4. CAPACITY AND POWERS OF CROWN ENTITIES

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Introduction

This chapter discusses the provisions of the Crown Entities Act which relate to the capacity and exercise of powers of statutory entities and, to a more limited degree, Crown entity companies and Crown entity subsidiaries. The commentary covers the generic model as covered by the Act and does not, for example, cover the exercise of powers by statutory officers whose powers must be exercised independently of an entity.[72]

Legal status

Statutory entities, Crown entity companies and Crown entity subsidiaries are all bodies corporate and are therefore legal entities which exist separately from their members, office holders, employees and, importantly, the Crown.[73] This separation is illustrated most acutely by the position of statutory entities that are corporations sole. A single person, for example, the Privacy Commissioner, may have corporate status by virtue of being declared a corporation sole. This enables an artificial line to be drawn between the person as an individual and the office as a legal person.

Crown entity status contrasts with Departments, which are legally part of the Crown.

Departments, having no separate legal status, can be established and disestablished by the Government by executive action. By contrast, a "statutory entity" can only be established or disestablished by legislation. Setting up Crown entity companies requires registration of a company with Ministers as shareholders.[74]

Capacity of statutory entities

"Capacity" describes the legal ability or qualification of an entity to do something. The general rule regarding the capacity of corporations is that:[75]

> The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential on, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

[72] Eg. the Director of Civil Aviation.
[73] Section 15 Crown Entities Act 2004 and section 15 Companies Act 1993.
[74] See Crown Entities Act, s79.
[75] *Halsbury's Laws of England*, (4th ed) Corporations, para 1137.

Further, general words in a constituent Act which if read literally would enable a statutory corporation to carry on any business or undertaking will be construed as ancillary to the dominant or main objectives for which the corporation was formed.[76]

Powers of statutory entities

The Crown Entities Act divides powers of Crown entities into:

(a) statutory powers; and

(b) natural person powers.

"Statutory" powers

In regard to the first head, section 16 of the Act provides that "a statutory entity may do anything authorised by this Act or the entity's Act."[77] These powers might include, for example, a power to issue licences, issue standards, or make decisions according to statute about funding. They may also include coercive powers.

Natural person powers

Natural person powers are conferred by section 17 of the Crown Entities Act, which provides that:

(1) A statutory entity may do anything that a natural person of full age and capacity may do.

(2) Subsection (1) applies except as provided in this Act or another Act or rule of law.

Interpretation of natural person powers

While the wording is different, there is no difference in substance between the natural person powers given to a statutory entity under section 17 of the Crown Entities Act and the powers of a company under section 16 of the Companies Act 1993, which are phrased in terms of capacity. Natural person powers include things that were traditionally set out in constituting statutes of statutory corporations such as the power to hold property, to sue and be sued, and the power to enter into binding obligations (contracts).

The Court of Appeal has made it clear that natural person powers will not be read down. In *New Zealand Kiwifruit Marketing Board* v *Beaumont*[78] that Court considered section 5A of the Primary Products Marketing Act 1953 which in subsection (1)(a) gave a

[76] *Halsbury's Laws of England*, Corporations, para 1141.
[77] Note: the "entity's Act" includes both the Act under which the statutory entity was constituted, and any other Act that expressly provides for the functions, powers, or duties of the entity - section 10(1) of the Crown Entities Act.
[78] [1997] 3 NZLR 516 (CA).

marketing authority such as the NZKMB "Except as provided in this Act….[the] rights, powers, and privileges of a natural person". Subsections (2) to (4) provided that:

> (2) A Marketing Authority does not have a power (whether or not it is a power of a natural person) if the regulations that established it provided that it does not have that power.
>
> (3) A Marketing Authority does not have a power (whether or not it is a power of a natural person) if the regulations that established it provided that its powers are limited to certain specific powers, or powers of a specified kind or description, that do not include that power.
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> (4) A Marketing Authority shall not exercise any of its rights, powers, or privileges except for the purpose of -
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> (a) performing its functions; or
>
> (b) entering into any financial transaction or financial obligation intended to [lessen risk or liability, or maximise income]

The Court found that: [79]

> The structure and purpose of section 5A is to give the board all the powers of a natural person. They are not incidental or subsidiary powers. They are primary powers and are subject only to the limitations as to their existence set out subss (2) and (3) and as to their exercise set out in subs (4).

Further, it does not appear that the courts will lightly imply a limitation on natural person powers. In the *Kiwifruit* case counsel argued that while there was no express limitation in the relevant regulations, the limitation arose by necessary implication from the legislation (Act and regulations) as a whole. In response the Court said that:[80]

> A limitation on an express power arising by necessary implication is not a conceptual impossibility, but the implication would have to arise very clearly from the constituting regulations. There is no such clear implication arising from the board's regulations.

Not surprisingly, the Courts have confirmed that the existence of natural person powers does not give a statutory entity the power to override a statute. In *Mansell v Legal Services Agency*[81] the Court of Appeal considered the appellant's contention that natural person powers gave the LSA the power to waive a statutory time limitation on the filing of applications for legal aid on the basis that the time limit was:

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[79] Above n 78, 524 Tipping J, on behalf of Richardson P, Thomas, Keith and Tipping JJ.
[80] Above n 78, 520.
[81] CA 167/03, 12 November 2004.

(a) a matter of practice and procedure;

(b) entirely for the Agency's benefit; and

(c) no public interest was involved.

The Court said that:[82]

> A natural person does not have the power to waive a statutory requirement binding on him or her.

Constraints on the exercise of powers by statutory entities

Powers must be exercised for the purposes of functions

At common law, the powers of a statutory corporation must be used for the purposes of performing its functions. For statutory entities this constraint is set out in section 18 of the Crown Entities Act, which provides:

> A statutory entity may do an act under section 16 or section 17 only for the purposes of performing its functions.

The functions of a statutory entity are defined in section 14 of the Act as:

(a) the functions set out in the entity's Act; and

(b) if the entity's Act gives the responsible Minister power to add functions, any other functions that the responsible Minister may direct the entity to perform in accordance with that Act and section 112 of this Act; and

(c) any functions that are incidental and related to, or consequential on, its functions set out in paragraphs (a) and (b).

It is of course a matter of statutory interpretation whether in any particular case, the proposed actions of an entity lie within its functions. In *New Zealand Kiwifruit Marketing Board* v *Beaumont* the Court of Appeal summarised the exercise that must be undertaken as follows.[83]

> Whether the board's [natural person powers], may be exercised depends on whether the proposed exercise is for the purpose of performing the board's functions. The dichotomy between the existence of the power and the legitimacy of its proposed exercise is inherent in the structure and language of [the empowerment section] …[The legitimacy question] will usually… involve a detailed factual inquiry against the functions of the board…. [This] aspect depends…

[82] Above n 81, para 30.
[83] Above n 78, 524.

> upon the purpose for which the power is to be exercised and whether there is a sufficient relationship between that purpose and the board's functions.

It is unclear whether paragraph (c) of section 18 of the Crown Entities Act, which extends a statutory entity's functions to include "any functions that are incidental and related to or consequential on its functions set out in paragraphs (a) and (b)" is intended to extend the law. Arguably it does no more than restate the common law position in relation to powers, as an exercise in relation to functions, partially reflecting the fact that in many cases what are now considered to be functions were in early statutes expressed as powers.[84] That is, the common law recognised that an entity's powers extended to those powers that were "necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential on, those things which the legislature has authorised".[85] It also read any general powers that would enable a corporation to carry on any activities as ancillary to the dominant or main objectives for which the corporation was formed. It is doubtful that the Courts will read paragraph (c) as enabling the performance of functions, which would formerly have been outside the "powers" of a corporation.[86]

In this regard, the question of what is incidental to an authorised business has never been an easy one as their Lordships acknowledged in *A-G v Mersey Rly Co*,[87] where the House of Lords considered whether a railway company had the power to run a bus service. In that case Lord Loreburn LC said:[88]

> The rule of law has been laid down in this House to the effect that it must be shewn that the business can fairly be regarded as incidental to or consequential upon the use of the statutory powers; and it is a question in each case whether it is so or whether it is not so.

Unhelpfully, Lord Macnaghten then went on to confirm that:[89]

> The question is this: Is the business of omnibus proprietors as the defendants were carrying it on when the action was brought reasonably

[84] But also reflecting the fact that the "power" (ie. the capacity) of statutory entities to do an act is unlikely now to be an issue.
[85] See *Halsbury* in n 75 above.
[86] For example, it appears unlikely that the existence of section 18(c) would change the outcome of a case such as *Commerce Commission v Telecom NZ Ltd* [1994] 2 NZLR 421 where the Court considered whether an inquiry conducted by the Commission into the development of competition in the telecommunications industry in New Zealand and the extent to which the regulatory framework assisted this, was within the Commission's powers. Cooke J found that the power did not relate to any of the functions of the Commission as set out in the Act and said further that "the power of inquiry and public report claimed by the Commission go beyond the incidental or the consequential: the argument stretches the principle to breaking point" (at 430). It appears likely that the Court would have come to the same conclusion if it had been asked to decide whether the inquiry was within the Commission's functions as defined by section 14 of the Crown Entities Act.
[87] [1907] AC 415 (HL).
[88] Above n 87, 415.
[89] Above n 87, 417.

> incidental to their business as authorised by their special Act? The principle to be applied is perfectly clear. The difficulty is in the application. Hundreds of cases may be suggested where the thing done comes very near the line and may fairly be open to a difference of opinion. Here, I think the respondents [defendants] have transgressed the line. It may be that in doing what they wish to do they cannot help it. If they wish to extend their undertaking beyond the limits authorised by their charter, the proper course is to apply to Parliament for further powers. In my opinion a matter of this sort is much better left to Parliament.

It is submitted that the Courts are unlikely to interpret incidental functions of a public body as including enterprises undertaken purely to derive a profit and otherwise unconnected with the entity's functions.[90] In *Hazel v Hammersmith and Fulham LBC*[91] the House of Lords considered whether a power to enter into swap transactions was "incidental" to the local authority' function of borrowing and held that it was not. Lord Templeman said that:[92]

> The authorities also show that a power is not incidental merely because it is convenient or desirable or profitable. A swap transaction undertaken by a local authority involves speculation in future interest trends with the object of making a profit in order to increase the available resources of the local authorities. … Individual trading corporations and others may speculate as much as they please or consider prudent. But a local authority is not a trading or currency or commercial operation with no limit on the method or extent of its borrowing or with powers to speculate. The local authority is a public authority dealing with public moneys exercising powers limited by [statute].

Other constraints on how powers may be exercised

There are several other provisions of the Act which constrain the exercise by a statutory entity of its natural person powers. These are discussed below.

Objectives

Section 14(2) of the Act states that in performing its functions an entity must act consistently with its objectives. "Objectives" is not defined, but would encompass objectives in the entity's Act, statement of intent and output agreements.

[90] Unless, of course, one of its functions is investment or commercial activities.
[91] [1991] 1 All ER 545 (HL).
[92] Above n 91, 556.

Directions

Under section 114(1) of the Act, a Crown entity must, in performing its functions, comply with-

> (a) any direction given to it under a power of direction in [the Crown Entities Act] or another Act; and
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> (b) any whole of government direction given to it under section 107.

Under section 114(2), "comply" means to give effect to the direction or to have regard to it, as the context requires.

Importantly, section 114(3) provides that the obligation in subsection (1) to comply with a direction applies –

> (a) except as provided in section 113; and
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> (b) to a direction given by a Minister, only if it is in writing and signed by a Minister entitled to give the direction.

The first paragraph refers to the fact that section 113 explicitly states that Ministers are not authorised by the Act to give directions:

> (a) in relation to statutorily independent functions; or
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> (b) 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.

Thus an entity that was given a direction that did not comply with section 113(1) would be entitled to submit to the Minister that it was invalid.

However, section 114(3)(b) is equally important in that it reflects the fact that, by contrast with Departments, there is no informal Ministerial power of direction of Crown entities. Directions must be formal, usually be made after consultation with the entity,[93] and must be tabled in the House.[94] Informal interference by a Minister in a Crown entity's operations would be inappropriate, as is reflected in a 1999 Cabinet Office circular which notes:[95]

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[93] See sections 108(2)(a) and 115(1).
[94] Sections 108(2)(b) and 115(2)(b) Crown Entities Act
[95] Cabinet Office Circular "Ministers' Roles and Responsibilities in Relation to Crown Entities" (24 August 1999) CO 99/13 paras 8 and 15. The circular is also referred to in the *Cabinet Manual 2001* (Wellington, 2001) para 17. The circular was issued in response to the Controller and Auditor-General's report on the New Zealand Tourism Board (May 1999), which provides graphic examples of the risks of informal interactions.

> A Minister's interactions with Crown entities must be consistent with the legislative provisions applying to the entity and nature of the arm's length relationship. It is the responsibility of the governing body of the entity to run the organisation according to its legal mandate and to take operational decisions about the entity. Crown entity governing bodies are, however, accountable to their Responsible Minister.
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> ….
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> Ministers need to be clear about which tasks they do not undertake in relation to Crown entities. Ministers are not responsible for:
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> - making decisions about an entity's management and operations, e.g. approving travel;
> - appointing the chief executive and other employees of an entity; and
> - carrying out the statutory functions of the entity.

Further, a Minister's interactions with a Crown entity should normally be through its board. The Auditor-General's 1996 report on Crown entity governance noted that while there may be occasion for the Minister to deal with the chief executive of a Crown entity, this should only take place with the full knowledge of the board, preserving the accountability of the chief executive to the board and the board to the Minister.[96]

Specific constraints

The Crown Entities Act contains certain specific constraints on the exercise of natural person powers.[97] The constraints include:

- a requirement to consult the State Services Commissioner before agreeing to the terms and conditions of employment of chief executives and, when an Order in Council is made, in collective employment agreements;[98]
- a requirement to give notice before acquiring or setting up subsidiaries, or acquiring other interests in a partnerships, joint ventures etc and setting up trusts;[99]
- constraints on bank accounts;[100]

[96] *Report of the Controller and Auditor-General on Governance Issues in Crown Entities*, November 1996, para 411 to 412.
[97] There may of course be other constraints in entities' Acts or other more general Acts eg. sections 84 to 84B State Sector Act 1988.
[98] Sections 116 and 117 Crown Entities Act.
[99] Sections 96 and 100.
[100] Section 158.

- conditions on the exercise of the powers to invest, borrow, give guarantees or indemnities, and enter into derivative transactions;[101] and

- limits on the power to indemnify and insure.[102]

While the provisions referred to in the first four bullet points are clearly worded as "conditions" on the exercise of a statutory entity's powers, the wording of the provisions referred to in the last bullet point appear to go further, and may be interpreted as a substantive constraint on the powers of the entity. This may be important in interpreting the impact of failure of the entity to comply with the constraint, as is discussed below.

Duties

While not a constraint on the entity itself, the duties of board members in carrying out their role will impact on how the entity's powers are exercised. In particular, the board has duties to ensure that the entity –

- acts in a manner consistent with its objectives, functions, current statement of intent, and output agreement (if any);

- performs its functions efficiently and effectively and consistently with the spirit of service to the public;

- operates in a financially responsible manner; and

- complies with its duties in regard to its subsidiaries.

(These duties are discussed in the next chapter.)

Thus, while an entity may not be in breach of the Crown Entities Act if it does not comply with its statement of intent in carrying out its operations, its board members may be in breach of their duties to the responsible Minister.

Board members are also required to comply with directions applicable to the statutory entity.[103]

Administrative law requirements

The Act does not alter the obligations of a statutory entity to comply with administrative law principles when exercising its statutory powers.[104]

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[101] Sections 160 to 164.
[102] Sections 122 and 123.
[103] Section 26(1)(c) Crown Entities Act 2004.
[104] These principles require entities when exercising statutory powers, among other things, to take into account relevant considerations, and not take into account irrelevant considerations; give due weight to mandatory considerations (and to do so they must have sufficient information to allow a reasonably informed decision); and to act consistently. When exercising statutory powers, entities must not use their

Who may exercise the powers of a statutory entity?

The board

Subject to the provisions referred to below (and the provisions of the entity's Act), only the board may exercise the powers of a statutory entity.

The Crown Entities Act gives the board of statutory entities the authority, in the entity's name to exercise the powers and perform the functions of the entity. All decisions relating to the operation of a statutory entity must be made by, or under the authority of, the board in accordance with the Crown Entities Act and the entity's Act.[105]

Conflicts

Board members have a fiduciary relationship with the statutory entity of which they are members. It is an inflexible rule of the law of equity that a person in a fiduciary position is not allowed to put himself or herself in a position where his or her interest and duty conflict.[106] This rule is reflected, but partly modified by sections 63 to 68 of the Crown Entities Act. However, in addition the common law rules in relation to bias will continue to apply to the exercise of statutory powers by statutory entities. These matters are discussed below.

a) The Crown Entities Act conflicts regime

Meaning of "interested"

Section 62(2) provides that a person is "interested" in a matter for the purposes of the Act if he or she:

(a) may derive a financial benefit from the matter; or

(b) 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; or

(c) may have a financial interest in a person to whom the matter relates; or

(d) 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; or

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powers for an improper purpose or act in bad faith; make a decision which they have no power to make; breach the rules of natural justice (including those relating to legitimate expectation); disable themselves from exercising discretion in individual cases (eg. by adopting a fixed rule of policy, or fettering their discretion by contract; or act irrationally - P A Joseph, C*onstitutional and Administrative Law in New Zealand*, 2nd ed, (Brookers, Wellington, 2001), chapters 21 to 23.

[105] Section 25 Crown Entities Act 2004.

[106] *Bray v Ford* [1896] AC 44.

(e) may be interested in the matter because the entity's Act so provides; or

(f) is otherwise directly or indirectly interested in the matter.

However, under section 62(3), a member is not interested in a matter–

(a) only because he or she is a member or an officer of a wholly-owned subsidiary of the entity or of a subsidiary that is owned by the entity together with another parent Crown entity or entities; or

(b) because he or she received an indemnity, insurance cover, remuneration, or other benefits authorised under the Crown Entities Act or another Act; or

(c) if his or her interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence him or her in carrying out his or her responsibilities under this Act or another Act; or

(d) if the entity's Act provides that he or she is not interested, despite this section.

A "matter" is defined in section 62(1) as meaning –

(a) a statutory entity's performance of its functions or exercise of its powers; or

(b) an arrangement, agreement, or contract made or entered into, or proposed to be entered into, by the entity.

The provisions in section 62 are loosely modeled on section 139 of the Companies Act, except that instead of defining the thresholds for interests as interests that are "material, the Act defines "material" in section 62(3)(c) in terms of whether an interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in carrying out his or her responsibilities under the Crown Entities Act or another Act. This test is lifted from section 6(3)(f) of the Local Authorities (Members' Interests) Act 1968.

Paragraphs (a) to (e) of the definition of "interested" in section 62(2) are self explanatory. Paragraph (f) is designed as a catch-all for pecuniary interests that may not fall within the relationships in paragraphs (a) to (d) and for non-pecuniary interests which could be seen to influence a member's exercise of his or her duties. In that regard paragraph (f) would catch at least matters where a member had a close relationship or involvement with an organisation that is interested in the matter.

Consequences of being interested

Sections 63 and 64 of the Act require interests to be disclosed in an interests register and to the chairperson, (or in default of the chairperson to the deputy chairperson, or in default of both the chairperson and deputy chairperson, to the responsible Minister). Section 66 of the Act then provides that a board member of a statutory entity who is "interested" in a matter involving a statutory entity–

> (a) must not vote or take part in any discussion or decision of the board or any committee relating to the matter, or otherwise participate in any activity of the entity that relates to the matter; and
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> (b) must not sign any document relating to the entry into a transaction or the initiation of the matter; and
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> (c) is to be disregarded for the purpose of forming a quorum for that part of a meeting of the board or committee during which discussion or decision relating to the matter occurs or is made.

The provision appears to leave open the possibility that board members may attend a board meeting at which a matter in which they are interested is being considered. Nor is it clear that an interested member is not entitled to receive information from the entity about the matter in which he or she is interested. However, in some circumstances it may be that members will choose not to exercise these rights.

Permissions to act

The fact that the Act does not relax the equitable rules relating to fiduciaries very far means that it is possible that in some cases a board may be left without a quorum. It appears likely that this is the reason (rather than a desire to further relax the equitable rule) that section 68 of the Act provides that in some instances a chairperson, deputy chairperson, or in the last instance the Minister, may give permission for a board member to act if "satisfied that it is in the public interest to do so".[107]

That is, in a situation where a quorum cannot be formed, the relevant person could give a permission under section 68 to allow the conflicted member to vote on a motion to delegate the matter to a committee or other authorised person. Section 68 may be particularly important for corporations sole, such as the Retirement Commissioner, who if they are interested in a matter before them could otherwise be powerless to act.

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[107][107] Note, there may also be other situations when it may be in the "public interest" for a member to be permitted to act. The commentary in the Controller and Auditor-General's *Guide to the Local Authorities (Members' Interests) Act 1968 and Non-pecuniary Conflicts of Interest* on the approach the Auditor-General takes to permitting members to act under section 6(4) of the Local Authorities (Members' Interests) Act may be useful in determining other matters that might be considered to be in the public interest (see pp 34 – 35).

The "permissions" provision means that there should never not be a quorum. This is important because there is no other default provision in the Act that would enable someone else to exercise the entity's powers in a situation of conflict.

b) Common law rules on bias

While sections 62 to 66 require disclosure when members are "interested" in relation to a statutory entity's performance of its functions, it nevertheless appears that the common law rule against bias continues to co-exist with the conflicts provisions in the Act.

Section 67(2) provides that a failure to comply with sections 63 (disclosure) or section 66 (consequences of being interested) does not affect the validity of an act "or matter". Section 67(3) then provides that subsection (2) does not limit a person's right to apply for judicial review. The result of these provisions appears to be that in an action for judicial review of a decision which is tainted by a conflict, the applicant may seek relief either on the common law ground of bias, or on the ground that section 63 or section 66 has not been complied with. The Court would have a discretion in such a proceeding as to whether to declare the transaction invalid.

At common law "bias" is divided into presumptive bias and apparent bias. Presumptive bias usually arises where a person involved in a decision has a direct pecuniary interest in the matter being decided (subject to the de minimis rule). [108] Apparent bias arises from non-pecuniary interests and is subject to a test of whether a reasonable person, knowing all the material facts, would consider that there was a real danger of bias.[109]. The Controller and Auditor-General's *Guide to the Local Authorities (Members' Interests) Act 1968 and Non-pecuniary Conflicts of Interest*[110] notes the most common risks of non-pecuniary bias are where:[111]

- your statements or conduct indicate that you have predetermined the matter before hearing all relevant information (i.e. you have a "closed" mind); or

- you have a close relationship or involvement with an individual or organisation affected by the matter.

While the Guide is directed at local authorities and covers the application of the Local Authorities (Members' Interests) Act which no longer applies to Crown entities (except for tertiary education institutions), it nevertheless provides good guidance in regard to the treatment of non-pecuniary interests that may be useful to Crown entities. The Guide notes also that in deciding whether a conflict of interest arises the Courts will take into account the type of function being exercised and that: [112]

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[108] *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, 148 to 149.
[109] *Auckland Casino* case, above n 108, 149.
[110] Controller and Auditor-General, August 2004 version.
[111] Above n 110, 41.
[112] Above n 110, 40.

> [t]hey are likely to take a strict approach with decisions that directly affect the legal rights, interests, and obligations of an individual or small group of individuals (as opposed to decisions with a large policy or political element).

Under the common law, where presumptive or apparent bias is present a decision maker is disqualified from hearing the case, unless the decision-maker discloses the personal interest and the parties waive their rights to object.[113] However, it is submitted that the effect of section 66 of the Act is that a member cannot act even where a waiver is given. To do so would not affect the validity of the act (per section 67), but would be a breach of the member's duty to comply with the Crown Entities Act. [114]

Delegations

Section 73 of the Act provides that the board of a statutory entity may delegate a function or power of the entity to one of the following:

(a) a board member or members;

(b) the chief executive or any other employee or employees, or office holder or holders, of the entity;

(c) a committee;[115]

(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.

A statutorily independent function may not be delegated to a subsidiary.[116]

Importantly, a delegation does not affect the responsibility of the board for the actions of a delegate under the delegation.[117]

Most boards will appoint a chief executive and will delegate the management of the entity and the responsibility for employing other employees to that person. However, this

[113] See Joseph, above n 104, 874 to 886.
[114] It is unclear whether the power in section 68 of the Act to permit a member to act "if satisfied that it is in the public interest to do so," would extend to situations of waiver of the right to object to bias. If it did, and such permission was given, then the member's act would not be in breach of duty.
[115] A committee to which a function or power is delegated must contain a board member (clause 14(1)(b) of Schedule 5 Crown Entities Act).
[116] Section 73(3) Crown Entities Act.
[117] Section 75(b) Crown Entities Act 2004. This situation may be contrasted with the situation under section 130(2) of the Companies Act 1993.

is no longer provided for explicitly in most Crown entity statutes.[118] Delegations must be by resolution and written notice.[119]

Committee members, but not other delegates, are covered by the conflicts provisions by virtue of clause 15(2) of Schedule 5.

Court orders requiring or restraining board members

Under section 60 of the Act, the responsible Minister or a member of a statutory entity may apply to a court for an order restraining the board or a member of the board from conduct that would contravene any requirement of the Act or the entity's Act. The responsible Minister may also apply for an order requiring the board or a member to take any action that is required to be taken under the Act or the entity's Act. The Court may make an order only if it is "just and equitable" to do so and only in respect of conduct that has not been completed.

This provision could be used, for example, to restrain a member from acting in breach of the Act's conflicts provisions.

Section 60 of the Act is modeled on similar sections in the Companies Act 1993.[120]

Use of Crown entity subsidiaries and other vehicles

The Act provides that, subject to the pre-conditions in section 96 and section 100, Crown entities other than corporations sole may acquire or set up subsidiaries or take interests in other bodies for the purposes of carrying out their functions.

Setting up Crown entity subsidiaries

Section 96 requires all Crown entities other than Crown entity subsidiaries to notify their responsible Minister before acquiring or forming a Crown entity subsidiary. A Crown entity subsidiary is, of course, not restricted to a company that would be a subsidiary of the statutory entity in terms of the pure Companies Act definition, but includes companies in which the entity's interest, together with the interest of another Crown entity, meets the subsidiary definition in sections 5 to 8 of the Companies Act.[121] Crown entity subsidiaries must notify their parent before acquiring or forming a Crown entity subsidiary.[122]

The use of the Crown entity subsidiary must also be consistent with the entity's statement of intent, (with which, as noted in the next chapter, boards have a duty to ensure that the entity acts consistently). The statement of intent must set out *how* the Crown entity

[118] The New Zealand Public Health and Disability Act 2000 is an exception.
[119] Section 73(1) Crown Entities Act.
[120] Namely, ss 164, 170 and 172 of the Companies Act 1993.
[121] See section 7(c) Crown Entities Act.
[122] Section 96(a) Crown Entities Act.

intends to perform its functions and conduct its operations to achieve its objectives. Arguably therefore, if the statement of intent does not already provide for the use of the subsidiary to carry out the function, an amendment to the statement would be necessary.[123]

Commentary on the duties attached to Crown entity subsidiaries appears in the next chapter.

Setting up associates

Section 100 provides that a Crown entity must ensure that the entity does not -

(a) acquire shares in a company that gives the entity substantial influence in or over that company; or

(b) acquire an interest in any partnership, joint venture, or other association of persons, or an interest in a company other than in its shares; or

(c) settle, or be or appoint a trustee of, a trust –

other than –

(d) after written notice to its parent Crown entity (in the case of a Crown entity subsidiary) or to the responsible Ministers (in the case of any other Crown entity; and

(e) in accordance with the procedures and conditions contained in its statement of intent or specified by the responsible Ministers; and

(f) for the purpose of the Crown entity carrying out any of its functions, and acting consistently with its objectives, under any Act and its constitution (if any).

"Substantial influence", in relation to a company, means the capacity to affect substantially either the financial or operating policies, or both, of the company.

Again, the acquisition of the new interest will either need to be preapproved in the entity's statement of intent and be in accordance with procedures in that statement, or, it appears, an amendment to the statement of intent will be necessary. The amendment may come with conditions imposed by the responsible Minister under section 100(e).

Corporations sole

Corporations sole may not form or acquire Crown entity subsidiaries. However, they may, with the approval of the responsible Minister, otherwise take interests in bodies

[123] See sections 49 and 141(1)(d) Crown Entities Act.

corporate, partnerships, joint ventures, or other associations of persons, and settle, or be or appoint a trustee.[124]

"For the purpose of carrying out its functions"

The question of whether an acquisition or other act under section 96 or 100 is *for the purposes of carrying out an entity's functions*, must be considered in the light of the overriding rule in section 18 that the powers of the entity may only be used for the purposes of performing its functions. Thus, acquisitions of interests in other associations or trusts cannot be used for the purposes of avoiding constraints in the Crown Entities Act or the entity's Act.[125]

However, one question which may arise in this context, is whether an entity can acquire, for example, a substantial interest in a company which may have among its activities matters which fall within the functions of the entity, but may also carry on other activities which do not.[126] A related issue was considered by the Court in *Takapuna City and Waitemata County v Auckland Regional Authority*,[127] in the context of whether the ARA had the power to take shares in a bus company whose business was admitted to be within the ARA's functions, but whose memorandum of association contained an objects clause which would have enabled the company to embark on activities outside the type of service covered by the ARA's Act. McMullin J said that in his opinion "it would not be proper to imply into the Act the right for the Authority to acquire the shares in a company with a memorandum containing such provisions."[128]

It is submitted that the scheme of the Crown Entities Act and changes in the companies regime mean that the *ARA* case would now be unlikely to be followed in relation to purchase of a substantial interest in a company by a statutory entity.[129] It is more likely that the Courts would now look at the actual activities being conducted by the proposed acquisition, rather than whether it was constrained by its constitution to carry out a particular activity (especially given that such restrictions are now unusual). This was the approach accepted by the majority of the High Court of Australia in *Kathleen Investments (Aust.) Ltd v Australian Atomic Energy Commission*[130] where the Court considered whether the AAEC, whose functions were limited to matters involving uranium or atomic energy, had power to take an interest in a company, Mary Kathleen Uranium Ltd ("MKU"), whose memorandum and articles neither specifically authorised uranium exploration, mining or treatment, nor limited the authorised activities of the company to mining or mining activities of any kind.

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[124] Section 101 Crown Entities Act.
[125] See discussion in *Allerdale* below n 139. Also, the general discussion regarding the validity of such actions below.
[126] This is assuming the entity's functions do not include investment.
[127] [1972] NZLR 705, HC, McMullin J.
[128] Above n 52 712.
[129] Or, for that matter, purchase of a subsidiary.
[130] (1977) 139 CLR 117.

Unfortunately the judgment of the court is in relation to a demurrer by MKU to the claim against it, so not all facts were before the Court. However, the following principles can be gleaned from the case:

- the width of the objects of the company did not necessarily mean the acquisition of the shares was outside the Commission's power. Rather, this depended on all the circumstances of the case;[131]

- a subscription might be intra vires if, for example, it was a term of some agreement, whereby MKU had agreed with the Commission to mine a specific uranium ore body, and that the Commission should provide the necessary working capital by way of a subscription of shares in MKU.[132]

As Mason J said, in relation to determining whether the purchase was within the powers of the Commission,:[133]

> We would need to know, for example, the details of, and the circumstances surrounding, the transaction so as to enable us to determine its purpose, whether it was [within the functions of the Commission].
>
> …
>
> The fact that the company is authorised to mine other minerals not associated with uranium does not of itself demonstrate that the Commission's investment is not for the purpose already stated. The capacity or authority to engage in an activity is not inconsistent with the investment having been made for the stated purpose.
>
> No doubt when the Commission subscribes for shares in a company mining uranium it will be relevant to ascertain whether the company is carrying on any other, and if so what, activities in order to determine whether the transaction falls within the Commission's function[s]. And even if the company is carrying on some other activity it may be possible to conclude that the investment is intra vires.

Following this approach, it would not necessarily be fatal that a company in which a Crown entity wishes to take a substantial interest may carry on activities other than activities that are related to the entity's functions. Rather, the purpose of the action must be considered, in all the circumstances.

Of course if the company ceased carrying on any activities which were related to the statutory entity's functions, then the entity (unless it received permission to continue with the investment under sections 160 and 161) would be forced to sell the interest. Its power

[131] Above n 130, Gibbs J at 138, para 9.
[132] Above n 130, Stephen J at 145, para 19
[133] Above n 130, Mason J at 154, paras 8 and 10-11.

to hold the shares (a natural person power) would arguably no longer meet the test in section 18.

It is noted that, while a delegation of powers and functions other than statutorily independent functions may be made to a subsidiary, it may not be made to other bodies such as a trust, unincorporated joint venture, or company in which the entity holds a minority interest, without the permission of the responsible Minister.

The statutory entity as trustee

There are several scenarios under which statutory entities may become involved in trusts, in[134]cluding –

(1) where property is transferred to or settled on trust by a third party, on trust for the benefit of the entity;

(2) where property is transferred by a third party to an entity as trustee, on trust for the benefit of a third party (or even for a group of beneficiaries including itself);

(3) where the entity settles some of its property on trust–

(i) with itself as trustee, or

(ii) with a third party as trustee –

for the benefit of a third party (or even for a group of beneficiaries including itself).

In the first case, the only role of the entity is as beneficiary. While it may have some powers in this role to enforce the trust, the legal owner of the property is the third party, and the third party's duty is to perform the trust, in accordance with the terms of the trust. The Crown Entities Act will only be relevant to the extent that it affects the entity's beneficial interest in the trust.

In the second case, while the entity is the legal owner of the property, it has a duty as trustee to comply with the terms of the trust deed. However, the trust deed may in some instances authorise matters which conflict with the entity's exercise of powers under the Crown Entities Act. Some attention is paid to this in section 161 which provides in subsection (3) that the restrictions in the section on investment do not apply to any money, security, or credit balance in a bank account held by a Crown entity on trust for any purpose or for another person. However, there is no clear exception to the bank account provision in section 158 of the Act, or other sections of the Act, so that in some cases the restrictions in the Act may apply to the entity as trustee in the second case scenario.

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It is noted that, in the second case, the entity must also comply with section 100, which provides both that a Crown entity must notify the responsible Minister *before* becoming a trustee, and that the trust must be for the purpose of its functions. If the trust was not for the purpose of its functions, the entity would need to seek appointment of a new trustee, either by the settlor, or if necessary by the courts.

The Trustee Act 1956 would not apply to the extent that it conflicted with the Crown Entities Act.[135]

In the third scenario the entity must comply with section 100 in regard to setting up the trust, and is then bound by the restrictions in its Act regarding the exercise of its powers. The Trustee Act would not operate so as to extend those powers.[136]

What if the constraints on powers are breached?

Ultra vires at common law

At common law the unauthorised activities of corporations were traditionally thought to be ultra vires and void. As Halsbury's states: [137]

> If the transaction is beyond the scope of the constitution of the corporation, it is ultra vires and void ab initio. Such a transaction cannot become intra vires by reason of ratification, estoppel, lapse of time, acquiescence or delay; nor can such a transaction be made binding on the corporation by reason of the corporation's consenting to judgment in an action brought against it on the transaction…

Further, under the common law:[138]

> where a corporation is constituted by a public Act of Parliament, all persons and corporations are presumed to know the nature and extent of its powers. Hence, if there is anything to be done which can only be done by the officers of such a corporation under certain limited powers, the person who deals with those officers must see that these limited powers are not being exceeded. Similarly, when an act has not by the constitution of the corporation been put within its powers except on the fulfilment of a condition, the persons dealing with the corporation are bound to ascertain whether the condition has been fulfilled.

This ultra vires rule existed to protect the owner or shareholders of a corporation from its board members or directors exceeding their powers. However, as was illustrated in the company context it created enormous problems for persons dealing with companies in

[135] Section 2(5) Trustee Act 1956.
[136] Section 2(5) Trustee Act 1956.
[137] *Halsbury's Laws of England* (4th ed), Corporations, para 1138
[138] *Halsbury's Laws of England*, Corporations, para 1338.

good faith and the doctrine was amended for companies by the passage of the Companies Amendment Act 1983.

The term "ultra vires" is also still sometimes used in the context of "judicial review", although the grounds of review are now considerably wider than acting in excess of power. A person affected by the exercise of a statutory power that is in excess of the authority of the relevant Act may seek to have the act declared invalid or set aside and their prior position restored as far as possible. This may involve a degree of discretion.[139]

The difference between the two different applications of the ultra vires doctrine was focused on by the English Court of Appeal in *Credit Suisse V Allerdale BC*[140], where Credit Suisse sought to enforce a guarantee entered into by the ABC without statutory authority. The Court found that there was no discretion to grant relief against a finding that the Council had no power to enter into the guarantee and that it was void and unenforceable. Hobhouse J said:[141]

> Private law issues must be decided in accordance with the rules of private law. The broader and less rigorous rules of administrative law should not without adjustment be applied to the resolution of private law disputes in civil proceedings. Public law, that is to say, the law governing public law entities and their activities, is a primary source of the principles applied in administrative law proceedings. The decisions of such entities are the normal subject matter of applications for judicial review. When the activities of a public law body (or individual) are relevant to a private law dispute in civil proceedings, public law may in a similar way provide answers which are relevant to the resolution of the private law issue. But after taking into account the applicable public law, the civil proceedings have to be decided as a matter of private law. The issue does not become an administrative law issue; administrative law remedies are irrelevant.

Ultra vires under the Act

It is against this background that sections 19 to 24 of the Crown Entities Act must be considered.

Section 19 states:

> (1) An act of a statutory entity is invalid, unless section 20 applies, if it is –
>
> (a) an act that is contrary to, or outside the authority of, an Act; or
>
> (b) an act that is done otherwise than for the purpose of performing its functions.

[139] See discussion in Joseph above n 104, 761 to 763.
[140] [1996] 4 All ER 129, (Eng CA).
[141] Above n 139, 171.

(2) Subsection (1) does not limit any discretion of a court to grant relief in respect of a minor or technical breach.

On first glance it appears that section 19 is intended to apply to both sorts of ultra vires. That is, that it is intended to operate in relation to both the natural person acts of an entity, and its acts when exercising statutory powers.[142] However this interpretation would cause real difficulties in reconciling the provision with the established law of judicial review.

In particular, such an interpretation would appear to make all acts of a statutory entity in breach of an Act invalid ab initio, whereas, as Elias J noted in *Murray v Whakatane District Council*:[143]

> It is settled law that every unlawful administrative act, except perhaps in extreme cases of clear usurpation of powers, is operative until set aside by a Court. Even where a decision is challenged by a plaintiff entitled to do so in appropriate legal proceedings, the Court is not compelled to set aside the decision: *Smith v East Elloe Rural District Council* [1956] AC 736 at p 769 per Lord Radcliffe; *A J Burr Ltd v Blenheim Borough* [1980] 2 NZLR 1 at p 4 per Cooke J. The validity of a decision is therefore a concept which is "relative, depending upon the court's willingness to grant relief in any particular situation": Wade and Forsythe, *Administrative Law* (7th ed, 1994) at p 341; *Martin v Ryan* [1990] 2 NZLR 209. The Court's wide discretion is emphasised by ss 4 and 5 of the Judicature Amendment Act 1972. It does not follow from the fact of illegality in the decision making that the decision will be set aside or, if it is, that it will be set aside ab initio. Matters relevant to the determination of the Court as to the form of relief will include the gravity of the error and its effects upon the applicant, the inevitability of the same outcome or the futility of granting relief, and questions of delay and prejudice to third parties.

For this reason, while the matter is not free from doubt, it is submitted that the Courts may well take the view that the operation of section 19 is intended to be limited to "natural person acts" as is the following section 20.[144] The Courts may be loath to adopt the alternative interpretation which would have the effect of limiting their discretion in an application for judicial review.

However, even if section 19 is read as limited to such natural person acts, it may still alter the common law position whereby an act of a corporation outside its capacity was void

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[142] "Act" is defined in section 24 as including "a transfer of property, rights, or interests to or by a statutory entity". It is used in section 18 in relation to both natural person acts and exercise of statutory powers.
[143] [1999] 3 NZLR 276, 320.
[144] "Natural person acts" are defined in section 24 as acts that a natural person of full age and capacity can do (whether or not the act is something that is also authorised by an Act); and as including entry into a contract for, or relating to, acquisition of securities or borrowing; a derivative transaction; the purchase, leasing, or sale of, or other dealings with, property; and the employment, or engagement of the services, of a person. However, such interpretation may not be aided by the existence of section 19(2), which appears to be a reference to the Court's discretion in a proceeding for judicial review.

and could not be validated, but an act that was within capacity, but was in breach of statute was not necessarily so. In this regard, Keith J noted in *The Trustees of the K D Swan Family Trust v Universal College of Learning*:[145]

> Not every action in breach of a legal obligation is illegal and void… The nature of the obligation has to be considered. So, too, must the other means for ensuring and promoting compliance with the obligation.
>
> …The law has traditionally been less censorious of failure to comply with rules about the manner of the exercise of powers than of failure to keep within the substantive limits of the powers themselves.

Section 19 appears to cut through these nuances to make all unauthorised acts of an entity invalid – whether they are outside an entity's capacity, or in breach of provisions in an Act.

Ultra vires and natural person acts – section 20

Section 20 provides that:

> (1) Section 19, or any rule of law to similar effect, does not prevent a person dealing with a statutory entity from enforcing a transaction that is a natural person act unless the person had, or ought reasonably to have had, knowledge –
>
> (a) of an express restriction in an Act that makes the act contrary to, or outside the authority of, the Act; or
>
> (b) that the act is done otherwise than for the purpose of performing the entity's functions.
>
> (2) A person who relies on subsection (1) has the onus of proving that that person did not have, and ought not reasonably to have had, the knowledge referred to in that subsection.

This provision is considerably more complex than the protections in regard to ultra vires acts of companies in sections 17 and 19 of the Companies Act 1993 and raises several issues, including as to what would be considered an express restriction; what knowledge will be imputed; and how the provision fits with the general law. More fundamentally, it also raises the question of what "enforcement" of a transaction means for a statutory entity. The provision does not go so far as to validate a transaction that is invalidated by section 19, but rather gives one party the right to enforce it. Does that mean that the other

[145] CA 255/02, 23 September 2003, para 17 -18.

party to the transaction, the statutory entity, has no rights on its part to enforce reciprocal obligations in the invalid transaction?

"express restriction in an Act that makes the act contrary to, or outside the authority of, an Act"

The meaning of this provision is important, because section 20 explicitly applies to transactions that will be restricted under the Act's financial powers regime, such as derivative transactions. Under section 164 of the Act a Crown entity must not enter into a derivative transaction *other than as provided in section 160*. Section 160 provides that section 164 applies "subject to" regulations, joint approvals of the Minister of Finance and the responsible Minister, the entity's Act and any exemption given to the entity under the Crown Entities Act.

Fisher J recently consider the term "express limitations or restrictions" in *Bridgecorp Finance Ltd v Proprietors of Matauri X*[146] in the context of an order for incorporation of a Maori incorporation. He stated:

> In a legal context "express" means definitely formulated and explicit, stated in express, direct and positive terms, as distinct from implied: *Walton v Bank of Nova Scotia* [1964] 1 OR 673 (Ont CA) at p682, affirmed in (sub nom) *Eisenberg v Bank of Nova Scotia* [1976] SCR 681.

He said further that:

> A limitation or restriction in an order of incorporation could be "express" only if it directly and specifically limited the incorporation's powers.

However, section 20(1)(a) does not appear just to relate to limitations on powers (ie. authority) but covers restrictions that make the act "contrary to an Act". On one interpretation that would include preconditions, such as those in section 160.

On this point, it may be pertinent that the Courts have generally held that failure to comply with similar precondition provisions renders an exercise of such a power invalid.[147]

"knowledge"

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[146] [2004] 2 NZLR 792, 806.

[147] See for example, *Broadlands Finance Ltd v Waiapu Hospital Board*, High Court, Gisborne, A 26/94, 19 April 1988, where Barker J considered a contract that had been entered into by the Hospital Board without the requisite Ministerial consent and held it illegal. Also in *The Trustees of the KD Swan Family Trust v Universal College of Learning* , above n 144, where the failure to obtain the consent of the Secretary of Education rendered a transaction illegal.

The Act gives no guidance as to what would constitute knowledge, but it must be implicit that knowledge of the contents of the Act will not imputed as it was under the common law.[148] Nevertheless, it may be that neither is actual knowledge required.

In this regard, when considering the proviso to section 18 of the Companies Act, which similarly refers to knowledge that a person dealing with a company has or ought to have, Andrew Beck opines that:[149]

> It is highly probable that the concept of "knowledge" within the proviso is intended to extend beyond situations where the persons dealing with the company have full subjective knowledge of the relevant defect. It almost certainly can be taken to include circumstances where persons dealing the company willfully shut their eyes, or stop their ears, to prevent their being informed of facts constituting the relevant defect.[150]

The question of what a person dealing with a company "ought to know" was considered in *Equiticorp Industries Group v The Crown (No 47)*[151] where Smellie J having reviewed the authorities, stated that he preferred the view that the words differ from the common law concept of "put upon inquiry" and require something more.

Importantly, section 20(2) provides that it is the person relying on subsection (1) of section 20 that has the onus of proving that the person did not have, and ought not reasonably to have had, the knowledge referred to in that subsection.

The issues raised by section 20 mean the section is likely to be fertile ground for opinions by lawyers. However, more importantly the issues also mean that it would be prudent for those dealing with statutory entities who do have knowledge of a restriction in the Crown Entities Act, such as the financial powers regime, to seek comfort from the entity with which they are transacting before entering into the transaction. Statutory entities should not therefore be surprised to be asked for certificates in relation to compliance with the Act's restrictions. While this will not assist the application of section 20 for those transacting with the entity - the section does not offer assistance to those who know of a restriction but wrongly believe that any conditions have been met -, it may help in an action under other statutes, such as those referred to below, or in an action for misrepresentation should the information given prove to be untrue.

The time at which knowledge is determined is the date of the transaction.[152]

Other relevant law

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[148] See *Halsbury's* Corporations, para 1338.
[149] Andrew Beck "Company Transactions" , in *Morison's Company & Securities Law* (LexisNexis NZ Ltd, looseleaf, March 2004), para 25.33.
[150] See *White v White* [2001] 1 WLR 481 (HL).
[151] [1998] 2 NZLR 481, 724.
[152] *Perkins v National Australia Bank Ltd* (1999) 30 ACSR 256.

Section 20(4) provides that, for the avoidance of doubt, the section does not affect any person's other remedies (for example, remedies in contract) under the general law. The Select Committee report on the provision noted the provision's intention that the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979 should continue to apply. This is consistent with dicta in *Harding v Coburn*[153] and *NatWest Finance Ltd v South Pacific Rent-a-Car Ltd* where the Court suggested that the fact that an Act might contain a limited remedy in relation to an illegal contract did not necessarily tell against the discretionary remedies in the Illegal Contracts Act applying.[154]

Having said that, it does not, of course, necessarily follow that a remedy will be given under the Illegal Contracts Act, for example, if a derivative transaction is entered into in breach of sections 160 and 164. In this regard, the clear purpose of the restrictions on the exercise of financial powers may tell against exercise of the discretions available under the Illegal Contracts Act. For example, in *Broadlands Finance Ltd v Waiapu Hospital Board*[155] Barker J declined to validate a contract which had been entered into without the requisite Ministerial consent under the Illegal Contracts Act 1970 as "one of the principal aims of the [Hospitals Act 1957] is to require strict Ministerial supervision and control of publicly-funded hospital boards" and "there are wider considerations of public interest, when considering ultra vires conduct in respect of a statutory body".[156]

Dealing between statutory entities and third parties – section 23

There are various procedural matters that could mean that acts of a statutory entity are invalid, (for example, a resolution of the board when there is not a quorum will be invalid; or a meeting will be invalid if the notice of meeting requirements were not met and this irregularity was not waived by all members attending the meeting without protesting the irregularity, or by all members agreeing to the waiver of the irregularity *before* the meeting.[157]) While the Crown Entities Act does not go so far as to provide that a statutory entity may not rely on any failure to comply with the Crown Entities Act in an action by a third party (as is found in relation to companies in section 18(1)(a) of the Companies Act 1993), it does provide some protection for third parties transacting with the entity in good faith.

Section 23, which is based on section 18(1)(b) to (e) of the Companies Act, provides –

> (1) A statutory entity may not assert against a person dealing with the entity that-

[153] [1976] 2 NZLR 577, 584.
[154] Obiter of Cooke J in *Harding v Coburn*, approved by the Court of Appeal in *NatWest Finance Ltd v South Pacific Rent-a-Car Ltd* [1985] 1 NZLR 646, 657
[155] Above n 146.
[156] Above n 146, 22-23. Note, Barker J appears to have been using the term "ultra vires" in a broad sense, rather than in the sense of lack of capacity.
[157] Schedule 5, cl 7(4), Crown Entities Act.

(a) a person held out by the statutory entity to be a member, office holder, chief executive, employee, or agent of the statutory entity (as the case may be) -

(i) has not been duly appointed in that capacity or has ceased to be appointed in that capacity; or

(ii) does not have the authority to exercise a power which, given the nature of the statutory entity, a person appointed to that capacity customarily has authority to exercise; or

(iii) does not have the authority to exercise a power that the statutory entity holds him or her out as having; or

(b) a document issued on behalf of the entity by a member, office holder, chief executive, employee, or agent of the entity with actual or usual authority to issue the document is not valid or genuine.

(2) However, a statutory entity may assert any of those matters if the person dealing with the statutory entity has, or ought reasonably to have, knowledge of the matter.

(3) Nothing in this section affects a person's right to apply, in accordance with the law, for judicial review.

A "person dealing" with the entity means the other party to the transaction, if the act of the statutory entity is a transaction, and includes a person who has acquired property, rights, or interests from a statutory entity.[158]

Section 23 partly reflects the "indoor management" rule, otherwise known as the "rule in *Turquand's* case.[159] The section means that statutory entities cannot rely on some procedural irregularities, for example perhaps, in delegating, to unwind transactions.

However, it is unclear whether section 23 is intended to be a code. In a company law context it has been suggested that section 18 of the Companies Act may not be a code, but may leave other parts of the indoor management rule intact.[160] It is possible this view would be taken in relation to statutory entities.

It is noted the Act does not replicate section 18(2) of the Companies Act, which provides that the third party protections in section 18(1) apply even where there has been fraud or

[158] Section 24 Crown Entities Act. Again, while the section on it face appears to apply to all acts of a statutory entity, this definition, and section 23(3) suggest that its main application will be to natural person acts of a statutory entity.
[159] *Royal British Bank v Turquand* (1856) 6 E & B 327.
[160] See Beck, above n 148, para 25.22

forgery (unless the person dealing with the company had actual knowledge of the fraud or forgery). The intention of this omission appears to be that the statutory entity, as principal, will not be bound by the fraudulent acts of its agents.[161]

Again, the limits of the provision mean that the area may be a ripe one for legal opinions.

Other validation provisions

Section 34 and 35 of the Act provide clarification of the legal situation where there is doubt about the authority of a member to act. Section 34 provides that the acts of a person as a member, chairperson, or deputy chairperson of a statutory entity are valid even though-

(a) a defect existed in the appointment of the person; or

(b) the person is or was disqualified from being a member; or

(c) the occasion for the person acting, or for his or her appointment, had not arisen or had ended.

Section 35 provides that the appointment of a person as a member, chairperson, or deputy chairperson of a statutory entity is not invalid only because a defect existed in the appointment of the person. However this section does not apply to -

(a) a defect in the qualifications for appointment of a member, chairperson, or deputy chairperson; or

(b) a member of a statutory entity who is appointed under the entity's Act by election.

Ratification

Statutory entities are bound by the same general agency principles as those that apply to individuals or companies. This means that even where the acts of its agents (members or employees) were unauthorised, they may be ratified by the entity if the acts were otherwise within its powers.

Breach of conflicts of interest provisions

Section 67(2) of the Act provides that a failure to comply with the obligation to disclose an interest under section 63, or acts of members in breach of section 66, do not affect the validity of an act. However, under sections 69 to 72 a natural person act[162] may be avoided by the entity within 3 months of the affected act being disclosed to the

[161] Although see discussion of this in Beck, above n 148, para 25.41.
[162] The definition of "natural person act" appears in section 24.

responsible Minister, if the entity did not receive fair value. The provisions relating to avoidance are modeled on similar Companies Act provisions.[163].

Section 67(3) provides that subsection (2) does not limit the right of a person to apply for judicial review.

Judicial review

Exercise of "statutory powers" by statutory entities will of course be subject to judicial review. Judicial review has been called:[164]

> …a judicial intervention to secure that decisions are made by the executive or a public body according to law even if the decision does not otherwise involve an actionable wrong.

With the possible, but extremely important exception of section 19, the Act generally does not affect judicial review.[165] However, case law shows that the question of what is a reviewable exercise of a statutory power is not always clear.

For example in *Royal College of Surgeons v Phipps*[166] the Court of Appeal emphasised that review is available not simply in respect of powers that are conferred *by* the constitutional document, but also in respect of powers which are contracted *under* it. The Court concluded that in that case both the constitutional document and the contract were necessary for the inquiry to be undertaken. Thus, in some situations, a combination of statutory and contractual powers may be subject to judicial review. However, purely commercial decisions may not be subject to judicial review. It appears that the point at which a private commercial operation merges into a public one attracting judicial review and public law duties ultimately involves a question of degree.[167]

> in appropriate situations, even although there may be no statutory power of decision or the power may in significant measure be

[163] Namely sections 141-142 of the Companies Act.
[164] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 388 (PC).
[165] Judicial review in New Zealand is usually conducted under the Judicature Amendment Act 1972. McGechan's commentary on that Act (JA Intro.01.vol 11, 4-3) concludes that:

> At the risk of oversimplification, it might be said that a reviewing Court may intervene in a decision-making process of Government-related authorities and of other bodies who have the power to affect the affairs of the public if the decision or decision making process employed by any such authority or body is:
>
> (a) considered to be in excess of its power; or
> (b) procedurally unfair; or
> (c) flawed in the sense that, for example, it
> (i) is based on a misunderstanding of facts, or
> (ii) is based on an error of law, or
> (iii) has taken irrelevant matters into account, or
> (iv) is entirely unreasonable.

[166] [1999] 3 NZLR 1, 12.
[167] *O'Leary v Health Funding Authority* 6 June 2001, CP 129/00 HC Wellington, Chisholm J at para 24,.

> contractual, [the Courts] are willing to review the exercise of the power…

Crown entity companies

General

Crown entity companies are governed by the Companies Act and there are several good commentaries on the provisions of that Act. The synopsis below is therefore limited to the areas in which the Act provides that Crown entity companies differ from other companies.

Powers

Like statutory entities, Crown entity companies have the capacity (ie. the power) to do any natural person act. However, this may be constrained by the Crown Entities Act, their Act or by their constitution. While constitutions are optional for other companies, all Crown entity companies must have a constitution which must contain a statement that the company is a Crown entity (section 18).

Directions

Crown entity companies may be subject to whole of government directions under section 108 of the Act and any directions given under the entities' Acts. Crown entity companies are not subject to any directions as to government policy under the Crown Entities Act.[168]

In performing its functions, 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 section 107 of the Crown Entities Act.[169]

Ministers are not authorised to give directions that impinge on the independence of Crown entity companies in the manner set out in section 113. The obligation to comply with a direction is subject to section 113, and to the requirement that the direction be in writing and signed by the Minister.[170]

Specific constraints

The Crown Entities Act contains certain specific constraints on the exercise of Crown entity companies' powers. There may of course be other constraints in entities' Acts, the Companies Act[171] or other Acts that are also relevant.[172] The constraints in the Crown Entities Act are:

- a requirement to consult with the State Services Commissioner before agreeing to

[168] Section 105 Crown Entities Act.
[169] Section 114(1) Crown Entities Act.
[170] Section 114(3) Crown Entities Act.
[171] Eg. in section 162 on indemnities of directors.
[172] Eg. sections 84 to 84 State Sector Act 1988.

the terms and conditions of collective employment agreements, if an Order in Council has been made to this effect;[173]

- conditions on the acquisition of subsidiaries, interests in joint ventures etc;[174]
- conditions on bank accounts;[175]
- conditions on the exercise of the various financial powers.[176]

Duties

In exercising the Crown entity company's powers, the board has duties to its shareholding Ministers to ensure that the company –

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

Thus, while a Crown entity company may not be in breach of the Crown Entities Act if it does not comply with its statement of intent in carrying out its operations, its board may be in breach of their duties to the shareholding Ministers in this regard.

Administrative law requirements

Decisions of Crown entity companies that are made under a "statutory power of decision" will need to comply with administrative law requirements.[177]

The interface between the Crown Entities Act and the Companies Act for Crown entity companies is set out in section 85 of the Act.

Crown entity subsidiaries

The Crown Entities Act has a limited effect on the capacity or powers of Crown entity subsidiaries. While there is an extensive regime in sections 97 and 98 for constraining subsidiaries' actions, those obligations are placed on the parent Crown entity rather than the subsidiary itself. For example, Ministers may not give directions to Crown entity subsidiaries, but their parent or parents must ensure that they comply with Ministerial directions given to it or them.

The following provisions of the Act may, however, constrain Crown entity subsidiaries in exercising their powers –

[173] Sections 116 and 117 Crown Entities Act.
[174] Sections 96 and 100.
[175] Section 158.
[176] Sections 160 to 164. Although it is noted that all the existing Crown entity companies except Radio New Zealand Ltd have exemptions from these sections.
[177] See discussion in relation to statutory entities.

- sections 96, 97, 99, 100 and 102 (which set out the conditions on the acquisition of subsidiaries, interests in joint ventures etc by all Crown entities);[178]

- section 158 (conditions on bank accounts);[179]

- sections 160 to 164 (conditions on the exercise of the various financial powers).[180]

On the last point, the Act provides that the financial powers provisions apply to a Crown entity subsidiary as they apply to its parent. Therefore if the subsidiary's parent is exempted from one or more of sections 160 to 164, those same sections will not apply to the subsidiary.

Where there is doubt about how the Act applies to a multi-parent Crown entity subsidiary, section 99 provides that the responsible Ministers of the parents must agree on the restrictions and obligations to apply.

The interface between the Crown Entities Act and the Companies Act for Crown entity subsidiaries is set out in section 102 of the Act.

[178] Sections 96 and 100.
[179] Section 158.
[180] Sections 160 to 164. Although it is noted that all the existing Crown entity companies except Radio New Zealand Ltd have exemptions from these sections.