

Treasury Report: MOM Bill: Further Policy Issues

Date:	1 February 2012	Report No:	T2012/145
--------------	-----------------	-------------------	-----------

Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Bill English)	Approve recommendations	Friday 3 February 2012
Associate Minister of Finance (Hon Steven Joyce)	Note	None
Minister for State Owned Enterprises (Hon Tony Ryall)	Approve recommendations	Friday 3 February 2012

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Dieter Katz	Principal Advisor, Commercial Transactions Group	917 6264 (wk)	<i>[Withheld under s9(2)(a)]</i> ✓
Chris White	Manager, Commercial Transactions Group	890 7256 (wk)	

Minister of Finance's Office Actions (if required)

None.

Enclosure: Yes (attached)

Treasury Report: MOM Bill: Further Policy Issues

Purpose of Report

1. This report:
 - recommends that the MOM Bill should provide flexibility to allow future reconstructions and mergers of MOM companies, and
 - advises you of the Chief Ombudsman's views on the proposal to remove the MOM companies from the ambit of the Official Information Act (OIA) and the Ombudsmen Act (OA).

Analysis

Flexibility for Reconstructions and Mergers

2. We consider the following to be a minor policy issue which you have delegated authority to decide under CAB Min (11) 43/2.
3. The MOM Bill provides for MOM companies to be removed from the State-Owned Enterprises Act 1986 and to be added to a new schedule 5 of the Public Finance Act 1989. That Act will contain the provisions that require the Crown to retain at least 51% of voting rights and limit individual holdings other than the Crown to a maximum of 10% of voting rights.
4. A question has arisen as to whether provisions akin to s.80(2)(a) of the Crown Entities Act 2004 and s.10A(1) of the State-Owned Enterprises Act 1986 should be included in the MOM Bill.
 - S.80(2)(a) of the Crown Entities Act provides that notwithstanding the general restriction on Ministers disposing of shares, a Minister may dispose of shares as part of a reconstruction or merger in which the Crown's interest in the shares of the company is not diluted.
 - S.10A(1) of the State-Owned Enterprises Act provides that companies may be added to schedules 1 and 2 by order in council.
5. The MOM Bill as currently drafted does not provide Ministers with the flexibility to merge or reconstruct the MOM companies once they are listed on Schedule 5 if this would result in a disposal of shares in one or more of the companies beyond 49%.
6. At present we do not foresee any prospect of the Government wanting to merge any of the MOM companies. We also do not anticipate any reconstructions (which could include splitting a MOM company into two). There are sometimes valid reasons for company mergers and, in particular, reconstructions. It is difficult to anticipate future business needs and it would seem to be prudent to permit the Crown as shareholder to allow such changes, if they are commercially justified and so long as the legislative requirements concerning minimum 51% Crown ownership and maximum 10% individual ownership by other parties are not compromised. Not doing so could in some circumstances unduly constrain the companies and the Crown as shareholder. We understand the Government did not intend to constrain the MOM companies' operational freedom beyond the 51% and 10% restrictions already provided for.

7. We therefore consider that a provision akin to s.80(2)(a) of the Crown Entities Act and a provision that allows companies to be added to the list of mixed ownership model companies in schedule 5 of the Public Finance Act should be included in the MOM Bill.

Risks

8. There is a risk that providing for the disposal of shares for the purposes of reconstructions or mergers could create a perception that the Government is creating a loophole out of its commitment to ensure Crown control of the MOM companies. This will not be correct because the 51% minimum Crown shareholding will apply regardless of any reconstruction or merger.
9. There is also a risk that the ability to add companies to schedule 5 of the Public Finance Act may create a perception that the Government intends to move more SOEs into the mixed ownership model. Again, this will not be possible because no shares in SOEs could be sold without first passing legislation to take them out of the SOE Act.

Application of Official Information Act and Ombudsmen Act

10. In order to implement the Government's mixed ownership model programme, Cabinet agreed that we should proceed with drafting instructions that include removal of the MOM companies from the ambit of the OIA and the OA, subject to consultation with the Chief Ombudsman (CAB Min (11) 43/2 refers).
11. We have now received a letter from the ombudsmen setting out their views. A copy is attached. In short, they consider that:
 - it would be highly desirable for the OA and the OIA to continue to apply to the MOM companies for a number of positive reasons set out in their letter, and
 - they also disagree with the arguments we put forward for removing the MOM companies from the ambit of the OA and OIA.
12. Our interpretation of the ombudsmen's position is that they are focused on legal ownership of the companies and the signals that sends regarding accountability. The Treasury's views are based on drawing a distinction between the functions that are unique to Government, and the competitive role of commercial entities.
13. In other words, in their dealings with Government agencies, people have little choice and no easy remedies if they face poor service. The ombudsmen therefore play an important role.
14. But in the case of commercial entities operating in a competitive environment, the best and ultimate remedy people have is to shift their business to another provider. This is true for people both as consumers of services and as investors/owners. The risk of losing customers provides strong incentives for the companies to be client-focused, and the risk of losing or disappointing shareholders and facing a falling share price incentivises the companies to operate efficiently.
15. Other arguments for taking the companies out of the ambit of the OA and OIA, which were discussed in the Cabinet paper, include:
 - Ministers of the Crown and officials will themselves continue to be subject to the OIA, and officials will continue to be subject to the OA
 - application of the OA and OIA would place the MOM companies at a competitive disadvantage

- Air New Zealand is not subject to the OA or OIA, and
 - the companies will be subject to the Stock Exchange's continuous disclosure regime.
16. If the MOM Bill provides for the MOM companies to be taken out of the ambit of the OA and OIA, then it is likely that the Chief Ombudsman will make a submission to the Select Committee that will review the Bill.

Recommended Action

17. We recommend that you:

- a **note** that Cabinet has delegated to you the authority to "make minor policy decisions relating to the draft MOM legislation" (CAB Min (11) 43/2 refers)

Flexibility for reconstructions and mergers

- b **agree** that the MOM Bill should provide that a Minister may dispose of shares as part of a reconstruction or merger in which the Crown's voting rights in the company is not diluted below 51%

Agree/disagree.
Minister of Finance

Agree/disagree.
Minister for State Owned Enterprises

- c **agree** that any reconstructed or merged MOM companies may be added by order in council to the list of mixed ownership model companies in schedule 5 of the Public Finance Act 1989

Agree/disagree.
Minister of Finance

Agree/disagree.
Minister for State Owned Enterprises

Application of Official Information Act and Ombudsmen Act

- d **note** the Ombudsmen's views in the attached letter, and
- e **agree** that the MOM companies should be removed from the ambit of the Official Information Act 1982 and the Ombudsmen Act 1975.

Agree/disagree.
Minister of Finance

Agree/disagree.
Minister for State Owned Enterprises

Chris White
Manager, Commercial Transactions Group

Hon Bill English
Minister of Finance

Hon Tony Ryall
Minister for State Owned Enterprises

Our Ref: 8-51

20 January 2012

Mr Gabriel Makhlouf
Chief Executive and Secretary to the Treasury
The Treasury
PO Box 3724
Wellington 6140

By email: Andrew.Blazey@treasury.govt.nz; Dieter.Katz@treasury.govt.nz

Dear Mr Makhlouf

**MIXED OWNERSHIP PROGRAMME
APPLICATION OF THE OMBUDSMEN ACT AND OFFICIAL INFORMATION ACT**

Andrew Blazey and Dieter Katz of the Commercial Transactions Group have invited the Ombudsmen's comments on the proposal to remove the mixed ownership model (MOM) companies from the ambit of the Ombudsmen Act (OA) and Official Information Act (OIA).

We understand that this is one of a number of changes under consideration, including the removal of ministerial powers to give directions and obtain information,¹ and the good employer and social responsibility requirements of the State-Owned Enterprises (SOE) Act.² We note that the cumulative effect of the changes under consideration will be to substantially diminish ministerial and public oversight of the MOM companies.

In such a context, we consider it would be highly desirable for the OA and the OIA to continue to apply to the MOM companies for a number of reasons, including the fact that there appears to be no necessity for companies that are currently subject to those Acts to cease to be so subject apparently solely on the ground that up to 49 per cent of the shares in those companies are proposed to be made available for sale to private sector interests.

¹ Sections 13, 14 and 18 of the State-Owned Enterprises Act.

² Section 4.

The MOM companies will continue to carry on the same operations as they do at present, and the Crown, as majority shareholder, will continue to have the determinative voice on all shareholder decisions. It is therefore difficult to see a principled reason for diminishing their OA and OIA accountability to the public (on whose behalf the majority shares will still be held), particularly in circumstances where it is proposed that their current accountability to Ministers under the SOE Act be diminished.

The decision to retain majority Crown ownership sends an important signal about the importance to New Zealand's interests of these companies, and the role they play in the state sector. In our view the proprietary rights of the public in the MOM companies, coupled with the impact their activities have on the lives of individual members of the public, suggest that the current measure of accountability should remain, and not be limited to such rights as are accorded to ordinary shareholders in the private sector.

The MOM companies will continue to be "*public entities*" for the purpose of the Public Audit Act because they are controlled by the Crown. It is significant that "*council-controlled organisations*" – which are defined as companies in which one or more local authorities has 50 per cent or more of the voting rights, or the right to appoint 50 per cent or more of the directors – are subject to the OA and the Local Government Official Information and Meetings Act.³ While there are some specified exclusions from that definition, the general principle appears to be that where an entity that is subject to the OA and/or OIA continues to be owned more than 50 per cent by the Crown (or a local authority), they should remain subject to those public sector accountability requirements.

We address below some of the reasons put forward for removing the MOM companies from the ambit of the OA and OIA. These reasons are derived from the legislative implications section of the draft Cabinet paper shared by Mr Katz in October 2011. We do not understand the current advice to Government to have altered in any material respect since then.

MOM companies are not involved in matters of administration

The draft Cabinet paper states that the MOM companies do not fit well within the purposes of the OA and OIA because they "*do not have a role in the administration of laws and policies*" and "*play no role in the government's administrative practice*".

With respect, this is far too narrow an interpretation of the concept of "*administration*" in the context of the OA. The precedent case in this area held that the conduct of business is fully capable of falling within the meaning of the phrase "*matter of administration*", and only legislative and judicial acts fall to be excluded:

"There is nothing in the words 'administration' or 'administrative' which excludes the proprietary or business decisions of governmental organisations. On the contrary, the words are fully broad enough to encompass all conduct

³ Section 74 of the Local Government Act.

engaged in by a governmental authority in furtherance of governmental policy – business or otherwise.

...

In my view, the phrase ‘a matter of administration’ encompasses everything done by a governmental authority in the implementation of government policy. I would exclude only the activities of the legislature and the courts from the Ombudsman’s scrutiny”.⁴

State-owned enterprises (whether wholly or majority state owned under the mixed ownership model) may act unfairly or unreasonably just as government departments do. The problems the Ombudsmen investigate are problems of human failings, organisational inadequacies, and remoteness caused by bureaucratic structure. All of these can exist in commercial enterprises, as well as in government departments.

In terms of the OA, the actions and decisions of MOM companies do relate to “*matters of administration*” affecting individuals in their personal capacities, including the provision (and cessation) of essential services and conduct of operations which impact directly on local communities.

Other agencies will be subject to the OA or OIA

The draft Cabinet paper states that “*Ministers of the Crown and officials will themselves continue to be subject to the OIA and the OA*”. This is not correct. Ministers are *not* subject to the OA. While Ministers and departments are subject to the OIA, this will not address the significant gap that would be created by excluding the MOM companies themselves.

The ability to request official information about the MOM companies will depend on whether it comes to be held by a Minister or agency subject to the OIA. Less information may come to be held by Ministers given they may no longer have the ability to require information under section 18 of the SOE Act. As the draft Cabinet paper notes, MOM companies could still choose to make information available “*provided an appropriate confidentiality deed is entered into*”. Therefore even information that is supplied voluntarily may be subject to confidentiality requirements, which may restrict its availability under the OIA.

Competition provides adequate protection

We understand there may be a suggestion that sufficient protection may be derived from the fact that the MOM companies operate in a competitive environment. The draft Cabinet paper states:

“The companies’ activities are of a commercial nature. They operate in a competitive environment and are subject to contract law. Customers have the usual contractual and consumer law remedies available to them as well as the ability to ‘walk’, i.e. to shift their business to another company.”

⁴ *Re British Columbia Development Corporation and Friedmann* (1984) 14 DLR (4th) 129.

We would observe that the competitive environment cannot always be relied upon to facilitate a fair and just provision of goods and services. Although private remedies exist, their cost may make them prohibitive for some people. In contrast, access to the Ombudsmen's services is free, and can lead to better public accountability and improved decision-making and service delivery.

The focus on "*customers*" also obscures the fact that it is not just consumers who stand to be disadvantaged by the administrative conduct of MOM companies. The activities of the MOM companies, which include electricity generators / retailers and a coal mining company, can have significant environmental impacts. Affected persons may have recourse to the Environment Court. However, the OA provides a low-cost and informal means of resolving complaints about the administrative conduct of MOM companies; and the OIA enables citizens to be informed about the activities of the MOM companies as they affect both the community and them personally. In recent years, for instance, some people have used the OIA to obtain information about controversial electricity generation projects such as wind farms.

Application of the OA and OIA would place the MOM companies at a competitive disadvantage

The draft Cabinet paper notes the possibility that investors worried about the extent to which commercially valuable information can be protected from companies' competitors may discount the prices of the shares compared with the shares of companies not subject to the OIA.

This suggestion seems speculative at best. There are likely to be other positive factors associated with the Crown's retention of majority ownership that would balance or outweigh any concern that might occur to potential investors in this regard. For instance, it could just as easily provide a potential marketing advantage for a MOM company that its investors and customers enjoy the benefit of an independent review procedure not available to those of its private sector counterparts.

In our view, the OIA has provided adequate protection for information of a commercially sensitive nature, the disclosure of which would disadvantage the commercial operations of the MOM companies. We are not aware of any case where the release after review by an Ombudsman of information which an SOE initially deemed to be commercially sensitive has in fact been shown to have adversely affected the business operations of that organisation.

The Law Commission is also considering the appropriateness of whether there should be additional grounds for withholding information where disclosure would be likely to prejudice the competitive position or financial interests of an agency.

The draft Cabinet paper also notes "*the SOEs consider that the administrative compliance costs of the OIA in particular impose a significant cost burden on them*". You will be aware that the Parliamentary Select Committee which reviewed the application of the OA and OIA to SOEs in 1990 concluded there was "*not sufficient evidence that the additional costs borne by SOEs are generally significant and that alternative costs would not have been incurred*" (paragraph 4.8).

We do not have information about the number of OIA *requests* received by the MOM companies, and the cost involved in processing such requests (we wonder whether the companies have supplied evidence of such to the Treasury). We do not dispute that there is some cost, but like the Select Committee in 1990, we consider that *“this needs to be balanced against the benefits to the community of access to information and the potential costs of other forms of remedy”* (paragraph 4.8).

We do have information about the number of OIA *complaints* received against the MOM companies (see table 1). As you can see, the number of OIA complaints received annually is small, and in some cases no OIA complaints were received. To put this in perspective we **enclose** an appendix showing the number of OIA complaints received against a selection of Ministers and central government agencies in the same period.

Table 1: OIA complaints received 1 July 2006 – 30 June 2011

	2006/07	2007/08	2008/09	2009/10	2010/11	Total
Genesis	1	-	1	-	-	2
Meridian	1	2	3	5	2	13
Mighty River Power	-	-	1	-	-	1
Solid Energy	1	4	1	1	4	11

On average (based on figures over the past five years) an OIA complaint costs \$1572 for the Office of the Ombudsmen to resolve.⁵ By far the greater proportion of work involved in a complaint is done within the Office of the Ombudsmen and not in the respondent agency, so it is reasonable to assume that the cost per complaint for a respondent agency is no greater than, and presumably less (if the agency is efficient) than the figures for the Office of the Ombudsmen. The volume of complaints against the MOM companies would have to be many times greater than present to result in a level of cost that could prejudice the enterprise's competitive position.

In addition, we do not consider that the application of the OA to the MOM companies could result in any significant costs on their part. The following table records the number of OA complaints received against the MOM companies in the past five years.

Table 2: OA complaints received 1 July 2006 – 30 June 2011

	2006/07	2007/08	2008/09	2009/10	2010/11	Total
Genesis	3	-	1	7	8	19
Meridian	-	-	-	1	1	2
Mighty River Power	-	-	2	5	3	10
Solid Energy	-	-	-	-	-	-

A small number of these complaints were the subject of informal enquiries enabling the matter to be resolved. Once again, the cost of such work is primarily borne by this Office and not the companies.

⁵ Annual Reports year ended 2007 p 60, year ended 2008 p 54, year ended 2009 p 90, year ended 2010 p 95, and year ended 2011 p 111.

Only one complaint was formally investigated, and in that case the Chief Ombudsman had sufficient information on which to form an opinion without requiring the provision of information from the company concerned.

In most cases, the MOM companies will not even have been aware that a complaint has been received by this office. This is because most electricity and gas consumer complaints are, in the first instance, referred back to the company's internal complaints process, and thereafter to the Electricity and Gas Complaints Commission. These avenues are considered to provide an adequate alternative remedy to an Ombudsman's investigation, although complainants are invited to return to the Office if they remain dissatisfied after those avenues have been exhausted. While this remedy is not available in relation to complaints about Solid Energy, the above table shows that any concerns in this regard would appear to be of little, if any, significance.

It is important to remember that even if the MOM companies are removed from the Ombudsmen's jurisdiction, complaints will still be made that require resolution. It is inevitable that costs will be incurred by the MOM companies in addressing such complaints.

The fact that the Ombudsmen receive so few complaints against the MOM companies should not be taken to suggest there is no benefit in retaining the jurisdiction. That statistic only says that a company is not at present acting in a way that any or many people feel it is necessary to complain to an Ombudsman. If there are few complaints, then the company is in no practical way affected by the Ombudsmen's jurisdiction, but that is not good reason to derogate from principle, and thereby prejudice the few, perhaps many, in the future for whom an Ombudsman may be the most appropriate remedy.

The assumption seems to be that state-owned enterprises must be treated exactly the same as private enterprises if they are to be able to compete with them. However, state-owned enterprises (whether wholly or majority state owned under the mixed ownership model) *are different* from private enterprises by necessary definition of their ownership and purpose (to make profits for the Government to expend in promoting the interests of the public). The issue cannot be one of exact equivalence, but equality of actual competitive position in a practical sense.

It should also be noted that in the private sector both in New Zealand and abroad (the banking and insurance industries, to name the two most well known locally) the absence of the Parliamentary Ombudsman's jurisdiction has led to the creation by the participants in those industries of private sector "Ombudsmen" for the very reason that "Ombudsmen" were recognised as beneficial in providing an appropriate means of dealing with such matters that other accountability mechanisms, including the Courts, could not adequately address. It is therefore surprising that the suggestion is being made that being subject to an existing Ombudsman regime should be seen as placing MOM companies at a competitive disadvantage.

Air New Zealand is not subject to the OA or OIA

Finally, the draft Cabinet paper notes that Air New Zealand is not subject to the OA or OIA. While that is a correct statement of the position, we see this as an anomaly, given that the Crown holds 74 per cent of the shares in Air New Zealand and it is our national carrier.

Until it was wholly privatised in 1989, Air New Zealand was subject to the OA and OIA. On privatisation, the Company, as a private sector entity, was appropriately removed from an Ombudsman's jurisdiction. When the Crown again became a majority shareholder in 2001 Air New Zealand should arguably have again been made subject to those Acts. To our knowledge, making Air New Zealand again subject to the OA and the OIA was never addressed at that time.

The fact that Air New Zealand is not currently subject to the OA and OIA is more an argument for making it so subject, rather than an argument for exempting other Crown owned companies from the Acts they are currently subject to on the grounds that the public is being permitted to acquire some of the shares in those companies.

Conclusion

In our view, there are no advantages in the MOM companies being removed from the Ombudsmen's jurisdiction under the OA and OIA and, so long as the Crown retains a majority interest in the companies, no reason in principle for their removal. This is particularly so given the potential removal of other accountability requirements. I trust that our views will inform the Cabinet's decisions in this regard.

Yours sincerely



Beverley A Wakem
Chief Ombudsman



David McGee
Ombudsman

Enc: Appendix: *OIA complaints received 1 July 2006 – 30 June 2011 against a selection of Ministers and central government agencies*

Appendix: OIA complaints received 1 July 2006 – 30 June 2011 against a selection of Ministers and central government agencies

	2006/07	2007/08	2008/09	2009/10	2010/11	Total
Police	98	97	113	149	122	579
MSD	64	43	36	53	70	266
District Health Boards	47	44	43	62	42	238
Corrections	34	24	31	38	91	218
Department of Labour	37	39	47	24	48	195
ACC	9	21	39	41	39	149
Ministry of Justice	33	33	21	29	30	146
Ministry of Health	28	39	24	18	19	128
Ministry of Education	14	22	18	20	22	96
Minister of Health	17	26	16	11	7	77
Minister of Education	20	20	5	17	7	69
IRD	6	20	15	10	23	74
Minister of Justice	23	19	8	5	6	61
LINZ	23	10	6	10	11	60
Treasury	12	12	12	4	7	47
Minister of Finance	6	7	6	14	11	44