

12 October 2018

Mr Peter Hughes CNZM
PO Box 329
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Dear Peter

PROPOSED INCLUSION OF INDEPENDENT CROWN ENTITIES

1. The Commerce Commission ('Commission') welcomes the opportunity to comment on the proposed reforms of the State Sector Act 1988 (the Act).
2. We would like to start by acknowledging the effort that your team has put into ensuring that entities, and people within them, are able to provide meaningful input at an early stage of the process.

Meeting of Monday 8 October 2018

3. We would also like to extend a thank you for the opportunity to meet with you and independent Crown entities on Monday 8 October 2018. It was helpful to hear you speak about the proposed reforms and what they might mean for independent Crown entities.
4. The majority of this submission focusses on the original question posed in the discussion document about the applicability of the proposed reforms to independent Crown entities. We are conscious in making this submission, that you indicated verbally on Monday that your recommendation will now be that independent Crown entities are not included in the reforms. We are supportive of your revised proposal based on the matters of independence raised at the meeting and the helpful bright line it creates.
5. We thought it may remain useful to explain that we did not see the proposed inclusion within the reforms as intrinsically incompatible with the Commission performing an independent role. This view was reached assuming careful thought, management, and nuanced drafting would be undertaken to ensure the independent exercise of functions, powers and duties in other Acts would not be compromised. However, the bright line created by your revised proposal (not to include independent Crown entities) removes the need for that detailed and nuanced approach and we are comfortable with it.

System commitment

6. We recognise that while independent we are not alone in the wider system. We are committed, as was mentioned on Monday, to working with other independent Crown entities to ensure we are identifying areas where there may be mutual benefits or efficiencies in us working together. We are also committed to ensuring we engage with the wider system.
7. The Commission has offered to convene a meeting of all independent Crown entities before the end of this year, with the purpose of:
 - 7.1 coming back to you with a list of areas where we see the mutual benefits of independent Crown entity engagement with the State Services Commission and wider system; and
 - 7.2 asking the question of whether an independent Crown entities forum is needed in the future.
8. We will also continue to collaborate and be involved in:
 - 8.1 a range of cross-Government initiatives, including: the Government Regulatory Practice Initiative (G-REG), Government Legal Network, Government Economic Network, Health and Safety Government Forum, Government Women's Network, Council for Energy Regulators, Tapu Tai Pasifika Public Sector Internship Programme, cross government OECD work and the Auckland Regional Career Board; and
 - 8.2 close working relationships with other agencies, including the Reserve Bank, Financial Markets Authority, Electricity Authority (including delivering shared corporate services), and the Ministry of Business, Innovation, and Employment.

Possible clarification provision

9. While it was discussed on Monday that there is no need for legislative authority to ensure independent Crown entities are able to collaborate with one another and the wider system, we suggest that consideration be given to a provision that provides that doing so is not a basis on which to challenge the independence of an independent Crown entity's exercise of its functions, powers and duties.

Original question posed

10. The question you have raised in the discussion document was about the applicability of the proposed reforms to independent Crown entities. We have approached this question from the perspective of our organisation specifically, not independent

Crown entities more generally. It was evident from the discussion on Monday that the statutory context and nature and applicability of independence differ for each of the entities present.

11. Our starting point is that the Commission is independent but not alone in a wider system that serves the public. Within that system, the Commission is a quasi-judicial body that exercises statutorily independent functions as an independent Crown entity.¹ This arrangement gives rise to certain boundaries on Ministerial influence that helps to support the success of the system as a whole. We are also a regulator, enforcement agency, and an information and education provider in relation to the legislation we operationalise.
12. Under s 8(2) of the Commerce Act 1986, the Commission is required to act independently in the performance of certain statutory functions, duties, and powers. The Crown Entities Act 2004 safeguards this independence insofar as s 113 states that it does not authorise a Minister to direct a Crown entity, or a member, employee, or office holder of a Crown entity in relation to a statutorily independent function.² The Crown Entities Act 2004 also sets boundaries on the Minister's role in relation to the appointment, removal and conditions of Commission members.
13. These safeguards are important because when acting independently in the performance of its statutory functions, duties, and powers, Commission members may be required to make decisions that are at odds with (and potentially sharply at odds with) the views of the Government of the day.
14. Our understanding of the reforms was confirmed by you and your team on Monday, that if independent Crown entities were included in the reforms, the Commission would have been directly affected by the proposals to:³
 - 14.1 expand the definition of the Public Service to include a range of Crown entities; and
 - 14.2 develop a common purpose, principles and values to help unify all public services.

¹ These functions include adjudication, enforcement, investigation, and regulation.

² In addition, s 113 states that the Crown Entities Act 2004 does not authorise the Minister to direct a Crown entity, or a member, employee, or office holder of a Crown entity requiring the performance or non-performance of a particular act, or the bringing about of a particular result, in respect of a particular person or persons.

³ We note that the proposals relating to ethics and integrity would not apply to the Commission because the State Services Commissioner cannot currently set, issue, apply and enforce a code of conduct. Refer: State Services Commission "State Sector Act Reform, Crown Entities" September 2018, page 2.

15. In addition, the intention was that the purpose, principles, and values will be given life through leadership, corporate documents and agency policies, and other instruments such as active promotion of codes of conduct.⁴

Common purpose

16. We do not consider the concept of a common purpose, principles, and values is intrinsically incompatible with the Commission performing an independent role but accept the indication expressed on Monday, that the independent Crown entities will not be included.
17. While we did not see that the original proposal was intrinsically incompatible it is possible to conceive of formulations of these matters that might compromise the ability of the Commission to continue to act independently in the performance of its functions, duties, and powers. If it were to proceed, it is our view that careful consideration would need to be given to existing legislative arrangements to ensure the purpose, principles, and values were not specified in a way that created unintended conflict between staff objectives and the expectation that the Commission acts independently (noting that independent functions, duties, and powers can be delegated to staff).
18. We note that the potential inclusion of “serving the Government of the day” in the purpose may be a source of tension. We fully appreciate that the statement is intended to ensure on-going political neutrality, but we would not want it to enable our independence from Government to be inadvertently ‘read down’ or overridden in any way.
19. We also note that arrangements similar to what you have proposed appear workable in other jurisdictions.⁵ This helped inform our view that the original proposal was not intrinsically incompatible with the Commission performing a statutorily independent role.

⁴ State Services Commission “Reform of the State Sector Act 1988, Directions and Options for Change: Discussion document for public feedback” (September 2018), page 11.

⁵ For example, the Australian Competition and Consumer Commission (ACCC) is also a quasi-judicial body and, under the Public Services Act 1999, staff working at the ACCC share common values with the rest of the Australian public sector. The objectives of the Public Service Act 1999 include “to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public.” Refer: Public Service Act 1999, s 3(a).

Comments in closing

20. We trust this submission is helpful. While independent Crown entities are not to be included, we remain committed to the appropriate role entities play in contributing to the success of the system as a whole.
21. As part of our vision of making New Zealanders better off we are conscious of the New Zealand public's expectations of us and note that under s 50(b) of the Crown Entities Act 2004, the Board of the Commission is required to ensure that the Commission performs its functions in a manner consistent with the spirit of service to the public.

Yours sincerely



Sue Begg
Deputy Chair



Adrienne Meikle
Chief Executive Officer