

# Delegations and Governance

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## 1. Introduction

Governance is concerned with the allocation of decision rights. By organising an activity in a separate legal entity, the Crown may be expected to have generally forgone the legal right to control directly the use of the assets involved in providing that activity. This paper considers the basket of controls of Ministers over Crown entities, the rights and duty of the board to exercise the powers of the Crown entity, how some of this power may be devolved by the board through delegations under section 73 of the Crown Entities Act, and how this should be monitored.

The paper focuses on statutory Crown entities and Crown entity companies. It does not specifically cover boards of trustees of schools, tertiary institutions or Crown entity subsidiaries.

## 2. Controls of Ministers

### *Overview of role*

While the Crown Entities Act clearly reserves operational control of an entity to its board, the responsible Minister has a toolbox of methods for influencing the overall direction of the entity, depending on its category.

The role of a “responsible Minister” of a statutory entity under the Act is described as:<sup>1</sup>

[To] oversee and manage the Crown’s interests in, and relationship with, a statutory entity and to exercise any statutory responsibilities given to the Minister, including functions and powers-

- (a) in relation to the appointment and removal of members...;
- (b) to determine the remuneration of some members...;
- (c) in relation to the giving of directions to the entity...;
- (d) to review the operations and performance of the entity...;
- (e) to request information from the entity....;
- (f) to participate in the process of setting and monitoring the entity’s strategic direction and targets...; and
- (g) in relation to other matters in this Act or another Act.

The “shareholding Ministers” role for Crown entity companies is similarly expressed, but minus paragraphs (b) and (c).<sup>2</sup> The shareholding Ministers may give directions to the company only if expressly authorised to do so by an Act.

The Minister’s role set out in the Act is also essentially a list of the Ministers controls. However, those controls vary according to the category of Crown entity as set out below.

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<sup>1</sup> Crown Entities Act, s27.

<sup>2</sup> Crown Entities Act, s88.

### *Direct controls*

#### **Crown agents**

- the power to remove a member appointed by the responsible minister entirely at the minister's discretion (subject to natural justice) and appoint a new member in the member's place;<sup>3</sup>
- the power to direct the entity to *give effect* to a government policy relating to the entity's functions and objectives;<sup>4</sup>

#### **Autonomous Crown entities**

- the power to remove a member appointed by the responsible minister for any reason that in the minister's opinion justifies removal (subject to natural justice) and appoint a new member in the member's place;<sup>5</sup>
- the power to direct the entity to *have regard* to a government policy relating to the entity's functions and objectives;<sup>6</sup>

#### **Independent Crown entities**

- a limited power to recommend the removal of a member for "just cause" to the Governor-General after consultation with the Attorney-General (subject to natural justice) and appointment by the Governor-General of a new member in the member's place;<sup>7</sup>
- no power to direct entity on policy unless provided for in the entity's Act;<sup>8</sup>

#### **Crown entity companies**

- the powers of a shareholder to remove directors under the Companies Act 1993;
- no power to direct entity on policy unless provided for in the entity's Act.<sup>9</sup>

The responsible minister also has powers in relation to all statutory entities and Crown entity companies:

- to remove board members for breach of an individual or collective duty (subject to the removal standard applying to the entity);<sup>10</sup>
- to review the operations and performance of a Crown entity;<sup>11</sup>
- to require a Crown entity board to supply any information relating to the operations and performance of the Crown entity that the minister requests (unless withholding the information is necessary to protect the privacy of any person, or would limit the ability of the

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<sup>3</sup> Crown Entities Act, ss36 and 41. The Minister may also remove elected members for "just cause" under section 38.

<sup>4</sup> Crown Entities Act, s103.

<sup>5</sup> Crown Entities Act, ss37 and 41. The Minister may also remove elected members for "just cause" under section 38.

<sup>6</sup> Crown Entities Act, s104.

<sup>7</sup> Crown Entities Act, s39, and 41. Under section 40, "just cause" includes misconduct, inability to perform the functions of office, neglect of duty, and breach of any of the collective duties of the board or the individual duties of members (depending on the seriousness of the breach).

<sup>8</sup> Crown Entities Act, s105.

<sup>9</sup> Ibid.

<sup>10</sup> Crown Entities Act, ss 58, 59, 94, and 95. The removal standard referred to is the appropriate standard for the category of entity.

<sup>11</sup> Crown Entities Act, s132.

entity or its employees or members to act judicially or carry out their statutorily independent functions in relation to a particular matter);<sup>12</sup>

- to direct all the contents of an entity's statement of intent, except how the entity proposes "to manage the organisational health and the capability of the entity".<sup>13</sup> (A significant power in this area is the power to direct the content of the SOI in relation to "how the entity intends to perform its functions and conduct its operations to achieve the impacts, outcomes, or objectives, set out in its statement of intent".<sup>14</sup>

However, the Act expressly does not authorise ministers to give directions in relation to a statutorily independent function, or 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.<sup>15</sup>

#### *Indirect controls*

In addition the responsible Minister has other controls which could impact on a statutory entity's operations as follows:

- a statutory entity cannot delegate to a person other than a board member, committee, employee or subsidiary, without the responsible minister's approval;<sup>16</sup>
- a statutory entity must consult with and have regard to the views of the State Services Commissioner, or if the proposed terms do not comply with the Commissioner's guidance, the responsible minister, on the terms and conditions of employment for a chief executive;<sup>17</sup>
- except for a few "professional investors" (for example, the Accident Compensation Corporation, who may borrow in accordance with procedures approved by the Minister of Finance) the exercise of financial powers by any Crown entity must be approved by regulation or by joint approval of the responsible minister and the Minister of Finance. These powers include the power to establish a bank account outside New Zealand, to invest in securities other than certain New Zealand debt securities and public securities, to borrow, to enter into guarantees and indemnities, and to enter into derivative transactions.<sup>18</sup>
- Crown entities must notify the responsible minister of acquisitions of a subsidiary, a substantial interest in a company (or any interest in a company other than in its shares), an interest in a partnership, or an interest in a joint venture or trust.<sup>19</sup>

In a worst case scenario, the responsible minister of a statutory entity may apply for a court order either restraining the board or a board member from engaging in conduct which would contravene the Crown Entities Act or the entity's Act, or requiring a board or board member to take any action required to be taken under the Crown Entities Act or the entity's Act. The court may only make such orders if it is just and equitable to do so, and the conduct is not complete;<sup>20</sup>

### **3. Other central control mechanisms**

Quite apart from the powers given to the responsible minister, the Crown Entities Act also gives powers to the Minister of Finance and the State Services Commissioner in relation to Crown entities.<sup>21</sup>

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<sup>12</sup> Crown Entities Act, ss 133 and 134. A "statutorily independent function" is one which the entity's Act states must be carried out independently, or in respect of which the entity's Act states Ministers may not give directions (s 10).

<sup>13</sup> Crown Entities Act, s 147.

<sup>14</sup> Crown Entities Act, ss 141(1)(d) and 147.

<sup>15</sup> Crown Entities Act, s 113.

<sup>16</sup> Crown Entities Act, s 73.

<sup>17</sup> Crown Entities Act, s 117.

<sup>18</sup> Crown Entities Act, ss 159 - 164.

<sup>19</sup> Crown Entities Act, ss 96 and 100.

<sup>20</sup> Crown Entities Act, s 60.

<sup>21</sup> The Minister of Finance's powers include the power to request information from entities (for the purposes of exercising his or her powers under the Act), joint approval to the exercise of financial powers, exempting

The most significant of these is the power of the Ministers of Finance and State Services to jointly direct any Crown entity to comply with "specified requirements" for the purpose of both:<sup>22</sup>

- supporting a whole of government approach; and
- either directly or indirectly, improving public services.

The associated amendments to the State Sector Act 1988 which passed as part of the Crown Entities Act legislative process also extended the State Services Commissioner's mandate in relation to Crown entities by expanding the Commissioner's functions to include:<sup>23</sup>

- reviewing the "machinery of government" including the allocation of functions to and between departments, Crown entities and other agencies and the desirability of creation, abolition or amalgamation of departments, Crown entities and other agencies;
- providing advice and guidance to employees of Crown entities (except Crown Research Institutes) on matters that affect the integrity and conduct of employees within the State services;<sup>24</sup>
- providing advice on management systems, structure and organisations in the Crown entity sector.

In carrying out certain functions in relation to Crown entities, including reviewing the "machinery of government", the Commissioner may require a Crown entity to supply information concerning its activities.<sup>25</sup> The powers the Commissioner may exercise if required or requested under section 11(4) State Sector are also extended to include new powers that have been given in relation to departments.<sup>26</sup>

Most importantly, the State Services Commissioner may set minimum standards of integrity and conduct for the employees of Crown entities, as well as for the public service, the Parliamentary Counsel Office and the Parliamentary Service.<sup>27</sup> While the code may be derogated from by a Crown entity with the approval of a responsible minister, the consequences for an entity or Crown entity employee of failing to comply with the code are generally the same as for the public service. That is, the Commissioner may advise the responsible minister of a serious breach and the Commissioner may exercise the same powers in sections 7 to 9 of the State Sector Act 1988 (and the power to summon witnesses in section 25 State Sector Act), that he or she may exercise in relation to departments.

If an Order in Council requires it, a statutory entity must consult with and have regard to the views of the State Services Commissioner before agreeing to the terms and conditions of employment in a collective employment agreement<sup>28</sup>

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outputs from statement of intent requirements; exempting multi-parent subsidiaries from reporting requirements, specifying credit rating tests and approving banks, powers in relation to the payment of surpluses and the payment of a capital charge and the power to give instructions to Crown entities in relation to the publication of information and form of information to be provided under the Act- Crown Entities Act, s133(2), 143, 157(2), 158, 160(1)(b),. 165, 166, 174.

<sup>22</sup> Crown Entities Act, 107.

<sup>23</sup> See ss 6(a), (ha) and (i) State Sector Act 1988.

<sup>24</sup> In carrying out this function the Commissioner may conduct any inspections and investigations, and make and receive reports, that the Commissioner considers necessary or the Minister directs (s 8 State Sector Act 1988).

<sup>25</sup> State Sector Act 1988, s9. The functions are those in s 6(a), (ha) and (i) State Sector Act 1988.

<sup>26</sup> State Sector Act, s 6(d), function of Commissioner to promote and develop senior leadership and management capability for the Public Service; and s 6(h), function to provide advice on the training and career development of staff in the Public Service.

<sup>27</sup> State Sector Act, ss 57 to 57C.

<sup>28</sup> Crown Entities Act, s116.

#### 4. Control rights of the board

Under the various Acts governing Crown entities the board is the governing body of the entity. For a statutory entity, section 25 CEA provides that the board "is the governing body of the entity, with the authority, in the entity's name, to exercise the powers and perform the functions of the entity."<sup>29</sup> All decisions relating to the operation of the entity are to be made by, or under the authority of the board.

For Crown owned companies, the CEA provides that the business and affairs of a Crown entity company must be managed by, or under the direction or supervision, of the board of the company in accordance with the Companies Act 1993.<sup>30</sup>

It is worth stressing that no matter what its form, unless an entity's Act provides otherwise, a Crown entity's powers are exercisable by that entity's board and no one else. While boards may and should appoint chief executives to manage or assist with management of the entity, there is no power inherent in the position. The chief executive must derive any powers exercised by him or her from the board.

#### 5. Delegations by statutory entities under the Crown Entities Act

Of course most boards of Crown entities are part time, meeting more or less regularly or irregularly depending on the nature of the entity. (The major exception being those that are corporations sole). Generally they would be unable to effectively manage an entity and exercise its statutory powers without assistance.

The Act therefore gives power to boards of statutory entities to delegate these matters to certain people.

##### *a. What may the board delegate?*

Under section 73(1) CEA, a board may prima facie delegate "any of the functions or powers of the entity or the board". The power therefore covers both statutory powers of the entity and powers associated with management of the entity and its employees.

However, a board may not delegate –

- Any powers or functions expressed in the entity's Act as not being capable of delegation; or
- the power to delegate;<sup>31</sup>

There is also a restriction on delegation of a statutorily independent function to a subsidiary.<sup>32</sup> A statutorily independent function in relation to a Crown entity or a member, employee, or office holder of the entity, means any matter in respect of which the entity's Act provides that the function must be carried out independently, or a Minister of the Crown may not give directions.<sup>33</sup>

In addition to the generic Crown Entities Act provision, many entity's statutes set out special provisions relating to delegation of specific powers. They also provide in many cases for delegations by Ministers to the entities. It is noted that section 73 CEA does not expressly permit a board to subdelegate a power delegated to it by a Minister under a statute. It appears unlikely that it would therefore be read as authorising this.

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<sup>29</sup> Crown Entities Act, s25.

<sup>30</sup> Crown Entities Act, s86(1).

<sup>31</sup> Crown Entities Act 2004, s73(4)

<sup>32</sup> Crown Entities Act 2004, s73(3)

<sup>33</sup> Crown Entities Act, s10(1).

The restriction on the power to delegate “the power to delegate”, does not relate to the power to subdelegate, which is dealt with elsewhere. Rather it reflects the principle that if a person has been given a power by Parliament that person should remain responsible for either exercising it themselves, or must keep control of the chain of persons who by delegation are authorised to exercise the power. A power to delegate the power to delegate would possibly sever the connection of control and supervision between delegator and decision-maker and subvert Parliament’s intention in conferring powers of decision on the delegator.<sup>34</sup>

**b. What should the board delegate?**

The answer to this question of course depends entirely on the size of the entity and its functions. However, it is normal for entities to appoint a chief executive and to delegate to that person the powers of managing the entity’s day to day operations. That person will also normally be delegated powers to hire and fire employees, often with particular rules around appointment of the senior management team. The actual scope of any delegation by the board to a chief executive is a matter for the board and will vary from entity to entity.

Most Crown entities will also put in place formal financial delegations. .

If an entity has statutory powers which are exercised regularly, for example, decisions on applications for licences, then for practical reasons (as well as those of efficiency) these are also likely to require delegation. One of the reasons for delegating may be to decentralise decision-making or to relieve pressure of work, leaving more senior staff to concentrate on more important decisions.

The State Services Commission’s publication for Crown entities, *Board Appointment and Induction Guidelines 2006* states that-<sup>35</sup>

Delegations by a board to employees, or to other persons where permitted by the legislation, are an example of decision-making under a board’s authority. Some entities give their chief executives day-to-day management responsibilities, such as hiring staff. Other entities give this role to the board, even if it ultimately chooses to delegate the responsibility to its chief executive.

Rather ambiguously it continues:

Statutory functions and powers should, in general, reside in board members, who are selected for their knowledge, skills and experience. For most entities under the Crown Entities Act, however, the board may delegate to members, employees, office holders and committee members, Crown entity subsidiaries, and other persons or classes of persons approved by the Responsible Minister.

It is noted that the Crown Entities Act provisions are default provisions that apply only if there is nothing to the contrary in an entity’s Act. It is therefore important before they are relied on, that entities consider the statutory scheme of the power proposed to be delegated. In some cases, this scheme may give alternatives to delegation.<sup>36</sup> However, in other cases, entity’s will need to consider whether there is anything in the statutory provision itself, or the Act in which it appears, that impacts on the ability of the power to be delegated, or limits or extends the persons to whom it may be delegated in a manner contrary to the general delegation provision in the Crown Entities Act.

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<sup>34</sup> Public and Administrative Law Reform Committee *Powers of Delegation: Working Paper* (Wellington, November, 1984) para 138.

<sup>35</sup> State Services Commission *Board Appointment and Induction Guidelines 2006*, on [www.ssc.govt.nz](http://www.ssc.govt.nz)

<sup>36</sup> For example, under section 16 of the Commerce Act 1986, the chairperson may set up “divisions” of the Commission to consider particular matters..

**c. To whom may the Board delegate?**

Section 73(1) of the Crown Entities Act gives a general power to delegate functions and powers to any of the following persons:

- (a) a member or members of the board:
- (b) the chief executive or any other employee or employees, or office holder or holders, of the entity:
- (c) a committee:
- (d) any other person or persons approved by the entity's responsible Minister:
- (e) any class of persons comprised of any of the persons listed in paragraphs (a) to (d):
- (f) a Crown entity subsidiary of the statutory entity.

This list is deliberately restrictive in that it generally restricts delegations to persons within the organisation or associated with the board. Delegations may not be made outside this group without the consent of the Minister.

A committee to whom a function or power of the entity is delegated must contain at least one member of the board.<sup>37</sup>

**d. To whom should the Board delegate?**

Like its companion question above, the answer to this question depends entirely on the nature and importance of the power and the management structure within the organisation. However, it is likely that the power to delegate would be reviewable by the courts were it not exercised reasonably. (Quite apart from the fact that a board that, for example, delegated an important power to a junior employee, would likely breach at least its duty to act with reasonable care, diligence and skill).

Most boards will put in place a tiered delegations framework within the entity. This might, for example, consist of a wide delegation to the chief executive, with a chain of further subdelegations to senior managers and then to specified positions within the organisation, depending on the function. The framework may also have different tiers of delegations relating to risk to the organisation. One view is that powers should be exercised at the lowest level of hierarchy consistent with them being well exercised and with the public having effective access to information about who exercised them and how, and to remedies if aggrieved.

Boards with discrete functions that may be carried out efficiently by a separate legal entity, may consider establishing a subsidiary and delegating performance of that function to that subsidiary, although in making such decision, boards should be aware of the strenuous governance requirements in relation to subsidiaries in sections 97 and 98 of the Crown Entities Act.

Some governance functions may also be delegated by the board to sub-committees.

While powers and functions may not be delegated to outside persons such as private companies without the consent of the entity's responsible Minister, it is noted that there are many tasks that may be able to be undertaken under contract without a delegation. So long as the board retains sufficient control of the power or function so that it can be said that it is still the effective exerciser of the power, it is generally permissible to contract third parties to carry out functions preliminary to the exercise of the power. This may depend on the nature of the authority, of the power – legislative, judicial or administrative - and the tasks required.<sup>38</sup>

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<sup>37</sup> Crown Entities Act 2004, Schedule 5, cl 14(1)(b)

<sup>38</sup> *Laws of New Zealand*, Administrative Law, para 49, (on [www.lexisnexis.com](http://www.lexisnexis.com), last accessed 5 February 2006) notes that the decision to uphold a subdelegation of tasks is a contextual one. Relevant factors may include:

**e. Delegations when conflicts occur**

In addition to general delegations, boards may also consider the desirability of a one off delegation of a function or power when faced with a situation of conflict of interest. The propriety of using the power of delegation to avoid any appearance of bias in the determination of a dispute has been judicially noted.<sup>39</sup>

For statutory Crown entities, the Crown Entities Act's strict conflicts of interest provisions, which disqualify members of Crown entity boards from acting where they are "interested" in a matter involving the entity, could in some circumstances prevent a board from forming a quorum, or in the case of a statutory officer who is a Crown entity, such as the Retirement Commissioner, prevent that person from acting at all. In such case, before any delegation can be made, recourse may be necessary to section 68 of the Crown Entities Act, which permits the chairperson, deputy chairperson, or in the last instance the responsible Minister, to give permission for a board member to act if "satisfied that it is in the public interest to do so".<sup>40</sup> This provision could if necessary, be resorted to, to enable a vote to be taken by a Crown entity board to delegate the matter to a permitted delegate (including, a committee) who or which is not tainted by the same interest.

**f. Formalities of delegation**

Crown entity boards must delegate by board resolution and notice in writing to the delegatee. As referred to below, the Act also permits subdelegation in some instances. While there are no formal requirements for subdelegation in the Act, the fact that a delegate who "purports to exercise a function or exercise a power under a delegation must produce evidence of his or her authority to do so, if reasonably requested to do so",<sup>41</sup> means that it would be prudent for subdelegations to also be in writing and to be communicated to the person who will exercise the power.

Delegations under the Crown Entities Act may be revoked at will by resolution of the board and written notice to the delegate; or by any other method provided for in the delegation. Subdelegations may be revoked at will by written notice of the delegate to the subdelegate.

**g. Scope of delegation**

Under the Crown Entities Act a delegation can be made either generally or specifically. Thus, a whole power may be delegated, or part of a power where it is able to be split. This permits delegations to be made relating, for example, to different matters, or different classes of matters, for approvals but not rejections, or for "easy decisions" (ie. ones within policy), but not difficult ones.

For ease of administration, delegations should where possible be to positions or, where appropriate, classes of persons, rather than named individuals. All that is required in this case, is that the delegate is identified with sufficient certainty. Nonetheless, even in this case, care will be needed in any restructuring exercises to ensure that any delegations continued to be relied upon remain valid.

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- statutory language, objects and policy;
  - amplitude of the power;
  - importance of the decision and its effect on individuals;
  - whether the whole or only part of the power is subdelegated;
  - the degree of supervision over the delegate;
  - administrative efficiencies obtained; and
  - any other circumstances considered to have a bearing.

<sup>39</sup> *Charlesworth v Comptroller of Customs*, H Ct, Ak, M 2350/91. 8 June 1994, Speight J.

<sup>40</sup> In addition, for statutory entities, other than corporations sole, clause 10 of Schedule 5 of the Crown Entities Act provides that where aboard has only 1 member available, due, for example, to vacancy or conflicts, the quorum for a meeting is 1, and the available member may enter into certain obligations by him or herself.

<sup>41</sup> Crown Entities Act, s74(2)(b).

The Act provides that a delegate to whom any functions or powers of a statutory entity or board are delegated may subdelegate the function or power if the delegatee has the prior written consent of the board; and the subdelegation is subject to the same restrictions, and with the same effect, as if the subdelegate were the delegate.<sup>42</sup>

Generally more senior office holders are delegated more discretionary power than lower officers. In practice, this will usually mean that subdelegations are worded more tightly than initial delegations to the chief executive or senior staff.

A delegation should clearly set out what statutory power or function is delegated and the authority for the delegation. It should also include any consent to sub-delegation deemed appropriate, whether of all or any of the functions and powers delegated.

The delegation should also set out any conditions or restrictions on exercise of the power or function delegated. In this regard, it is normal to require delegated powers to be exercised in accordance with policy and within operational guidelines. However, as with any statutory power, it is important that a discretionary power which is delegated is not fettered by too strict guidelines. The Court of Appeal approved the following statement in *Westhaven Shellfish Ltd v Chief Executive of the Ministry of Fisheries & Anor* -<sup>43</sup>

While the chief executive can state a policy, the decision makers must keep their ears open... They must indicate, or at least reserve, a power to depart from the policy and a willingness to exercise that power. They must bear in mind and conform with the purposes of the legislation under which they are making decisions.

So that board members can meet their duties to the minister and the entity, in some circumstances it may be desirable to include in the delegation a requirement that the delegate comply with the duties of board members in carrying out their delegated powers.

It is good practice also to include in the delegation a requirement for the delegatee to report at intervals on the exercise of the power, so that the delegator can monitor its exercise and ensure his or her own duties in relation to the power are being met. These intervals may be anything from weekly or monthly in relation to subdelegated powers, to monthly or quarterly in relation to powers delegated by the board to the chief executive. The question of monitoring is returned to below.

#### ***h. Effect of a delegation***

A delegation does not denude the board of its power or effect its ability to exercise the power in its own right.<sup>44</sup> Rather it confers on the delegate the power to exercise a power in the delegate's own right, in addition to the person on whom it was conferred.

The delegate may, unless the delegation provides otherwise, perform the function or exercise the power in the same manner, subject to the same restrictions, and with the same effect as if the delegate were the entity or the board. This means, for example, that if the power or function is dependent upon the opinion or belief of that person in relation to a matter, the power or function must be exercised by the delegate in relation to his or her own state of mind.

The exercise of the power is in law the act of the delegate, not the act of the delegator. In theory, this means that the delegator cannot direct the exercise of the power or make the exercise by the delegate conditional on certain events occurring, or on the delegate taking certain action, for example, consulting another person,<sup>45</sup> However, as discussed above, in New Zealand it is

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<sup>42</sup> Crown Entities Act, s74(1).

<sup>43</sup> [2001] 1 NZLR 158, 173, para 45

<sup>44</sup> *Huth v Clarke* and Crown Entities Act, section 75(a).

<sup>45</sup> *Delegations, authorisations and the Carltona principle*, briefing by Australian Government Solicitor, 14 December 2004, 2.

nevertheless common for entities to issue non-binding guidelines which a delegate must consider when exercising the power. These may take the form of policies and other factors to be considered.

It should be noted that as delegates exercise powers or functions in their own right, a valid decision by a delegatee cannot be revisited by a delegator. If the decision is invalid, the delegator may exercise the power anew in his or her own right, but if valid, the delegator has no power to over rule the decision, except where this is provided for in statute (for example, through a process of internal review). There may, however, be grounds for the delegatee to rescind his or her own decision and make a new one.

The Crown Entities Act provides that a delegate who purports to perform a function or exercise a power under a delegation is, in the absence of proof to the contrary, presumed to do so in accordance with the terms of that delegation.<sup>46</sup>

Delegations do not automatically cease to have effect merely because there is a change in the identity of the person who is the delegator. However it is possible for the new holder of the power to expressly revoke or vary delegations given by the person who previously was the delegator.

***i. Responsibility of the board for decisions under delegations***

Section 75(b) of the Crown Entities Act provides that a delegation does not affect the responsibility of the board for the actions of any person acting under the delegation. This may be contrasted with the Companies Act, which provides in section 130(2) that:

A board that delegates a power under subsection (1) ... is responsible for the exercise of the power by the delegate as if the power had been exercised by the board, unless the board—

- (a) Believed on reasonable grounds at all times before the exercise of the power that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution; and
- (b) Has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

While common in statute, the meaning of the Crown Entities Act wording about board responsibility is less than clear. It could be that it is intended to say that where a delegatee (the board) is responsible in law (ie. liable) for the acts of the delegatee, the fact that the person acted as a delegate does not effect that liability. However the Companies Act wording and the use of the word "responsible" rather than "liable" would suggest that in fact something else is intended. That is, that the words are intended to mean that the "accountability" of the board for the exercise of the power in terms of their board member duties, is unaffected by the fact that the power may have been exercised by a delegate. This makes sense in terms of the accountability structure in the Crown Entities Act. It may also fit within the State Services Commission's somewhat ambiguous advice, that "The board remain legally responsible for the delegated powers and functions."<sup>47</sup>

***j. Exercises of powers by delegatees***

For a statutory power to be exercised validly under a delegation:

1. the delegatee must have jurisdiction, that is, a valid delegation to make the decision;
2. the decision must be authorised by the Act under which it is made;

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<sup>46</sup> Crown Entities Act, s74(2)(a).

<sup>47</sup> State Services Commission, *Board Appointment and Induction Guidelines 2006*.

3. any procedures or conditions required by law or imposed under the terms of the delegation must be followed; and
4. the delegatee must comply with administrative law principles of fairness etc

In addition, the delegatee as an employee may have duties to his or her employer which will apply when exercising the powers, such as an obligation to act with reasonable care and skill, to act in good faith in performance of the employee's duties, and not to disclose the employer's confidential information.

The Public and Administrative Law Reform Committee in its 1984 working paper *Powers of Delegation*<sup>48</sup> noted the importance of members of the public knowing who in fact made the decision affecting them and the extent of that person's authority. The committee commented that this enhanced the responsibility of office holders in keeping with the philosophy of the Official Information Act 1982.

In accordance with this principle, many of those acting under delegated authority cite the authority for their acts, when exercising powers delegated to them.<sup>49</sup> As the delegate is acting in his or her own capacity as office holder, that person should sign any letter in his or her own name and office.

The committee also opined that information about delegations should be maintained in a readily accessible form and should be available to members of the public on request. While not required by statute, it is good practice to keep a delegations register showing what delegations are in force, and where they are not open-ended, noting the dates at which attention should be given to renewal. If such a register is kept, it should record the authority for the delegation, the statutory power which has been delegated, the office held by the delegate, any conditions on the delegation, and whether consent is given to sub-delegation.

#### ***k. Monitoring mechanisms***

While board members may delegate their powers, they retain a duty to exercise reasonable care and diligence to ensure that the powers delegated are being efficiently discharged.<sup>50</sup> These include delegated powers of management and delegated statutory powers. To meet this duty and their other board member duties, members need to ensure that they have put in place adequate accountability and control processes and receive a supply of appropriate information about the operations of the entities they govern.

#### *Internal controls*

There are essentially three mechanisms for internal monitoring of powers being exercised under delegations within any entity - internal control, internal audit and audit committees. The first is risk driven – it is a process designed to provide reasonable assurance regarding the achievement of objectives in relating to effectiveness and efficiency of operations, reliability of reporting and compliance with applicable laws. For management and the board to be assured that key policies are being followed and are producing the desired outcomes, entities should have in place a documented system of internal control based on a defined objective, and must receive independent information on quality control by an internal auditor.

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<sup>48</sup> Public and Administrative Law Reform Committee above n 34.

<sup>49</sup> Nevertheless, the Court of Appeal in *R v Gilchrist*, CA29/06, 18 August 2006, (2006) 22 NZTC 20, 043 recently found that the existence of delegated authority is a question of fact and the absence of a formal statement of delegated authority in a statutory notice was of no consequence.

<sup>50</sup> In *ASIC v Rich No 2* (2004) 22 ACLC 1232, para 88 White J in the Supreme Court of New South Wales noted that in a large business the directors must delegate their powers, but that those who delegate powers have a duty to exercise reasonable care and diligence to ensure that the powers delegated are being efficiently discharged. This dicta would appear to apply equally to boards of Crown entities and other delegators.

### *Internal audit*

Internal audit is an integral part of the system of internal controls. To be effective it must have the support of senior management. As it requires independence to be effective, it is desirable that internal audit divisions also have authority to report to the highest level, preferably the board through an audit committee.<sup>51</sup>

The role of internal audit is to provide management and the board with assurance that governance processes are such that the board can be assured that the organisation will meet its objectives and achieve the outcomes in its statement of intent. It will cover –

- reliability and integrity of financial and operational information
- efficiency and effectiveness
- safeguarding of assets
- compliance with laws, regulations and contracts

The frequency of audits of particular areas will depend on risk assessment. Internal auditors should report to an audit committee regularly (monthly or quarterly) and keep the chief executive informed on significant assurance risks.

### *Audit committees*

Audit committees provide a useful method to assist boards to meet their duties. They should contain independent non-executive members. They should be the focal point of the monitoring systems put into place by the board, and should be reported to by both internal and external auditors. "It is only through a thorough oversight of the organisation's information and internal control systems by internal and external audit procedures that board members can gain a reasonable measure of assurance that effective controls are in place, that their policies are being enforced as directed, and that they are receiving all relevant information about potential risk areas."<sup>52</sup>

The role of the audit committee is oversight of the entity's internal controls and financial reporting process and the integrity of its financial statements, performance of its internal auditors, and compliance with legislation, policies and procedures.

Audit committees have traditionally been assigned the role of ensuring that management has adequately followed up recommendations of both internal and external auditors. The Office of the Auditor General will shortly publish guidelines on the use of audit committees.

### *Subsidiaries*

Where a delegation has been made to a subsidiary, boards need to make sure that they have put in place a monitoring regime that permits them to meet their duties under section 52 and 97 and 98 of the Act (duties in relation to subsidiaries). The primary method of putting this in place may be through the subsidiary's constitution.

## **6. Delegations by Crown entity companies**

Boards of Crown entity companies may delegate their powers, other than those set out in Schedule 2 of the Companies Act 1993 to a committee of directors, a director, employee or any other person.<sup>53</sup> Much of the advice above in relation to statutory Crown entities applies equally to Crown entity companies.

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<sup>51</sup> Linda English and Dr James Guthrie "An overview of Directors' Obligations and Accountability Stands for Government Business Enterprises in the 1990s" (1996) AJCL Lexis 34.

<sup>52</sup> Linda English and Dr James Guthrie, above n 51, 39.

<sup>53</sup> Companies Act 1993, s130(1)