

The Official Information Act in Respect of State-Owned Enterprises

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Accountability provisions under the State-Owned Enterprises Act

The State-Owned Enterprises Act 1986 sets out the accountability provisions for all state-owned enterprises, namely:

- A Statement of Corporate Intent. This is an essential control mechanism for the Shareholding Ministers in which they agree to the broad objectives (financial and other) and strategies of each SOE. It specifies the decisions which Shareholding Ministers must be consulted on and the operational and policy matters agreed to, such as accounting and personnel policies;
- Half-yearly and annual reports. These reports provide the opportunity for public monitoring of the SOE's success or otherwise in achieving its objectives;
- Section 18 of the Act also provides that Shareholding Ministers can request such information as they require relating to the affairs of the state enterprise. This principally involves the submission of the annual business plan to the Ministers.

The Act also provides the Shareholding Ministers with the ability to determine the level of dividends paid by the enterprise.

The accountability of SOE directors is, therefore, quite explicitly focused on achieving the agreed objectives in the Statement of Corporate Intent and the provision of the appropriate information to Ministers. The Act provides that the Shareholding Ministers of a state enterprise are responsible to the House of Representatives for the performance of the functions given to them by the Act or the rules of the enterprise. The matters for which Shareholding Ministers are accountable to Parliament and therefore to the public are quite explicit. They are not accountable for the operational decisions and policies of the SOEs, which are the responsibility of the directors, unless the Statement of Corporate Intent requires their involvement. ECNZ's Statement of Corporate Intent, for example, requires consultation with Shareholding Ministers if the Corporation intends to expand into new business activities.

ECNZ believes that the principal responsibility of the Shareholding Ministers is to ensure that the SOE achieves its objectives as set in the Act—to be as profitable and efficient as comparable businesses that are not owned by the Crown, a good employer and an organisation which displays a sense of social responsibility.

In addition to the accountability provisions set out in the SOE Act, parliamentary select committees are authorised to conduct an annual review of the performance and opera-

tions of SOEs. Unless there are exceptional circumstances all hearings are open to the public and members of the media are allowed to report on the evidence presented.

Given the explicit nature of the accountability to our Shareholding Ministers, our owners, it is difficult to see how this additional level of accountability fits in. However, in reality, ECNZ welcomes this particular opportunity to communicate our message more widely.

Accountability provisions under the Official Information Act

The two principal purposes of the Official Information Act 1982 are:

- to enable the public's more effective participation in the making and administration of laws and policies;
- to promote the accountability of Ministers of the Crown and officials.

Following from earlier comments regarding the accountability provisions in the SOE Act, ECNZ considers the accountability that exists between SOEs and the public is different from that which exists between government and the public. The Official Information Act is predicated on the desirability of open government. SOEs are not, however, government; in fact they are required under the SOE Act to be as profitable and efficient as the private sector. The fundamental principle of the SOE policy is the complete separation of all commercial and non-commercial objectives.

For social goals outside of those expected of any private sector equivalent, the Act provides for the government to directly purchase goods or services from an SOE.

As described earlier, the matters for which Shareholding Ministers are accountable to Parliament and therefore to the public are quite explicit. As with the SOE Act, accountability to the public under the Official Information Act should rest with the Shareholding Minister—not the SOE or its directors.

The Official Information Act should, therefore, aim to make freely available (subject, of course, to good reason for withholding) all information held by Shareholding Ministers in the course of carrying out their duties.

Information, such as that of an operational nature, which is the accountability of SOE directors, is not required by Shareholding Ministers for the performance of their duties. It is ECNZ's view, therefore, that such information should not be covered by the Official Information Act—after all, what privately owned company would ever have to contemplate making public the detailed outcomes of a tender process, for example?

One of the other principal purposes of the Official Information Act is to enable the public "more effective participation in the making and administration of laws and policies". Public participation in the processes of government can be justified on the grounds that government is accountable to the public and openness therefore enhances the quality of democratic government. Given earlier comments regarding the specific accountability of SOEs to the public it is not considered that this justification holds true for SOEs.

Public participation in the processes of government has also been justified on the grounds of the significant impact government decisions have on individuals and communities. It has been argued that the size and importance of SOEs justify their coverage under the Official Information and Ombudsman Acts. It is no doubt true that building a dam does have a significant impact on the local community. However, it is important to remember that many decisions of large private sector companies also have enormous effects on communities similar in scale to SOE decisions, for example, rationalisation of the meat industry. Other regulatory measures have been developed to deal with such "significant" effects on New Zealand's society and economy.

It is not therefore the significance of the activities carried out by an organisation that dictates whether public participation through the Official Information Act is desirable but the fact that the activity is undertaken by the government. Given then that the single feature that distinguishes SOEs from other businesses is their state ownership it is contended that any accountability measures should be focused on the accountability between the Shareholding Ministers and the SOE—as outlined earlier, these accountability measures are already in place in the SOE Act.

To illustrate this point further, it is interesting, in terms of the public's interest in the energy sector, to compare ECNZ with the gas industry (either retailer or wholesaler) which could be seen to be equally as strategic to New Zealand. In order for a gas company's actions to be in the public domain the company would need to write a letter to a Minister or government officials. This letter could then be requested under the Official Information Act. In contrast, ECNZ, because of its government links, only has to think of an idea for it to be in the public domain!

Taking this idea even further, if there are justifications other than ownership for our inclusion under the Official Information Act, the Corporation would logically continue to remain under the Act even if privatised. In practice, however, as other SOEs have become privatised they have been removed from the Official Information Act as a matter of course.

The Corporation is therefore in the somewhat difficult position of being neither a private sector enterprise nor part of the public service. As a state-owned enterprise we are required by the legislation that established us to act in a commercial manner and make a profit. Our commercial objectives form part of our Statement of Corporate Intent and are therefore one of the principle means of measuring our accountability. At the same time, however, because of our accountability under the Official Information and Ombudsman Acts we have to make the same disclosure as that required by government departments. This requirement is often in conflict with our commercial operations. Because of this conflict the main reasons the Corporation uses for withholding information are based on commercial sensitivity and associated issues. Despite these comments the Corporation receives numerous requests throughout the country from individuals and groups for which we are happy to respond to fully. Only a few of the more tricky requests come to the General Counsel's attention and the majority of these are about a small range of subjects.

One rather controversial subject on which the Corporation has received numerous requests for information, and one that clearly illustrates the conflict just outlined, is devel-

opment and capital costs, together with current book value of power stations. The Corporation has always maintained that this information should not be released because of the fact that it would prejudice the commercial position of ECNZ and disadvantage its ability to carry out commercial activities. Having this information can assist a competitor in working out ECNZ's cost of production and margins, hence giving that competitor a distinct advantage. This type of scenario, which is a fairly regular occurrence, illustrates how clearly at loggerheads the application of the Official Information Act is against the objectives required of SOEs under the SOE Act.

It is possible and is appropriate that information about the Corporation is available through mechanisms that apply to all organisations in a market, for example, in the electricity industry the Information Disclosure Regulations. Under the Information Disclosure Regulations (made under the Electricity Act) ECNZ only (not Contact Energy or any other generator) is required to publish the terms of its pricing contracts. ECNZ supports such a regime as long as it is necessary to enhance the working of the market, and/or increase accountability within the market. However, I believe mechanisms such as this should apply to either all or none of the companies within a given market. Industry-related legislation such as this is a more appropriate accountability and monitoring mechanism than the Official Information Act.

Having said the above the Corporation recognises that it makes good commercial sense to take its customers, the public, with it as it makes decisions rather than leaving them in the dark.

Is the Corporation "open" and what public access is there to our decision-making process

Despite earlier comments regarding ECNZ's difficulties in responding to requests under the Official Information Act for information that is commercially sensitive it is considered that we endeavour to be as "open" as possible. We have, in fact, been accused by some of the organisations we have commercial dealings with of being too open!

ECNZ has published an extensive range of documents on projects and issues such as the recent "Guide to Tender" and associated booklets. Historically this has been one way of educating the public as to how ECNZ's contracts and pricing methodologies work. However, the recent development of an independent Wholesale Electricity Market means that neither the government nor ECNZ has any direct means of setting a price for electricity. This market, which was developed to ensure robust competition between generators of electricity, has changed the way that ECNZ now has to do business. ECNZ and the other SOE, Contact Energy Ltd, are now having to compete against privately owned electricity generators. This situation highlights the conflict faced by SOEs in fulfilling the profit-maximising objective of the SOE Act and making available information that could be competitively damaging under the Official Information Act.

However, in spite of the new market and subsequent competition, ECNZ continues to publish many booklets about a range of topics. These include guides about the operation of our power stations, energy efficient options, information sheets about topics such as

“Working with Water” and “ECNZ and the Competitive Wholesale Electricity Market” to name a couple.

Other publications include *Market Matters*, a magazine produced quarterly, looking at the electricity industry as a whole, *The Environmental Report*, which will now be published on an annual basis, and *ECNZ News*, which updates the public on happenings within the Corporation. These particular publications are very widely disseminated.

These publications are available either on request or through the information centres situated at some of ECNZ’s power stations. Guided tours also form part of the agenda at ECNZ’s information centres which continue to attract up to 40,000 visitors per year.

It might be useful to illustrate by way of an example how the Corporation involves the public in our decision-making process.

Consultative process under the Resource Management Act

Another example of public involvement in the decision-making process leads onto the relationship ECNZ has with local authorities, in particular regional councils. One of the most significant effects ECNZ has on individuals and communities is as a developer of natural resources. ECNZ has a tricky balancing act to maintain in its Resource Consents Programme. This involves trying to maintain the difficult balance between the needs of other individuals and groups who use or want to protect natural resources and the needs of our customers.

One of the principal functions of the Resource Management Act is to put in place mechanisms to ensure adequate disclosure of information by any developer or user of resources, in order to enable the public to assess the effects on their interests in resource consent applications.

We believe that we have gone several steps beyond what is required under the Resource Management Act in terms of public participation. ECNZ has developed a process for consulting interested parties on the renewal of its consents. This process includes holding a forum of interested parties who are asked to identify and agree on the issues that affect them, relating to particular applications. These forums are widely advertised in the local community and enable individuals who would not usually take part in decision-making done at a national level to have their say.

A working party is set up from the forum (and anyone who wishes to be on the working party may be). The next process involves the working party collating known information, identifying gaps in knowledge, initiating studies to fill those gaps. It also commissions detailed studies to look at options to address adverse effects identified. The briefs for those studies and the experts to be used to undertake them are agreed by consensus of the working party. All studies, research, etc are funded by ECNZ. Participation on the working parties is varied and includes those who might be opposed to ECNZ—with the same information being available to everyone. The studies and research results are shared among the participants in a common database that is acceptable to all the parties. A range of options for avoidance, remediation or mitigation, based on the studies and the likeli-

hood of various outcomes occurring, is identified. A consensus can be reached on solutions to concerns prior to the applications for consents being lodged. In addition to the working party the Corporation will ensure that it consults government departments relating to their statutory responsibilities and tangata whenua.

The extensive nature of this consultation obviously assists ECNZ too, in that it means that when we get to the stage of seeking consents from the regional council they are very aware (even if they have not been on the working party themselves) of the level of consultation that has been undertaken. The effect of this level of consultation is to ensure comprehensiveness, and that the community has input into decision-making in a way that is more likely to address their concerns.

The relationship that ECNZ has with the regional councils is very much a cooperative one where information is shared. The information thus generated can be used in the future management of the resources. ECNZ recognises that it has a major impact on local communities and tries to ensure that the impact is, as much as possible, a positive one. Our staff have frequent meetings with officers from local authorities to discuss any issues of concern as they arise.

Our relationship with local government is something that ECNZ is putting considerable effort into. Traditionally we have been much more successful with our dealings with central government. This is partly historical, in that we used to be a government department and we know how to operate the system. Local and regional authorities have in the past few years had additional duties imposed on them which have made their job harder. To a certain extent, therefore, both we and the regional and local authorities we deal with are feeling our way in terms of developing an effective relationship. The Corporation recognises that developing this type of relationship is vital and we will continue to put considerable resources into it.

Public interest in our decision-making process

Having heard about how we involve the public in our decision-making process you might be wondering how much interest the public actually have in ECNZ. The Corporation engages a research group to survey the public regularly, over a significant time period, about their perceptions of the Corporation. One of the issues they question their interviewees about is the importance of information from ECNZ to the public. The most recent of these surveys was in August 1996. The participants felt that ECNZ should inform the public about:

- who we are and what our role is;
- how ECNZ intends to manage future demands for electricity with regard to issues such as energy efficiency and alternative means of electricity generation (however, with the new Wholesale Market these really become industry issues, not specifically ECNZ issues);
- the environmental impact of generating electricity and how ECNZ is minimising the impact both in the long and short term—maybe another industry-wide issue.

There was a clear message from this survey, consistent with those previously undertaken, that the participants were reasonably divided. Some wanted to feel this information was

freely available if they wished to access it, although the majority of these were not prepared to spend the time and energy accessing it. Others honestly admitted they weren't interested as long as electricity continued to flow. It is, however, interesting to note that the majority of what the public wanted to know is well catered for in the publications previously mentioned.

Summary

In summary, it is considered that the Corporation is an open organisation and as much as possible tries to involve the public in its decision-making process. We believe that this can in many cases lead to better decisions being made. The main example given to illustrate this was the consultative process used under the Resource Management Act. As stated, this is of benefit to us as well as it assists us in gaining the consents we need to run our system.

Having said this, it is important to remember that the Corporation has been established to run as a successful business. It has a tough accountability regime imposed on it by the State-Owned Enterprises Act. It also has other disclosure requirements placed on it by other legislation, for example, the Information Disclosure Regulations. On top of this the Corporation is covered by the Official Information and Ombudsman Acts. This can sometimes be difficult, primarily because of our commercial objectives. Despite this, in the majority of cases we are able to help people when they do request information from us.

Appendix

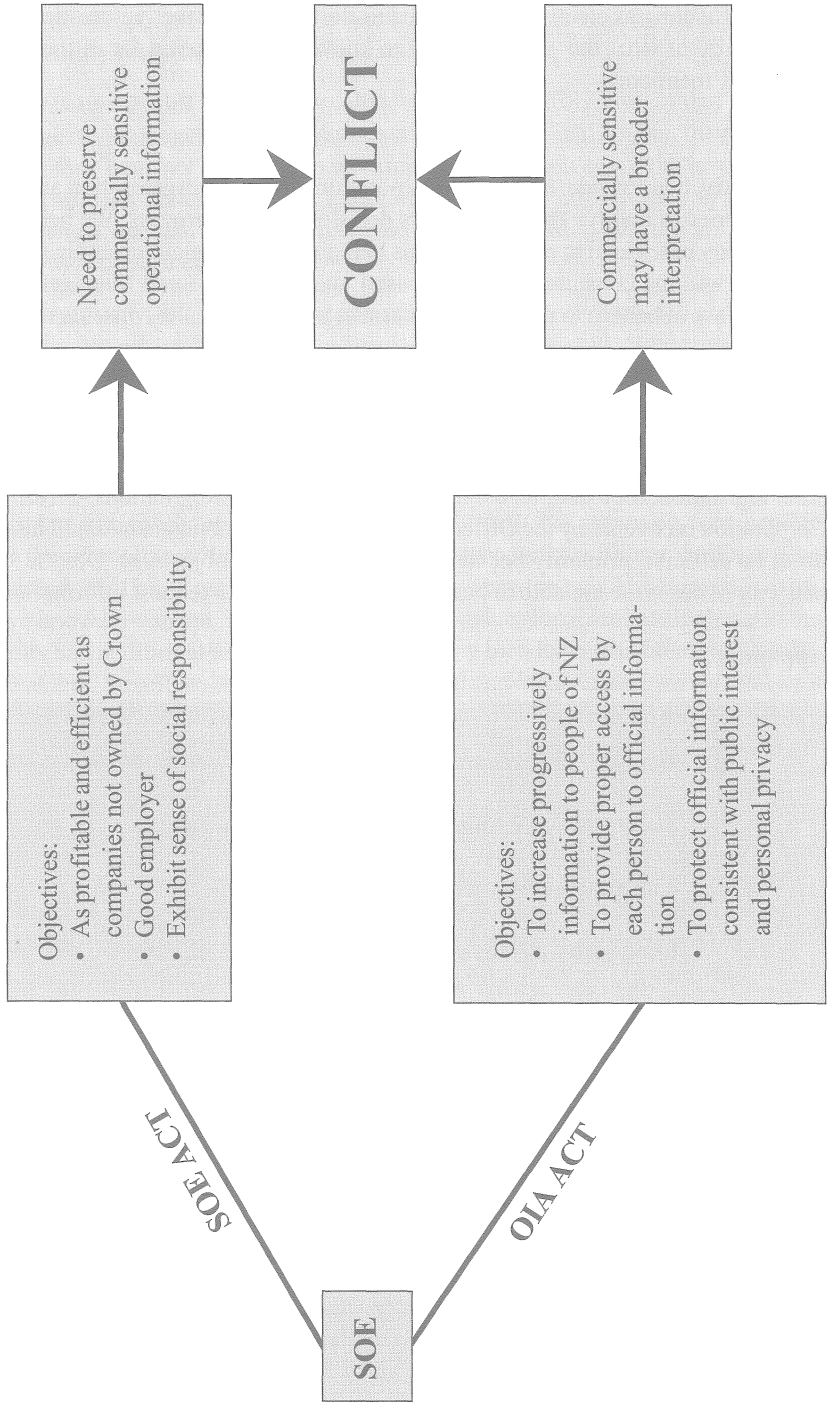
Accountability Provisions Under the State-Owned Enterprises Act

- Statement of Corporate Intent
- Half-yearly and Annual Reports
- Information as requested by Shareholding Ministers

Accountability Provisions under the Official Information Act

- Must release information requested unless good reason to withhold it to enable public participation in the processes of government
- Decisions to withhold information can be reviewed by the Ombudsman if asked to do so by the requestor

ECNZ's Position



Actual Accountability Regime

