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13 April 2012

The Chair
Finance and Expenditure Committee
Parliament Buildings
PO Box 18 041
WELLINGTON 6160

Dear Sir/Madam

MIXED OWNERSHIP MODEL BILL 7/1

1. The Legislation Advisory Committee was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.

2. The terms of reference of the LAC include:

   - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;

   - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

Appropriate means of achieving the policy objective

3. The Bill allows for the removal of four companies selected from the Mixed Ownership Model from the SOE Act (although some SOE Act provisions will be replicated or continued in their application). The four companies will be governed by the provisions of the Companies Act. However, additional restrictions on the ownership of shares in the companies will be inserted into

the Public Finance Act. That Act will be amended to include a new purpose and a new Part 5A that will apply only to the four mixed ownership companies. The four companies will be listed in Schedule 5 to the PFA.

4. The placement of these important provisions in the Public Finance Act is not ideal. However, there is no obvious home in the New Zealand statute book, and LAC has concluded that this is the best current alternative. Another alternative might have been a standalone Act, but that would have involved an even more complex and time-consuming exercise.

Public Audit

5. It is understood that the four mixed ownership companies will remain subject to the Public Audit Act (PAA) as "public entities" (see Public Audit Act 2001, s 5) and therefore subject to audit by the Auditor-General. Given that many other public controls have been stripped away, there may be uncertainty as to whether the mixed ownership companies will be subject to public audit. It may be preferable to expressly confirm that they are so subject.

Accountability of shareholding ministers to Parliament

6. On removal from the SOE Act, most provisions of that Act no longer apply to the mixed ownership companies, although some are continued or carried over. Section 6 of the SOE Act is not carried over. It provides that ministers of a state enterprise shall be responsible to Parliament for the performance of their functions in that role. However, we note that a provision like s 6 of the SOE Act is not needed to ensure ministerial accountability to the House. Under Standing Orders a Minister may always be questioned or held to account in the House in relation to the MOM companies. There is no equivalent of s 6 of the SOE Act for Crown entities under the Crown Entities Act or for government departments under the State Sector Act.

OIA Legislation, and Ombudsmen Act

7. A decision has been taken to remove the four companies from the ambit of the OIA and Ombudsmen Act. The shareholding Ministers would remain subject to the OIA, subject to applicable withholding grounds such as the commercial withholding ground, but will not be subject to the Ombudsmen Act. The companies themselves would instead be subject to the Stock Exchange's continuous disclosure regime.

8. We understand that the Ombudsmen have expressed the clear and firm view in advice to the Treasury that the mixed ownership companies should remain subject to both the OIA and Ombudsmen Act. Whatever is decided on that is clearly a policy issue. If the mixed ownership companies are to be excluded once their status changes, then the LAC recommends that coverage of those Acts should continue in respect of the period when they were SOEs. To do otherwise has adverse retrospective impacts on the rights and interests of the public to obtain information or have the conduct of the company, as an SOE, investigated. If, for example, an OIA request had been made but not resolved before the status of a company changed, then the request would be rejected

rather than considered on its merits. The same would apply if the Ombudsmen were in the course of investigating some act of the company as an SOE; the investigation would have to cease for lack of jurisdiction, even though it related solely to conduct of the company as an SOE. If that is accepted, then it should not matter if the request is made before or after the status of the company changed, so long as the request related only to matters and periods while the company was an SOE. Anything less must reduce the ability of the public to monitor the conduct of the company while it was an SOE.

Definition of the Crown

9. We note that the definition of the "Crown" in clause 45P differs from that in s 2 of the Public Finance Act. It is much broader in the Bill. We have presently been unable to identify any distinct downstream consequences of this duality, but cannot of course entirely rule out some confusion, or ingenious legal arguments!

Yours sincerely

Hon Sir Grant Hammond
Chair