies, which must have an SOI, including a Statement of Service Performance unless exempted by their enabling legislation.

37 Direction may be given on issues of scope, statements of forecast service performance, performance measures and other issues. However s 113 of the Act prevents Ministers giving directions that affect statutorily independent functions (see paragraph 22 above). When a direction may impinge on statutorily independent functions, Ministers should seek legal advice before a direction is issued.

- ensure all successful budget bids are reflected in accountability documents (for example, SOIs, output agreements) when budget decisions are released to Crown entities.

Other considerations

68 Ministers and their monitoring departments will ideally tell Crown entities in advance what information they must provide, and will try to keep requests for additional information to a minimum. Unanticipated demands for information can disrupt an effective working relationship between Ministers (and/or monitoring departments) and their Crown entities.

H. Support for Ministers

69 Monitoring departments should provide Ministers with the following support services:

- an initial briefing on each Crown entity that, among other things, gives the Minister information about any provisions in the Crown entity's Act (or any other Act) that materially modifies the core governance provisions in the Act;
- ongoing briefings on each Crown entity that identify emerging governance or performance issues that require the Minister's attention;
- management of all processes relating to board membership, including appointments, reappointments, setting members' fees and the induction and training of new members;
- distribution of information to each Crown entity about relevant decisions and/or changes in policy by the Government, relevant government processes (especially the budget) and the Government's expectations of the Crown entity;
- negotiation of an output agreement and any protocols (in both cases as required by the Minister);
- critical review of the Crown entity's draft SOI;
- monitoring of each Crown entity.

70 Ministers, monitoring departments and Crown entities should have a clear understanding of the roles of each party. Memoranda of understanding can help clarify roles.

The role of the Minister of State Services and the State Services Commissioner

71 The Minister of State Services is the Minister responsible overall for all state services and the State Services Commission (SSC) largely administers the Act (except part 4). Ministers should consult the Minister of State Services on any proposal that could establish a new organisation that might be a Crown entity [CAB (00) M 19/1I(1), paragraph 6(n)]. The Minister of Finance should be consulted on economic and fiscal considerations.

72 The State Services Commissioner's responsibilities under the State Sector Act were broadened from 25 January 2005 to include:

- providing advice and guidance on, with the option of setting minimum standards for, matters of integrity and conduct in Crown entities (except CRIs);
- providing advice on management systems and structures in Crown entities;

- reviewing the machinery of government across all areas of government including Crown entities.

73 The Commissioner must act on a range of matters affecting Crown entities, if directed by the Prime Minister or a Minister responsible for a particular agency, as allowed by s 11 of the State Sector Act. The Commissioner may also act, if asked by the head of that agency.

74 The Commissioner has new powers in senior leadership development in the State services beyond departments under the State Sector Act. The Commissioner also has a role in advising on the Fees Framework as it applies to board members and a role in advising on terms and conditions of chief executives of statutory entities.

75 Statutory entities must consult the SSC in relation to the terms and conditions of employment of their chief executives. Crown entities (subject to the making of Orders in Council) can be required to consult the SSC on collective employment agreements.

The role of the Minister of Finance and the Treasury in relation to the Act

76 The Minister of Finance has overall responsibility for oversight of the Government's fiscal and economic interests. The Minister of Finance has statutory responsibilities within the Act and Ministers should seek his or her support when appropriate.

77 The Treasury administers:

- Part 4 which relates to Crown entity reporting (including SOIs and annual reports) and to Crown entities' financial obligations;
- the Crown Entities (Financial Powers) Regulations 2005[38];
- the Public Finance Act 1989 which contains some provisions that relate to Crown entities and determine how departments must manage Crown funding for Crown entities[39].

I. Information specific to Crown entity companies

78 As mentioned earlier, the Act applies to the 'Crown entity companies' category in much the same way as for statutory entities. However, there are some specific differences.

Differences in governance

79 Unlike other Crown entities, Crown entity companies are subject to the Companies Act 1993 as well as the Crown Entities Act and any establishing Act (including, in the case of CRIs, the Crown Research Institutes Act 1992). The interface between the Crown Entities Act, the Companies Act and other Acts is set out in s 85.

80 Where statutory entities have 'Responsible Ministers', Crown entity companies have 'Shareholding Ministers', the Ministers who hold shares in a Crown entity company. One of these must be the Minister of Finance.

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38 See http://www.treasury.govt.nz/crownentities/default.asp#financial - Guidance on the Crown Entities Financial Powers Provisions.

39 Subject to s 36 of the Public Finance Act 1989, which states that departmental chief executives are not responsible for the performance of other entities.

Differences in ministerial control over Crown entity companies

81 The process for removing board members of Crown entity companies is slightly different from that of statutory entities. Shareholding Ministers may remove members by shareholder resolution under the Companies Act 1993 (see s 88(1)(a)). Under the Companies Act 1993, an alternative process (for example, removal by notice in writing) may be followed if allowed by the company's constitution.

82 Ministers do not have the power to direct Crown entity companies on matters of policy unless specifically provided in another Act (s 105). However, Crown entity companies may be subject to whole of government directions. A Crown entity company must comply with any direction given to it under a power of direction in another Act, and any whole of government direction given to it under s 107. However, CRIs are required to 'have regard to', not 'give effect to', whole of government directions.

83 Section 113 of the Act specifies that Ministers are not authorised to direct a Crown entity company in relation to a statutorily independent function, or to require an act or result for a particular person. The obligation of a Crown entity company to comply with a direction is subject to this section and must be in writing and signed by the Minister (s 114(3)).

Differences in setting and monitoring strategic direction

84 Shareholding Ministers of Crown entity companies have an important role participating in setting and monitoring the strategic direction of Crown entity companies (s 88). To assist in this role, Ministers may require Crown entity companies to supply a wide range of information (s 133) subject to certain limitations (s 134).

85 The Crown Company Monitoring Advisory Unit (CCMAU) and Treasury have a monitoring role on behalf of the shareholding Ministers in relation to Crown entity companies. CCMAU and Treasury:

- monitor the government's investment in Crown entity companies;
- assist with the appointment of directors to Crown entity company boards;
- provide performance and governance advice to shareholding Ministers.

86 In exercising the Crown entity company's powers, the board owes a collective duty to its shareholding Ministers to make sure that the company:

- acts in a manner consistent with its objectives, functions, current SOI and output agreement (if any);
- complies with its duties to its subsidiaries.

Different constraints

87 The Act contains specific constraints on the exercise of Crown entity companies' powers. There may be other constraints in the Crown entities' Acts, the Companies Act or other Acts that are also relevant[40]. The constraints in the Act include:

- conditions on acquiring subsidiaries, interests in joint ventures etc[41];

[40] For example, s 84 of the State Sector Act 1988.

[41] See ss 96 and 100 of the Act.

- conditions on bank accounts[42];
- conditions on the exercise of various financial powers, unless an exemption is granted in the Act[43];
- a requirement to consult with the State Services Commissioner before agreeing to the terms and conditions of collective employment agreements, if an Order in Council has been made to that effect[44].

Exceptions for Crown research institutes

88 CRIs, as Crown entity companies, are subject to the Act with several notable exceptions[45]. For example:

- the duties of the board and board members in ss 92-95 do not apply to CRIs;
- the rules applying to the operation of Crown entity subsidiaries in s 97 do not apply to CRIs;
- CRIs are required to 'have regard to', not 'give effect to', whole of government directions;
- the reporting provisions in ss 138 to 157 do not apply to CRIs.

89 These exceptions reflect that CRIs also have governance and accountability requirements as set out in the Companies Act and the Crown Research Institutes Act 1992. They also reflect that CRIs have been encouraged to take a greater role in commercialising their own research through the establishment of subsidiaries and joint ventures.

Diane Morcom
Secretary of the Cabinet

42 See s 158 of the Act.

43 See s 160 of the Act.

44 See s 116 of the Act.

45 See section 10A of the Crown Research Institutes Act 1992.