Finding Balance
Making State-Owned Enterprises Work in Fiji, Samoa, and Tonga

Volume II: Comparative Review of the Legal, Governance and Monitoring Frameworks
EXECUTIVE SUMMARY .............................................................................................................. 4

INTRODUCTION .......................................................................................................................... 8

I. THE LEGAL FRAMEWORK OF STATE-OWNED ENTERPRISES ............................................... 10
   A. KEY FINDINGS ..................................................................................................................... 11
   B. SAMOA ............................................................................................................................... 11
      1. Key components of the SOE Act .................................................................................. 11
      2. Implementation performance ...................................................................................... 12
      3. Companies Act .............................................................................................................. 14
   C. TONGA ............................................................................................................................... 15
      1. Key components of the SOE Act .................................................................................. 15
      2. Implementation performance ...................................................................................... 18
      3. Companies Act .............................................................................................................. 18
   D. FIJI ISLANDS ...................................................................................................................... 18
      1. Key components of the SOE Act .................................................................................. 18
      2. Implementation performance ...................................................................................... 20
      3. Companies Act .............................................................................................................. 20

II. THE MONITORING FRAMEWORKS OF STATE-OWNED ENTERPRISES ................................. 21
   A. KEY FINDINGS ..................................................................................................................... 21
   B. PARLIAMENTARY OVERSIGHT ....................................................................................... 22
   C. INSTITUTIONAL ARRANGEMENTS ..................................................................................... 24
   D. THE PRIMARY MONITORING DOCUMENT ......................................................................... 28

III. THE GOVERNANCE FRAMEWORKS OF STATE-OWNED ENTERPRISES ............................. 30
   A. KEY FINDINGS ..................................................................................................................... 30
   B. SAMOA ............................................................................................................................... 32
      1. Director Selection Process .......................................................................................... 32
      2. Directors’ duties .......................................................................................................... 34
      3. Appointment of SOE Chief Executives ....................................................................... 35
   C. TONGA ............................................................................................................................... 36
      1. Director Selection Process .......................................................................................... 36
      2. Directors’ Duties .......................................................................................................... 38
      3. Appointment of SOE CEOs ......................................................................................... 39
   D. FIJI ...................................................................................................................................... 39
      1. Director Selection Process .......................................................................................... 39
      2. Directors’ duties .......................................................................................................... 40
      3. Appointment of SOE CEOs ......................................................................................... 42

SUMMARY OF RECOMMENDATIONS ........................................................................................... 43

   SAMOA ................................................................................................................................. 43
   TONGA ................................................................................................................................. 44
   FIJI ......................................................................................................................................... 45

APPENDIX 1: SUMMARY CONTENT OF SOE ACTS IN FIJI, TONGA AND SAMOA
APPENDIX 2: ANALYSIS OF SOE LEGISLATION AGAINST KEY REQUIREMENTS
EXECUTIVE SUMMARY

This report examines the legal, governance and monitoring frameworks supporting the state-owned enterprise (SOE) sectors in Fiji, Samoa and Tonga. These frameworks guide the operations of the SOEs and enable their shareholders to monitor performance. Where the frameworks are incomplete or inadequately implemented, SOE performance tends to suffer. This is illustrated in the case of Fiji, Samoa and Tonga, as well as in many other countries around the world.

This report therefore focuses on the comparative effectiveness of each country’s (i) legislation pertaining to SOEs (and success at implementation); (ii) mechanisms in place for monitoring SOE performance; and (iii) governance practices that inform and characterize the operation of SOEs. The recommendations provided in each section of the report, if implemented, should directly contribute to improved performance of the SOE portfolios in Fiji, Samoa and Tonga.

The legal frameworks for SOEs in Fiji, Samoa and Tonga are based on the New Zealand model, which each country has adapted differently. The most striking difference, however, is in the practice of implementing the provisions and spirit of the legislation; Tonga has had the strongest implementation performance.

Of the three countries studied, Samoa has the most robust SOE legislation, but implementation performance has been weak. Fiji, in contrast, has less robust SOE and companies legislation, but implementation performance has generally been good. Tonga, in contrast to both Samoa and Fiji, has the weakest SOE legislation, yet has inculcated several excellent practices which go beyond the requirements of the law.

**Samoa needs a stronger implementation regime**

Samoa’s SOE law represents best practice in two key areas: (i) the ways in which it encourages SOEs to adopt the principle objective of operating as a successful business and (ii) the incentives it gives to SOEs to aim for long-term viability by meeting Community Service Obligations (CSOs). However, the Samoan SOE framework needs to be implemented with greater rigor. Not only are these two provisions not enforced, but the provisions requiring stricter controls on board membership, by restricting public servants and members of parliament from serving on SOE boards, are also ignored. Further, Samoa’s companies law should be properly implemented, especially with regard to insolvency and directors’ duties and liabilities.
**Tonga should formalize current practices while updating its SOE legal framework**

Tonga’s SOE legal framework is the least developed of the three jurisdictions examined in this study. Despite this, Tonga has implemented effective monitoring and governance arrangements that, in fact, go beyond the strict requirements of the law. Most notably, Tonga’s decision that ministers and public servants be allowed to step down from SOE boards is an important step: it suggests a commitment to accountability that could usefully be adopted by the other countries examined in this study. The same applies to the processes by which directors are appointed to the boards of SOEs, and Tonga’s development of robust CSO guidelines. These practices should now be formalized in the legislation. Further, Tonga’s SOE legal framework should be updated so that it provides adequate incentives for SOEs to operate as successful businesses; it should also provide additional guidelines for SOEs that are not Companies and therefore do not benefit from the governance and administration provisions contained in the Companies Act.

**Fiji should refine and update its SOE and Companies Acts**

Overall, Fiji’s SOE legal framework provides adequate guidance for the effective operation of SOEs. However, it could be refined by formally providing greater guidance to directors in terms of duties and obligations. This would eliminate the uncertainty and the complications arising from each SOE relying on its own, particular establishing legislation. Further, penalties should be provided for non-compliance with CSOs, and Fiji’s Companies Act should be updated to include duty of care and insolvency provisions.

**SOE monitoring units are most effective when they are independent and supported by parliamentary oversight**

**Ministers and public servants should be encouraged to step down from SOE boards**

Samoa, Tonga and Fiji each deploy different monitoring mechanisms; each structures the relationship between the SOE and the principal monitoring unit in a particular way. In Samoa, the monitoring unit is part of the Ministry of Finance; in Tonga, the monitoring unit comprises a separate ministry; and in Fiji there is a monitoring unit within the Ministry of Finance as well as the Ministry of Public Enterprises. This study found that it was not so much the particular structure that impacted on monitoring effectiveness; rather it was the independence of the monitoring unit. Where ministers and public servants serve on SOE boards, the independence and effectiveness of the SOE monitoring units is compromised. It is recommended that all ministers and public servants step down from SOE boards.
Workable systems should be in place regarding parliamentary oversight

Fiji, Samoa and Tonga could strengthen their respective monitoring mechanisms by ensuring that there is a workable system in place regarding parliamentary oversight. The monitoring units in each country consider their parliamentary oversight to be inadequate. Indeed, in some cases, annual reports were tabled in Parliament as much as twelve months after their completion, and in many cases quarterly reports lack useful data. Accountability is impossible in such circumstances. Stricter requirements are thus necessary in terms of the timeliness and content of monitoring reports.

Governance practices in each country should be more focused on accountability

The governance practices adopted in each country reflects, to some extent, their SOE legal framework: Samoa has very robust policies in place, but it does not effectively implement them; Tonga has some very effective practices in place, but needs to formalize them; and Fiji should refine aspects of its existing governance regime.

Samoa should implement its governance provisions regarding audit committees and the appointment of directors

Samoa could enhance accountability by giving effect to the provisions of its SOE Act regarding audit committees. The SOE Act also has detailed processes for the selection and appointment of SOE directors: these too need to be properly implemented and practiced. More specifically, Samoa should implement its general prohibition against ministers and public servants serving on SOE boards (especially commercial SOE boards).

Tonga should formalize its effective practices regarding the appointment of directors while also giving effect to its policies regarding non-performance

Tonga, in practice, deploys an effective process for the selection of directors: positions are advertised and selection is made on merit. These practices should be formalized by legislation. Provisions regarding the removal of directors for non-performance should also be introduced.

Tonga’s legislative requirement for performance based contracts for SOE chief executives is excellent, but could be made more effective through penalties for non-performance.
Fiji requires a more explicit process for the appointment of directors

Fiji only implicitly establishes guidance for the selection and appointment of directors, based on the ‘principle objective’ provisions of the SOE Act. Given the element of uncertainty that compromises this aspect of its governance practices, Fiji should explicitly provide a clear process and guidelines for the selection and appointment of SOE directors. Further, accountability needs to be enhanced by a more consistent and careful use of audit committees. Monitoring unit staff should not become deployed as “observers” on boards only to become treated as “deemed directors”—with liabilities that are not necessarily accompanied by protections such as professional indemnity. Fiji should actively discourage such observers from becoming de facto members of SOE boards.
**INTRODUCTION**

The legal, monitoring and governance frameworks of SOEs have a strong bearing on their efficiency and performance

This report evaluates the scope and effectiveness of the current SOE frameworks in Samoa, Tonga and Fiji, presenting recommendations on the ways in which they could be significantly improved. The report was prepared with the active support of the SOE monitoring agencies in Fiji, Samoa and Tonga. Each agency copies of SOE legislation and completed a questionnaire broadly describing their SOE monitoring practices and governance arrangements. This information was then discussed with each agency for further clarification before being assessed comparatively across the three countries. Fiji, Samoa and Tonga are considered comparable due to their long history of SOE reform and broadly similar SOE portfolios and legislative frameworks.

This report is part of a series of 3 reports which assess the comparative performance of the SOE portfolios in Fiji, Samoa and Tonga:

1. **Finding Balance**: Making SOEs Work in Fiji, Samoa and Tonga which focuses on the comparative performance of the SOE portfolios, the lessons learned from the reform efforts in each of the three countries, and approaches to improve the effectiveness of reform measures going forward

2. **Comparative Review of the Legal, Governance and Monitoring Frameworks** which provides a detailed analysis of the frameworks summarized in volume 1

3. **SOE Portfolio Review** which provides a detailed analysis of the financial performance of each country’s SOEs. This report is delivered only to the respective country.

This volume is the Comparative Review of the Legal, Governance and Monitoring Frameworks. It includes a set of appendices which provide further analysis of the provisions of the legislation in each country as well as the governance and monitoring structures.

This volume contains three chapters: Chapter I evaluates the SOE and company legislation; Chapter II examines the monitoring frameworks and Chapter III assesses the governance frameworks.
The reform recommendations included as part of each chapter, if implemented across each of the three areas, will provide a solid platform for improving the performance of each country's SOE sector.
The legal framework of SOEs is composed of laws, regulations and institutional arrangements that define how SOEs are established, managed and supervised. A carefully designed SOE legal framework is essential for ensuring the economic efficiency of the SOE sector. The legal parameters for the operation of State-Owned Enterprises (SOEs) are typically set out in a specific SOE law as well as in parts of the companies law.

The SOE Act guides the process underlying the formation of SOEs, detailing their obligations, powers and liabilities and specific rules around SOE governance.

The companies law also has a bearing on the operation of SOEs, particularly in terms of the general principles of governance, the rights and obligations of shareholders, and the administration rules that apply to companies.

The following sections provide an overview of the legal framework for SOEs in Samoa, Tonga and Fiji, assessing their effectiveness in terms of the most current tenets of best practice.

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### Box 1: What makes good SOE legislation?

Ideally, the SOE law should cover the following:

- The establishment of SOEs
- The principal objectives of SOEs
- The appointment and removal processes for directors
- The roles and responsibilities of directors
- Managing conflicts of interest
- The appointment of CEOs
- The roles and duties of Responsible Ministers and Shareholding Ministers
- The requirements dealing with the content and approval of
  - Business/corporate plans
  - Statement of Corporate Objectives/Intent
  - Annual (and semi-annual) reports
  - Audit requirements
  - Performance review/audit
- Reporting requirements to Parliament
- The definition and management of Community Service Obligations (“CSOs”) <sup>a</sup>

<sup>a</sup> In some jurisdictions, the divestiture of SOEs is

### Box 2: In terms of SOE provisions, what should the Companies law cover?

Ideally, the Companies law should cover the following:

- Capacity, powers and validity of actions
- Directors’ duties, including the duty of care and managing conflicts of interest
- Director’s liabilities
- Accounting records and audit
- Reporting requirements (i.e. annual report)
- Insolvency provisions
- Conduct of board meetings
- Appointment and removal of directors
- Rights of and obligations of shareholders
- Conduct of Annual General Meetings
- Offences and penalties
- The rules governing the company’s management (Constitution or Articles and
A. Key Findings

Samoa, Tonga and Fiji have all enacted SOE laws.¹ While each jurisdiction has enacted variations of the New Zealand SOE Act of 1986, there are significant differences between the three acts.² Further, each jurisdiction is unique in terms of their success in implementing their SOE legislation.

In Samoa, there is a comprehensive SOE Act, but it suffers from a lack of implementation. Tonga, in contrast, has a less developed SOE Act, but in practice has adopted effective governance behaviours that go beyond the strict requirements of the law. And in Fiji, the SOE Act meets many of the normal requirements for good SOE legislation—but it remains vulnerable to implementation risk and suffers from an uneven application of the rules concerning Community Service Obligations (CSOs).

B. Samoa

1. Key components of the SOE Act

Samoa’s SOE laws provide the key elements of best practice

The Samoan Public Bodies (Performance and Accountability) Act 2001 covers the key elements of good SOE legislation. Indeed, it could be regarded as an example of best practice in terms of its provisions regarding CSOs, corporate plans, directors’ duties and the management of conflicts of interest.

The Samoan SOE Act makes a useful differentiation between commercial or profit driven SOEs, which are called Public Trading Bodies (PTBs), and not-for-profit SOEs, which are called Public Beneficial Bodies (PBBs). The SOE Act states that the principal objective of a PTB is to operate as a “successful business”, which is further defined as being as profitable and efficient as “comparable businesses that are not owned by the state”. A PTB must also meet the following three requirements:

1. The SOE must meet any CSO established under the Act.³

¹ In this report, in the interests of clarity and brevity, the generic term “SOE Act” will be used to refer to the specific SOE legislation of each jurisdiction. Strictly speaking, however, Samoa’s SOE Act is the Public Bodies (Performance and Accountability) Act 2001; Tonga’s SOE Act is the Public Enterprises Act 2002; and Fiji’s SOE Act is the Public Enterprise Act 1996.
² The differences are summarized in the discussion below and further detailed in Appendix 1 and 2. Appendix 1 summarizes the contents and range of cover of the SOE Acts in each of the three countries; Appendix 2 provides a detailed analysis of each country’s SOE legislation against the key requirements listed above.
³ CSOs are provided for in Part II of the Public Bodies (Performance and Accountability) Act 2001.
2. The SOE must comply with the provisions of the Labour and Employment Act 1972.

3. The SOE must be an organization that demonstrates a sense of social responsibility by having regard to the interests of the community in which it operates.

These three criteria in effect reinforce the principal objective of operating as a successful business: they encourage long-term viability through the demonstration of a sense of social responsibility and by meeting local labour laws.4 Further, the CSO requirements established under the Samoan legislation require SOE boards to refuse to undertake a CSO that is not approved within the rules established in the Act and regulations. Indeed, it is a striking characteristic of the SOE Act and its supporting regulations that they contain detailed provisions dealing with the process of establishing and approving CSOs.5 These are in turn supported by detailed guidelines issued by the Ministry of Finance and approved by cabinet.

Another important feature of the Samoan SOE Act is that it stipulates penalties for breaching the key requirements of (i) operating as a successful business and (ii) meeting the CSO guidelines. The provisions categorically state that a failure to meet the legislative requirements will make the person at fault “guilty of an offence and liable to a fine”.6 That is, a failure to meet these requirements can result in fines being levied against the delinquent parties—which may include managers, board members and ministers. This provision is useful in enforcing high standards of performance, and it is noteworthy that Samoan SOE law includes it: no other jurisdiction has gone this far. The problem, however, is that Samoa has not been successful in implementing its SOE laws.

2. Implementation performance

_Samoa needs a more powerful implementation regime_

Despite the unambiguous wording of the Samoan SOE Act and accompanying regulations, implementation has been weak. Including the rules governing CSOs there are three other significant areas where the provisions are either ignored or breached: the criteria by which

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4 This is a business point: looking after staff and the community are organizational health indicators, impacting on the longer term viability of an organization. For example, if a manager does not look after staff, they may be subject to a high turn-over, which increases cost, reduces efficiency and adversely affects profitability.

5 The Public Bodies (Performance and Accountability) Regulations 2002.

6 Sections 13 and 17 of the Public Bodies (Performance and Accountability) Act 2001
an SOE is deemed to operate as a “successful business”; the membership of boards, and the payment of director fees and allowances.

_Samoa should implement the criteria by which an SOE is deemed to operate as a “successful business”_

Every decision taken by directors and the board of PTBs must be made “in compliance with the provisions of the Act”. That is, the decisions of SOE boards must be consistent with the operation of a “successful business.” However, the poor performance of most PTBs suggests that decisions are not made with the objective of operating as a successful business. In practice, the PTB portfolio generated a return on equity of less than 1% in FY2007; and an average of -0.5% over FY2002-2006 period. This performance is well below the Weighted Average Cost of Capital for the portfolio. This has occurred because SOE boards have supported decisions that fall short of sound business practice—and what would logically be required to “operate as a successful business.”

_Samoa should implement the general prohibition against public servants and ministers being appointed to SOE board members_

With regard to board membership, the provisions of the SOE Act appear to be widely breached. Under the SOE Act, public servants and Members of Parliament, including ministers, are prohibited from being appointed to the boards of SOEs; further, the prohibition is meant to override any other provision that suggests otherwise. Regulation 3.1.1(g) clearly states that no MP or public servant shall be a director unless cabinet has certified that the appointment is necessary because (i) the appointment is in the national interest and (ii) the qualifications of the appointee are both required on the board and cannot be found elsewhere.

Although these requirements are hard to satisfy, there are numerous MPs and public servants still serving on SOE boards. It therefore seems that the requirements stipulated in the regulation are either interpreted very liberally or—as is more likely—ignored altogether. A more rigorous application of the regulation establishing a general prohibition on MPs and public servants serving as board members is required to enhance accountability and eliminate conflicts of interest.

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7 Schedule 3.1.1(g) of the Public Bodies (Performance and Accountability) Regulations 2002.
8 Section 4(a) of the Public Bodies (Performance and Accountability) Act 2001 states that “If there is any inconsistency between an individual public trading body's empowering Act, the Companies Act 2001, the Public Finance Management Act 2001 and this Act, the provisions of this Act shall prevail to the extent of the inconsistency.”
Samoa should implement the prohibition against the payment of board member fees and allowances to public servants and ministers

If an MP or public servants becomes a member of an SOE board under one of the exclusions to the general prohibition, the regulation stipulates that they cannot be paid “remuneration or other benefits from the SOE for services as a director”. However, in apparent defiance of this provision the Samoan cabinet has authorized the payment of meeting allowances or sitting fees to MPs and public servants in the range of USD104-125 per meeting. It is difficult to see how these sitting fees are anything other than the type of remuneration prohibited by the regulation. Given that in principle cabinet decisions cannot override secondary legislation such as regulations, it would appear that the payment of such sitting fees is in violation of the law.

3. Companies Act

In alignment with best practice, Samoa has updated its Companies Act

All Samoan SOEs are companies and, as a consequence, are subject to the provisions of the companies law, particularly those regarding directors’ duties, governance and solvency. Until recently, the operative companies legislation in Samoa was the Companies Act 1955, which was based on the New Zealand 1955 act. In June 2008, however, the 2001Companies act, together with the 2006 amending act, became effective, bringing the Samoan companies legislation in alignment with international benchmarks of best practice.

Samoa should enforce its provisions regarding directors’ duties, especially with regard to insolvency, reporting requirements and liabilities

The recently adopted Companies Act has introduced new requirements in relation to directors’ duties and liabilities in situations where the company may be insolvent. Some of the provisions in the new act were already in the SOE Act and regulations, such as those dealing with insolvency. They were, however, ignored and it would be expected that with the enactment of the new Companies Act this practice will not continue.

The main provisions in the SOE act that are supported by the new companies law are that:

1. A director of an SOE must not act, nor agree to act, in a manner that contravenes the Public Finance Management Act 2001 or the Public Bodies (Performance and Accountability) Act 2001, or the Companies Act 2001.

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9 Regulation 3.1(g)(ii) of the Public Bodies (Performance and Accountability) Regulations 2002.
10 The range in local currency is SAT300 to SAT200.
2. A director must call a meeting of directors within 10 days to consider whether an administrator or liquidator needs to be appointed when (i) they believe that an SOE is unable to pay its debts or (ii) a director is aware of matters that would make a reasonable person question whether an SOE can pay its debts when they fall due.

3. A director must advise the chairperson and the shareholding ministers in writing if they believe that a breach of the Public Bodies Act, the Public Finance Management Act or the Companies Act has or may occur or if they become aware of any event that may materially and adversely affect the financial position of the SOE.\textsuperscript{11}

4. If a director is aware of the matters mentioned in (2) above and does not act, or alternatively votes not to appoint a liquidator and the company subsequently fails, then that director could be personally liable for the subsequent loss incurred by a creditor. Furthermore, the company cannot provide directors with an indemnity to cover this potential liability.\textsuperscript{12}

A financial analysis of the Samoan SOE portfolio reveals that a number of the SOEs are, in fact, technically insolvent. However, it does not appear that any of the provisions listed above have been applied to either inform the chair, the shareholding ministers or the creditors. This is probably due to the confused governance practices in Samoa, where the chair of the SOE is often also a shareholding minister.

If implemented properly, the Companies Act 2001 will increase the liabilities that directors face for poor performance. This will make them less likely to approve investments or make decisions that negatively impact upon the financial viability of the SOEs and that expose creditors to greater risk. Also one would expect that directors serving on the boards of companies that are insolvent, technically or otherwise, would now call board meetings to consider whether liquidators should be appointed. Enforcement of the Companies Act 2001 will therefore be a critical tool in improving the performance of SOEs.

C. Tonga

1. Key components of the SOE Act

\textit{The Tongan SOE Act is the weakest of the three countries studied}

Of the three countries examined, Tonga has the newest and briefest SOE Act. Enacted in 2002, it was originally administered by the Ministry of Finance. However, in early 2007 the

\textsuperscript{11} See Schedule 8 of the Public Bodies (Performance and Accountability) Regulations 2002. It should be noted that Schedule 8 included a number of duties which were referenced back to the Companies Act 2001. In the context of the Public Bodies Act 2002, these duties apply to both PTBs and PBBS.

\textsuperscript{12} Section 65 of the Companies Act 2001.
Ministry of Public Enterprise and Information (MPEI) was formed to monitor the ownership of Tonga’s Public Enterprises. There are various areas where the Tongan SOE Act represents best practice. These include:

1. The prohibition on incurring obligations that cannot be met. This is important as a number of SOEs in the three countries reviewed are technically insolvent and directors have to be continually reminded that it is their statutory duty to ensure that the SOE can meet its obligations (section 13).

2. The requirement that the Annual Report contains sufficient information for the reader to assess the operations of the SOE in terms of the targets set out in the Statement of Corporate Intent (SCI) (section 20(2)).

3. The provision dealing with the appointment of the SOE chief executives and detailing the minimum requirements for a written performance-based employment contract (section 26).

The Tongan SOE Act closely follows the New Zealand model, but departs from the New Zealand legislation in two main areas. The Tongan legislation does not provide for a “principle objective” definition; and it does not make an adequate distinction between company and non-company SOEs. These departures significantly weaken the effectiveness of the Tongan legislation.

**The legislation should require SOEs to operate as successful or profitable businesses**

The absence of a principal objective for an SOE, to “operate as a successful business” means that there is no defining benchmark against which its decisions can be measured. How then can the ultimate owners of the SOE, the public, know whether their representatives are doing a good job? And what guides the decisions made by the board? A specific provision establishing that the principle objective for each SOE is to “operate as a successful business” will encourage the board to always pursue value-adding strategies.

**Tonga should specifically provide for company and non-company SOEs in terms of governance and reporting requirements**

The Tongan SOE Act covers both company and non-company SOEs, rather than only companies registered under the Companies Act (as is the case in New Zealand). This adds significant complexity to the administration of the Tongan SOE portfolio as only some of the

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13 The New Zealand SOE legislation is over 20 years old and while sound, is a less effective model for Pacific nations than the Samoan Public Bodies Act.
SOEs are subject to the Tongan companies legislation. In practice, this means that an SOE must consult the relevant entity specific legislation in order to ensure that all of the necessary governance and stewardship provisions are in place, such as those dealing with directors’ duties, conflicts of interest, and so on.\textsuperscript{14} The SOE must ensure that it follows the rules in its own act and the monitoring agency (the MPEI) must ensure that the SOE remains compliant. This is a cumbersome process that could be overcome by amending the SOE legislation so that it makes a distinction between the management of company and non-company SOEs in terms of their reporting and governance requirements (and as befits their different legal structure). In this regard, useful drafting guidance could be taken from the Samoan legislation or New Zealand’s Crown Entities Act 2004.\textsuperscript{15}

**Tonga should provide guidelines regarding who may be appointed as a SOE director**

The Tongan SOE Act is virtually silent on who may be appointed as a SOE director and the appointment process that should be followed other than allowing directors to be appointed due to a specific office that person may hold. Provisions detailing who is eligible to be appointed to SOE boards need to be incorporated within the SOE Act.

**The SOE law should require the tabling of SCIs and Audit Reports in Parliament**

With regard to SCIs, the fact that they do not have to be tabled in the legislature weakens the accountability of SOEs to Parliament. Audit Reports are tabled as part of the Annual Report, but it is not clear whether this is actually required by the act or is simply an adopted practice. We therefore recommend the introduction of a formal review of SCIs, clarification that Audit Reports must be tabled and also the requirement that SOEs provide the monitoring agency with business or corporate plans, separate to the SCI.

**Tonga should provide guidelines for identifying, contracting and financing CSOs**

The Tongan legislation also provides no parameters for identifying, contracting and financing CSOs. This weakness could be mitigated in the short term through the introduction of binding CSO guidelines, such as those found in Samoa or Fiji; this in now, in fact, in process.\textsuperscript{16}

\textsuperscript{14} A quick review of the acts governing (for example), the Tongan Water Board, Broadcasting Commission, Ports Authority and Electric Power Board reveals that the establishing legislation in each case does cover the basic requirements. Of the significant non-company SOEs, only the Tonga Development Bank seems to have inadequate establishing legislation: it does not deal with directors’ duties and conflicts of interests. However, despite this apparent inadequacy, the legislation requires the bank to establish articles of association—and it would be expected that these matters would be covered in those articles.

\textsuperscript{15} See the discussion below on the Fijian legislation concerning the provisions of New Zealand’s Crown Entities Act which could be applied to an amended Tongan SOE Act. Please note that other areas for review are identified in Appendix X1 of this report.

\textsuperscript{16} Guidelines were drafted in July 2008 and the guidelines are expected to be submitted to cabinet for approval before the end of the 2008 calendar year.
2. Implementation performance

*Despite the shortcomings of its SOE Act, Tonga has implemented effective monitoring and governance practices*

While Tonga’s SOE legislation is fraught with various shortcomings, the Tongan government has imposed operating, monitoring and governance requirements upon SOEs that go beyond the pure requirements of the SOE Act. Two examples of this are how CSOs are responsibly dealt with in practice, and the decision taken by cabinet to ask all ministers to step down from SOE boards by the end of the 2008 calendar year. (The impact of this decision will be discussed in Chapter III of this report.)

3. Companies Act

*Tonga’s Companies Act provides adequate guidance*

The Tongan Companies Act of 1995 is based on the New Zealand Act of 1993 and as such includes robust provisions dealing with directors’ duties, managing interests and trading while insolvent. Together, the SOE Act and the Companies Act provide good coverage for the roles and responsibilities of directors, the rights of shareholders and overall company stewardship. The problem with Tonga’s SOE legal framework subsists more in its inadequate SOE legislation.

D. Fiji Islands

1. Key components of the SOE Act

*Fiji’s SOE Act is sound, but could be improved*

The Fijian Public Enterprise Act 1996 is the oldest of the three SOE Acts examined in this report and, overall, appears sound: it covers most of the requirements for good SOE law. Fiji’s SOE Act empowers the Ministry of Public Enterprises as the specialist-monitoring agency; it sets out the rights and obligations of the responsible minister in a clear and concise manner, and sets out adequate reporting requirements for the SOEs. Indeed, of the three countries surveyed, the reporting requirements set out in the Fijian SOE Act could be seen as the closest to best practice.

*Fiji’s SOE Act should provide guidelines for directors, especially with regard to duties and obligations*

However, while Fiji’s SOE Act emphasizes transitional rules and the processes associated with the establishment of a SOE, it provides little or no guidance to directors on how to best

17 Prior to December 2007 it was known as the Ministry of Public Enterprises and Public Sector Reform; however it was split into two ministries as part of a general government restructuring.
steward an SOE once established. Indeed, the area of greatest weakness in Fiji’s SOE Act concerns directors’ duties and obligations, a weakness exacerbated by the outdated supporting legislation in the Companies Act. Further, as a number of the SOEs are not registered companies, the guidance and protections of the Companies Act—such as managing conflicts of interest—are not available to non-company SOEs unless they are covered in their own establishing legislation.

While it is entirely possible that the establishing legislation specific to some SOEs cover matters—such as the appointment of directors, terms of appointment, criteria for appointment, duties and obligations and managing conflicts of interest—it would be more useful to eliminate uncertainty altogether by way of a more developed public enterprise regime. To this end, the Fijian government should consider amending its SOE Act to provide guidance for non-company SOEs by adopting some of the provisions in the New Zealand Crown Entities Act 2004 concerning the role and accountability of members; the appointment and removal of members; the collective duties of the board; the individual duties of members, and several others.

**Fiji’s SOE Act should include penalties for non-compliance**

The provisions in Fiji’s SOE Act requires the Ministry of Public Enterprises (in consultation with the Ministry of Finance) to prepare binding guidelines covering the implementation of the CSOs in terms of pricing, costing, funding, contracting and monitoring. To this end, the Ministry of Public Enterprises has prepared a useful two-page document outlining guidelines on CSOs for commercial SOEs. However, it contains a number of gaps. To address its shortcomings, the SOE Act should be amended to include penalties for non-compliance, especially where SOEs act beyond the approved guidelines; it should also apply to the not-for-profit SOEs along with the commercial SOEs.

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18 Fijian SOEs are categorised as either Government Controlled Companies (GCCs) or Commercial Statutory Authorities (CSAs). This report refers to both as SOEs unless it is meaningful to identify them separately. It should be noted that GCCs must operate as successful businesses—that is, as profitable as comparable businesses in the private sector; CSAs, however, are not subject to the same requirement.

19 This is also recommended for Tonga where the same problem arises.

20 To be more precise, the following sections from New Zealand’s Crown Entities Act 2004 should be adopted: sections 25–27 dealing with the role and accountability of members; sections 28–46 dealing with the appointment, removal, and conditions of members; sections 49–52 dealing with the collective duties of board; sections 53–57 dealing with the individual duties of members; sections 58–60 dealing with the effect of non-compliance with duties; sections 62–72 dealing with conflicts of interest disclosure rules; and sections 73–75 dealing with delegation.

21 As noted above, in Fiji’s SOE Act, Commercial SOEs are called ‘Commercial Statutory Authorities’ (CSAs).
2. Implementation performance

*Compliance does not appear to be a problem in Fiji*

Beyond the area of CSOs—where there would appear to be a number of unfunded and informal CSOs—there does not appear to be any significant non-compliance issues with the provisions of the SOE legislation in Fiji.

3. Companies Act

*Fiji’s Companies Act should be updated to provide additional guidance to board members regarding duty of care and insolvency*

The Fijian Companies Act 1984 appears to be based on the antiquated New Zealand Companies Act of 1955. As a consequence, it lacks a number of useful provisions that would give additional guidance to board members concerning the duty of care and insolvency. The New Zealand Companies Act of 1993 is widely regarded as good practice and both the Samoan 2001 Companies Act and the Tongan Companies Act of 1995 are based on this New Zealand Act. The Fijian government should do likewise, updating the Companies Act using the New Zealand 1993 act as the primary reference point.
II. The Monitoring Frameworks of State-Owned Enterprises

Monitoring frameworks ensure the accountability of SOEs

This chapter evaluates the comparative effectiveness of the SOE monitoring frameworks of the three countries. The analysis was conducted through questionnaires, observation and in-country interviews, and focuses on three key monitoring mechanisms: parliamentary oversight; institutional arrangements and the primary reporting documents. The analysis revealed that the most notable differences between the three country’s monitoring practices were the institutional arrangements for the monitoring function and the primary monitoring document.

A. Key Findings

All three countries have similar degrees of parliamentary oversight. However, the monitoring units of each country believe that parliamentary oversight should be more robust. The empirical evidence suggests that differences in the legal structure of the monitoring units, i.e. separate ministry or division within a ministry, do not have a significant impact on the ability of the monitoring units to execute their mandate. Rather, the presence of ministers and public servants on the boards of SOEs continues to compromise the independence of the monitoring units and their capacity to scrutinize the performance of SOEs.

Samoa and Fiji have adopted superior reporting practices than those found in Tonga: they use detailed corporate plans to set performance targets and agreed actions to achieve them. Tonga, in contrast, relies solely on SCIs, which do not provide sufficient operational detail to assess actual performance. Despite this, in terms of the pace of reform, Tonga clearly surpasses Fiji, and Fiji surpasses Samoa. While there is no evidence to suggest that the pace of reform is driven by the structure of the monitoring framework, there is evidence suggesting that the pace of reform is closely linked to the level of political commitment to achieve reform. That commitment is demonstrated by the empowerment of the agency responsible for monitoring the performance of SOEs.

22 Detailed analysis of data collected is provided in Appendix X2.
B. Parliamentary Oversight

The pervasive view amongst the monitoring units in each country is that parliamentary oversight should be improved

Parliamentary oversight is an essential element of effective SOE monitoring. While in practice all three countries demonstrated an acceptable level of parliamentary review over the performance of SOEs, the common view amongst monitoring unit officials was that it should be enhanced. One of the key problems identified is that information is not tabled in Parliament in a timely manner, with annual reports often tabled as much as twelve months after the end of the financial year. The reasons cited include the slow preparation of accounts by the SOEs and bottlenecks in the auditing process, particularly where the accounts must be audited by the Auditor General’s office. Regardless of the reasons, the information is out of date and may bear little resemblance to current performance.

Further, the systems in place to check whether reports have been tabled in Parliament are not always effective: in Tonga, for example, it is not clear whether the most recent annual reports have been tabled as there appears to be no system to record whether or when this has occurred. Alongside other measures, these problems could be addressed by imposing significant penalties on the SOEs that do not meet reporting deadlines. Greater parliamentary oversight could also be achieved by requiring all of the SOE’s formal reporting documents to be reviewed by a standing parliamentary committee. And in countries where Parliament is so small that it could not sustain a Standing Committee, Parliament as a whole should perform this function.

In New Zealand, a relevant parliamentary committee annually reviews the performance of SOEs based on their public documents and can require the board, senior management, responsible minister, auditor and monitoring agency to appear before the committee to answer questions. This ensures that SOE performance receives focused and regular attention and, as the members of the committee gain greater knowledge and experience of the portfolio, their questioning and oversight becomes increasingly more effective. It is recommended that the New Zealand practice be adopted: this will enhance the scrutiny of SOE performance by Parliament and should result in greater transparency and
accountability, especially with regard to the performance of the responsible and shareholding ministers as "owners" of the SOE portfolio, albeit on behalf of the people.\footnote{A recent example is where the Commerce Committee criticised the SOE monitoring for a lack of detailed reporting on SOE performance; Inquiry into Valuation methodology and practice for State-owned enterprises, Commerce Committee September 2008}
C. Institutional Arrangements

Institutional arrangements should be structured to facilitate and maximize accountability

In Samoa, the SOE monitoring function is undertaken by the State Owned Enterprise Monitoring Division (SOEMD), which is established as a division within the Ministry of Finance. The division consists of 7 staff, including the division’s head. SOEMD monitors 26 SOEs with a total asset value of around USD562 million. Each staff member monitors almost 4 SOEs. The Head of the SOEMD reports to the CEO of the Ministry of Finance.

In Tonga, the SOE monitoring function is undertaken by a dedicated ministry: the Ministry of Public Enterprises and Information (MPEI). The ministry is relatively new and was established in 2006. Previously the monitoring function was undertaken within the Ministry of Finance. The establishment of the MPEI has resulted in a greater focus on monitoring activity. The ministry consists of 5 monitoring staff, including the division’s head. The MPEI monitors 17 SOEs, with each staff member monitoring just over 3 SOEs.24 The chief executive of the ministry reports directly to the Minister of Public Enterprises.

In Fiji, two ministries undertake the SOE monitoring function: the Ministry of Finance is responsible for 5 SOEs (which are partially owned by the state) while the MPE is responsible for 17 SOEs (which are wholly owned by the state). The monitoring unit within the Ministry of Finance has 6 staff, including the division’s head. The ministry monitors 5 SOEs, with each staff member monitoring less than one SOE. The chief executive of the ministry reports directly to the Minister of Finance. Like the Ministry of Finance, the MPE also has 6 staff, including the division’s head. The ministry monitors 17 SOEs, resulting in a staff to SOE ratio of 2.8:1. The chief executive of the ministry reports directly to the Minister of Public Enterprises. (A summary of the institutional arrangements for SOE monitoring is presented in the Table below.)

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24 The 17 Tongan SOEs are: Tonga Machinery, TBC, TWA, Tonga Print, TCC, Tonga Timber, SC of P, Waste Authority, Int Dateline, Leiola Duty Free, Tonga Investments, PAT, TDB, Tonga Airports, TEPB, Tongatapu Markets and Tonga Post.
The Institutional Arrangements for SOE Monitoring

<table>
<thead>
<tr>
<th>Institutional Arrangements</th>
<th>Samoa</th>
<th>Tonga</th>
<th>Fiji (MOF)</th>
<th>Fiji (MPE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structure of monitoring unit</td>
<td>Unit within Ministry of Finance</td>
<td>Dedicated Ministry</td>
<td>Ministry of Finance</td>
<td>Dedicated Ministry</td>
</tr>
<tr>
<td>SOEs Monitored</td>
<td>26</td>
<td>17</td>
<td>5</td>
<td>17</td>
</tr>
<tr>
<td>SOEs Monitored 5 years ago</td>
<td>22</td>
<td>13</td>
<td>7</td>
<td>16</td>
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<tr>
<td>Number of Staff</td>
<td>7</td>
<td>13</td>
<td>7</td>
<td>16</td>
</tr>
<tr>
<td>Asset value of SOEs (USD millions)</td>
<td>$562</td>
<td>$111</td>
<td>$618</td>
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<tr>
<td>SOE per staff member</td>
<td>4</td>
<td>3.71</td>
<td>0.83</td>
<td>2.83</td>
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<tr>
<td>Asset value per staff member (USD)</td>
<td>$80</td>
<td>$22</td>
<td>$103</td>
<td>$133</td>
</tr>
</tbody>
</table>

* MOF refers to the Ministry of Finance
* MPE refers to the Ministry of Public Enterprise

The monitoring units of each country were uniformly small. In Fiji there where there could be benefits gained from a larger scale monitoring agency, the function is split between two ministries: the Ministry of Finance monitors partially-owned SOEs while the MPE monitors wholly-owned SOEs. This is a suboptimal arrangement: it raises costs and disperses the resources and skills available to monitor the SOEs. In the absence of a strong justification for maintaining separate monitoring functions within Fiji, the government should consider combining the two SOE monitoring units within one ministry.

Regardless of structural arrangements, the monitoring unit should be sufficiently independent

In Fiji and Tonga the monitoring agency is composed of a ministry where the CEO of that ministry reports directly to the responsible minister. In Samoa the monitoring agency sits within the Ministry of Finance and the head of the agency reports to the CEO of the Ministry of Finance. While the structural differences may appear significant, it is not clear that one model is better than the other.

There is no empirical evidence to suggest that one model encourages better monitoring outcomes or performance. While the financial performance of Samoa’s trading SOEs is comparatively poor, this is not necessarily because its monitoring agency sits within a ministry. In New Zealand, the monitoring agency (the Crown Company Monitoring and Advisory Unit) is a semi-autonomous body that sits within Treasury and the head of the unit reports to the secretary of Treasury on operational matters. This would appear to be similar to the Samoan model, but in the New Zealand context the monitoring unit has direct reporting lines to the Minister of SOEs and other portfolio ministers; it also has its own SCI.
and budget allocation and the unit separately reports its performance in the Treasury Annual Report. This degree of separation and accountability is not evident in Samoa. The ability for the head of the monitoring agency to gain direct access to the shareholding ministers is also important, to provide briefings and to discuss SOE performance on a regular basis.\textsuperscript{25}

\textbf{Ministers and Ministry Chief Executives should be encouraged to step down from SOE boards}

The effectiveness and robustness of the SOE monitoring agency must be considered in the context of the overall legal, monitoring and governance arrangements in place within a particular country. The role of the monitoring agency is complicated in the situation where ministers, ministry chief executives and senior public servants sit on the boards of the SOEs.\textsuperscript{26} This is because it is difficult for:

\begin{itemize}
  \item a public servant to critique the performance of a board or SOE where the chair is a minister or ministry CEO;
  \item a responsible minister to hold a board accountable for poor performance if he (or she) is either the chair or the chair is a cabinet colleague;
  \item a ministry CEO to put forward a paper to cabinet criticising the performance of a board that is chaired by that CEO, a minister or chaired by a fellow senior public servant.
\end{itemize}

The best response for addressing these problems is to follow the recent cabinet decision in Tonga which allows ministers and ministry chief executives to step down from SOE boards. If this cannot be achieved immediately, then an interim step would be to establish a separate Minister of SOEs, responsible for all SOEs. This minister would not be allowed to sit on any SOE boards and the monitoring agency would report directly to the minister against outputs contained in either a purchase agreement or SCI (as agreed between the minister and the monitoring agency). This would establish a direct reporting line from the monitoring agency to the minister.

Although this arrangement remains less desirable than a situation where there are no ministers on SOE boards, it does at least create a greater degree of accountability for the

\textsuperscript{25} It is interesting to note that in Tonga, the CEO of the MPE meets daily with the shareholding minister, while the head of the SOEMD would not expect to meet the shareholding minister more than quarterly, unless there was a special need to do so. The different meeting frequency is attributable to the difference in the monitoring model and, in this context, the Tongan experience should be considered more desirable.

\textsuperscript{26} Chapter III provides further discussion on the significant and irreconcilable conflicts of interest faced by Ministers who serve as both the owner representative and the chair of the SOE.
performance of SOEs at cabinet level. The SOE Minister would be held accountable for the performance of all SOEs and, in turn, would hold the chairs of the SOEs accountable for the performance of the SOEs which they chair.
D. The Primary monitoring document

*It is beneficial to have both a corporate plan and a SCI: each serves specific functions*

Samoa and Fiji rely heavily on the Corporate Plan as their primary means to monitor performance and influence the future direction of SOEs.27 Tonga, in contrast, relies heavily on the SCI. Where the SCI contains full budgets and sufficient operational detail to ensure that the monitoring agency can assess the performance of the SOE, the effective difference between the use of a corporate plan or SCI may not be significant.

However, to fully match the value of a separate corporate plan, the SCI should include detailed forward-looking business and Capex plans. In Tonga, the SCI typically contains limited financial information; it does not contain, for example, detailed budgets and projections. Because of this, Tongan SCIs can not replace the function of a corporate plan or operate as an effective monitoring and planning document.

It is recommended that Tonga drop its single document approach. A major benefit of having two separate documents—a corporate plan and a SCI—is that each can serve specific functions. The corporate plan can be a detailed document, including commercially sensitive information, while the SCI can be a more public document, containing the performance targets and measures. Indeed, it is usual practice for the SCI to function as the public accountability document while the business or corporate plan fulfils the role of a detailed planning document.

The main problem with the Tongan “one document” approach is that the Annual Report must contain sufficient information to allow an informed assessment of the operations of the SOE, including a comparison of the performance of the SOE with the relevant SCI.28 If the SCI is not public, then this provision lacks teeth as a means of creating accountability; and if it is public, then the SCI will probably lack sufficient detail to be useful as the sole planning and

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Box 3: Best Practice use Corporate Plans and Statements of Corporate Intent (SCI)

To be useful a corporate plan should contain detailed budgets for at least the first twelve months, forward projections for at least the next two years, a SWOT analysis (considering various Strengths, Weaknesses Opportunities and Threats) for the company, the strategy underlying the preparation of the plan, a risk assessment and mitigation strategy, and measurable and time-based performance targets and this should be segregated to the extent meaningful for that company.

SCIs are best used as public documents outlining the

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27 It should be noted that in Fiji, Corporate Plans are called ‘Business Plans’.

monitoring document, due to the need to protect commercial confidences. More specifically, the following problems arise with Tonga’s one document approach:

- the monitor (and shareholding ministers) do not get access to sufficiently detailed information on the SOE’s business plan to be able to accurately determine whether the proposed future direction or strategy is in the best interest of the shareholders (that is, the State’s), and

- as the full SCI is not tabled in Parliament and is not a public document, the ability of the Parliament and the public to judge whether the shareholding ministers are being good stewards of the respective SOE remains limited or even impossible.

Best practice would be to rely on two documents: a corporate plan as the primary planning and monitoring document and the SCI as the public summary containing the agreed performance targets and objectives.

All jurisdictions should provide clear guidance on what to include in a corporate plan
For all jurisdictions we recommend that the monitoring agency provide clear guidelines to the SOEs regarding what to include in the business or corporate plan as well as when it should be submitted and how it is to be reviewed and approved. Providing training for the SOEs on the development and preparation of the plan would also be good practice. It should be noted that this has already been recognized in Samoa, where the ministry provides special training for directors as well as detailed guidelines for the preparation of the corporate plan.
III. THE GOVERNANCE FRAMEWORKS OF STATE-OWNED ENTERPRISES

Effective governance frameworks provide guidance for directors and encourage better performance and greater accountability

This chapter evaluates the effectiveness of SOE boards, as influenced by their composition, management, provision for the training of members and the processes by which they appoint the company’s chief executive. Whereas the formal legal arrangements for the selection and appointment of directors were been discussed in Chapter I of this report, this chapter focuses on actual governance practices, including matters not necessarily covered by the relevant SOE legislation. The findings of this chapter are based on analyses of detailed responses to questionnaires sent out to SOEs.29

The boards play a central role in setting the strategic direction for their SOEs, and have an obligation to act in the best interest of the ultimate shareholders of the SOEs, i.e. the citizens of the state. Where SOEs generate consistently poor returns, the boards can and should be held to account. As will be seen, the findings of this report on the governance frameworks in Samoa, Tonga and Fiji affirm the results of other studies of SOE sectors around the world: strong SOE performance requires not only a competent board of directors, but also one that is free of inappropriate political influence.

A. Key Findings

The governance framework in Samoa suffers from a lack of implementation

Samoa has well-documented and detailed processes for the selection and appointment of directors of SOEs. There are also provisions regarding how directors are expected to undertake their stewardship role once appointed to the SOE board. However in many cases actual governance practice ignores the legislative requirements of good governance. Most alarmingly, contrary to the law and standards of good practice, there are large numbers of ministers and public servants on SOE boards.

It is probable that the most significant factor contributing to the poor financial performance of the Samoan SOE portfolio is the inadequate governance framework within which they operate.30 The implementation of governance practices is certainly the most marked difference between the three SOE portfolios reviewed. We conclude that if Samoa were to

29 The questions and detailed responses regarding governance matters set out in the SOE questionnaire are included in Appendix X3.
30 See also the feedback comments contained in Appendix X3
follow the requirements of its existing SOE legislation and regulations, the SOE portfolio would show immediate and dramatic performance improvements.

**Tonga needs to formalize its existing practices and improve guidelines for the appointment of CEOs**

In contrast to Samoa, the governance sections of the Tongan legislation would be considered far from best practice. Despite this, the actual processes and policies the government and the Ministry of Public Enterprises and Information (MPEI) have adopted are robust and designed to ensure strong, properly skilled boards. Tonga should therefore formalize its existing practices to ensure that they are maintained. More specifically, the adoption of the recommendations in Chapter I of this report will enable Tonga to formally embrace a best practice model.

With regard to CEO selection, the Tongan legislation provides the most robust guidelines for the selection and appointment of the CEO, requiring written performance-based employment contracts. Indeed, all countries should consider including explicit incentive structures and consequences for non-performance in CEO contracts as such provisions will encourage better performance in the respective SOE portfolios.

**Fiji should refine its policies regarding monitoring unit staff who act as “observers” on SOE boards**

Formal monitoring tools such as the SCI and corporate plan should be sufficient to monitor performance and influence future direction, without needing the added input of observers. However, in Fiji, the practice of public servants sitting as observers on SOE boards has both benefits and drawbacks (as detailed below). If observers are judged to be required, they should be appointed on a temporary basis and for a specific purpose. In all other cases, best practice guidelines argue against monitoring unit staff sitting as observers on the boards of SOEs.
B. Samoa

1. Director Selection Process

*Samoa should enforce its laws regarding the selection and appointment of directors*

In Samoa, under the Public Bodies Act and accompanying regulations, there is a formal process of selecting and appointing directors to the boards of SOEs. In practice it seems that it is seldom followed. Instead, it appears that the selection and appointment process is closely connected to the election cycle. Cabinet appoints SOE directors for a term of around five years and the term usually coincides with the term of the government: it is usually expected that the directors will remain in office until the end of that parliamentary term. Once appointed, directors are seldom removed from office prior to the expiration of their term: only once in the last five years has a director or chair been dismissed for non-performance.

It is common practice in Samoa to appoint ministers and senior public servants to chair SOE boards, or to appoint public servants as directors. For example, out of the 24 SOEs reviewed for this report, ministers chaired 18 boards and senior public servants chaired 3. Only in one case was an independent non-executive director appointed as chair. It was also observed that of the 202 director positions on the 24 SOEs, 46 positions were filled by ministry chief executives. There were 16 instances where the SOE’s chief executive or general manager also served as a board member. There were also a number of cross appointments; for example, in Samoa, the Public Trustee sits on both the Public Trust Board and the board of Samoa Life Corporation. In summary, the analysis showed that:

- One ministry CEO sits on 15 of the 24 SOE boards
- Two ministry CEOs sit on 6 boards.
- Two ministry CEOs sit on 5 boards
- The balance of the ministry CEOs sit on 1 to 3 boards

Most professional company directors limit themselves to 5 to 8 boards, and less if they are also chair. Experience has shown—based on the usual time commitment for a chair or director—that it is not possible to be an effective director if your commitment extends to more than five to eight boards concurrently.

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31 Detailed information was provided on board appointments for 24 of the total of 26 SOEs.
Therefore to sit on any more than three boards while also being a full-time chief executive would seem to comprise a very high workload: a workload that may be expected to compromise performance, efficiency and functionality.\(^{32}\)

**Samoan Ministers and public servants should be prohibited or restricted from serving on commercial SOE boards.**

The practice of allowing ministers and public servants to serve on commercial boards is not considered best practice. However, it is important to stress that this is not due to competency concerns; rather it is due to the time commitment necessary to be an effective director and inherent conflict-of-interest issues. More specifically:

- Ministers who are both chairs and responsible ministers violate a basic principle of good governance, namely the separation of the ownership function of the SOE (responsible or shareholding minister) with the management function (board of directors). A cornerstone of SOE reform is that there should be a clear separation between these roles and the persons who undertake them.

- Where a minister is also the chair of an SOE, the appropriate level of transparency and accountability is lacking. The minister’s role is to hold the board to account for how well they steward the public funds invested in the SOE: it is not possible to do this in a transparent manner when the minister is also the chair.

- Senior public servants who serve on the boards of SOEs similarly violate this principle of the separation of ownership and management, particularly where the public servant has some responsibility in their role as public servants for the area within which the SOE operates.

- Senior public servants are engaged in full-time work and they cannot be expected to apply the time necessary to fully discharge their obligations as a board member.

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\(^{32}\) Multiple directorships are not as common in the private sector. A 2005 review by the Australian Institute of Company Directors showed that 81% of directors in the ASX top 100 companies served on only one board, only 13% served on 2–4 boards, while only 1% held 4 directorships and just 1 director held 5.
Public servants in monitoring units cannot be expected to monitor SOEs effectively if they are reporting to more senior public servants or ministers who also sit on those SOE boards. They cannot be expected to hold to account or recommend disciplinary action against a board or director when that board comprises of ministers and/or senior public servants senior to themselves; their employment as a public servant may be compromised by such an action.

These concerns are well understood in New Zealand, where neither ministers nor public servants are permitted to sit on SOE boards. And it should be noted that the concerns are starting to be recognized by other Pacific island countries: in Fiji, neither ministers nor public servants serve on any SOE boards (although some public servants sit as observers); and in Tonga, the government has determined that all ministers and public servants currently serving on SOE boards will be allowed to step down by the end of 2008.

The Samoan Institute of Directors (SIOD) is training acceptable candidates for membership of SOE boards

One of the reasons cited to justify the continued presence of ministers and public servants on SOE boards is the lack of sufficient private sector directors. The SOEMD, the monitoring agency in Samoa, maintains that there is an adequate pool of potential SOE directors available and that they are comfortable recommending candidates from this pool to the responsible minister. In part, the size of the pool is due to the existence and effectiveness of the Samoan Institute of Directors, which has been in operation for over two years and undertakes extensive director training. SOEMD recognizes the importance of ongoing training in the professional development of existing directors and the development of the pool of possible directors and it sees the Samoan Institute of Directors as the primary medium of such training.

2. Directors’ duties

Directors’ duties should be clearly articulated and where practice falls short of requirements, there should be consequences

Formally, the Samoan legislation (and regulations) dealing with governance matters could be labelled “best practice”—or at least very close to best practice. Samoa has well-documented

33 Some public servants are expected to sit on industry boards or representative groups or even commercial boards as directors or observers. This would be factored into their normal work commitments and available time constraints.
and detailed processes for the selection and appointment of directors for their SOEs. There are also provisions dealing with how directors are expected to undertake their stewardship role once appointed to an SOE board. For example, it is regulated that “the board of the PTB shall establish an Audit Committee”. However as with the rules dealing with the selection and appointment of directors, practice falls short of the legal requirements: despite the requirement that each SOE establish audit committees, only six SOEs have formal audit committees.

If Samoa were to follow the requirements of its existing SOE legislation and new Companies Act, the SOE portfolio would show immediate and dramatic improvements in performance.

The Companies Act in place prior to the introduction of the new Companies Act 2001, poorly defined directors’ duties. While the new act has only recently come into force, a number of the duties contained in the new Companies Act were already included in the SOE Act and regulations but appear to have been ignored. As has been observed elsewhere, actual governance practice, however, has ignored the legislative requirements: Samoa has failed to adequately implement its governance framework and Samoa certainly falls short of good practice in relation to governance implementation. Indeed, of the three SOE portfolios reviewed, the implementation of governance requirements is the most marked problem for Samoa; and it is probable that this factor is the most significant single contributor to the poor financial performance of the Samoan SOE portfolio.

3. Appointment of SOE Chief Executives

CEOs should not sit on their own board(s)

There are two main issues regarding the appointment of SOE chief executives in Samoa. The first issue that is noteworthy is the high number of CEOs that sit on their own boards: 57%. While this is quite common in the United States, it is not considered best practice in many other countries as it is seen to confuse the accountability relationship between the board and management.

A director should be appointed on a performance-based contract with a well-designed bonus component

The second issue concerns the mechanisms in place to encourage the performance of SOE chief executives. Performance measures are vital for ensuring that there are objective

34 Schedule 8.2.1 of the Public Bodies (Performance and Accountabilities) Regulations 2002.
35 See the discussion above on the problems of implementation with regard to Samoa’s insolvency rules.
36 See also the feedback comments contained in Appendix X3
grounds upon which performance can be measured. Samoa is making progress in developing written contracts for CEOs: currently 46% of chief executives have written employment contracts. However, such contracts need to be more widely used and, moreover, they need to include specific performance-enhancing provisions: it should be noted that only 15% of the current CEO contracts include performance-based measures.

The use of a bonus component within a performance-based contract is potentially useful, but in the current environment may be problematic. Bonus schemes, if not structured correctly, can lead to behaviour that does not always maximize value from the owner’s standpoint. For example, a poorly structured bonus scheme may reward growth in revenue rather than growth in profit or set performance targets which are not within the control of the manager.

However, given that the SOE portfolio has performed so poorly for so long, the Samoan government should give consideration to the establishment of a carefully designed bonus scheme as a measure to improve SOE performance. Similarly, penalising poor performance may also provide an incentive for better performance. This report recommends that the Samoan government set aggressive targets to have all chief executives on carefully constructed performance-based contracts as soon as possible.

C. Tonga

While the Tongan SOE Act needs updating, the government’s processes and policies remain sound

The governance sections of the Tongan SOE Act would be considered far from best practice. However, the actual processes and policies which the government follows are robust and ensure strong, properly skilled boards. For example, the SOE Act in Tonga does not provide any guidelines for the selection and appointment of directors. In the absence of legislative requirements, however, the monitoring agency (the MPEI) has developed and adopted an effective process. To bring Tongan government legislation in alignment with best practice, existing practices should be formalized through the adoption of the recommended legislative changes (detailed in the Chapter I of this report).

1. Director Selection Process

Tonga deploys an effective director selection process

With regard to the director selection process, the Tongan practice demonstrates an effective process which may serve as a useful paradigm for other countries. Advertisements are placed throughout the year for people to submit an expression of interest to become a
director of a SOE. Those that respond are added to the pool of potential directors and when a vacancy exists—or the need to increase the number of directors arises—the MPEI selects eligible candidates from the existing pool of potential directors. Eligible candidates are those that have previously undertaken director training under the aegis of the MPEI or other credible organizations. However, they may also be required to have specific abilities, depending on the skills required for the position. A recommendation on a preferred candidate is made to the Minister of Public Enterprises and Information who, in turn, submits the recommendation to cabinet and the Privy Council for approval.

The term of appointment for a director is three years but they may be re-appointed for a further term. If a director is not going to be re-appointed, the ministry looks to its database of potential directors for a replacement. An SOE with a pending vacancy may suggest names for the MPEI to consider if they have identified a particular need or skill gap on that board. In this way, the MPEI ensures that the board has the correct balance of skills and experience to assist the SOE to operate effectively.

Directors and chairs, once appointed, are not often removed from office on the grounds of non-performance. In fact, the MPEI could not recall any instance when a director or chair had been removed from office prior to the expiration of their term. This is not a good sign: directors should not be immune from the consequences of poor performance or supporting poor decisions. Furthermore, it is very difficult to install a performance driven culture within management if it not evident at the board level. Governments should take action to deal with underperforming directors, by either removing them prior to their term of office ending or by obliging them to undertake further training and development.

The current practice is to appoint ministers as chairs and senior public servants to boards as directors or chairs for special purposes. Out of 17 SOEs, 8 have ministers serving as chairs; and out of 88 director positions, 22 are filled by public servants. The maximum number of board positions held by a public servant is 4. This is despite the fact that public servants are only suppose to be appointed to boards as an interim measure or to meet a particular need: for example, when an SOE is going through a rationalization or restructuring process.

**Tonga should ensure the availability of formal induction training for directors**

The stated policy of the Tongan government is that all ministers and public servants will be allowed to step down from SOE boards by the end of the 2008 calendar year. The move to replace ministers and public servants will be a positive development and should lead to improved performance within the SOE portfolio. As suggested in the analysis of the Samoan
regime, this is not an issue of competency, but rather of creating a more robust and sustainable governance arrangement that will result in clearer accountabilities and an improved framework for better decision-making. Ultimately this should lead to the improved performance of Tonga's SOE sector.

The MPEI has suggested that there is a pool of possible SOE directors whom they would be comfortable recommending to the minister, yet this pool is not sufficiently large enough to provide for the range of skills required for all positions. Additional training will be required to expand the pool of skilled directors. To this end, and to replace the board members that will step down because of their conflicting affiliation with the government, the MPEI has been conducting training programs to expand the pool of potential directors.37

Indeed, in February 2008 the MPEI carried out its first training course for potential directors and it intends to repeat this course every year. Further, a training program targeting existing directors was held in September 2008 and more are planned. The provision of training along these lines is crucial: there is currently no formal induction training given to new directors who join an SOE board; indeed, typically, inductions are limited to what the secretary to the board can communicate in terms of how the board operates, meeting times, the content of board papers etc. Clearly, a formal training and induction program will be more in keeping with the requirements of the directorship position.

2. Directors' Duties

*Tonga should formalize existing practices regarding the selection and appointment of directors*

In Tonga, it appears that directors are predominately selected and appointed on the basis of their ability to add value to the board and the SOE. Actual practice is very sound: this is despite the fact that the Tongan SOE Act does not cover basic governance processes and requirements, such as the process of selecting and appointing directors and the duties and key objectives of directors.

The decision to allow ministers and public servants to step down from the SOE boards and focus on their key responsibilities will encourage better performance from the SOE portfolio. While the current practice of appointing public servants to boards for a specific purpose, such as a privatization process, has some merit, it is not considered best practice to appoint public servants to boards on an ongoing basis, regardless of whether they are appointed as

37 The training program is being funded by an ADB TA, which is assisting the government to restructure and rationalize a number of SOEs.
observers or directors. One of the problems with the practice is that it can create a situation where the public servants become “deemed” directors. This not only exposes the public servants to increased risk, it also compromises their ability to question and monitor board performance.

3. Appointment of SOE CEOs

_The Tongan use of performance-based contracts represents best practice_

Tonga has adopted good practice in the appointment of chief executives and the establishment of accountability structures between the CEO and the board through performance-based contracts. In Tonga, the number of CEOs that have written performance-based contracts is high (75%) and, when combined with a moderate bonus incentive structure, this should facilitate the effective performance of SOEs. This effective practice is supported by the SOE Act, which contains clear provisions on the need to have written employment contracts (section 26).

D. Fiji

1. Director Selection Process

_Fiji’s SOE Act should provide for a formal director selection and appointment process_

In Fiji there is no formal director selection and appointment process detailed in the SOE Act. However, like Tonga’s MPEI, Fiji’s MPE has developed a selection and appointment process. The MPE, which has responsibility for the administration of the director database, affirms that the process of director selection is followed in every board appointment. The MPE submits names to the Minister of Public Enterprises to fill potential director positions. The recommendations are based on applicants possessing the skills required by the vacant position. The minister consults with the responsible minister and the Prime Minister; once they have agreed on a preferred candidate, the Minister of Public Enterprises formally appoints the director to the board.

Typically, directors are appointed for a three year term; and on average they serve for two terms. In practice, directors and chairs are seldom removed from office for non-performance prior to the expiration of their term. This is not an optimal arrangement: directors should face the consequences of poor performance, which may be further training or removal. The Ministry of Finance—responsible for monitoring the majority owned SOEs—reviews the SOE directors’ performance on an ongoing basis and has stated that it would be prepared to recommend corrective action be taken when a director is underperforming.
Fiji’s MPE should ensure the ongoing availability of director training and development

The Ministry of Finance considers that there is a sufficient pool of suitability qualified directors within Fiji to fill any vacancies that may arise within the SOE portfolio for which they are responsible. The MPE, on the other hand, believes that the pool is insufficient to meet their ongoing needs. The difference in view may be explained by the fact that the MPE is responsible for a much larger portfolio of SOEs. In any case, both agencies believe that existing directors have an important role in mentoring new directors and both believe that a reenergised Fiji Institute of Directors would be the most effective means to increase the size of the director pool.

The problem, however, is that the current Institute of Directors appears to be dormant. In an apparent recognition of this problem, the MPE has taken on the responsibly of ensuring the availability of ongoing director training and development. Two courses have recently been held for directors and senior managers within the SOEs: a two day director training course in December 2007 and a CSO training course in March 2008. If conscientiously managed, and offered on an ongoing basis, the training program should facilitate the availability of appropriately skilled directors.

2. Directors’ duties

Fiji’s SOE Act should provide for the selection and appointment of SOE directors

Fiji’s SOE Act contains a “principal objective” for its commercial SOEs. This can be useful as a guide to those appointing new directors: the provision stipulates that an appointed director must be one that will assist the SOE to meet its principal objective. The SOE Act also provides guidance on the role of the board, the minister’s relationship to the board, and the responsibility of board directors. However, when it comes to the actual processes to be followed in the selection and appointment of directors to SOE boards, the Fijian legislation is essentially silent. To enhance transparency and accountability, Fiji’s SOE Act should explicitly provide for the process to guide the selection and appointment of SOE directors.

All types of SOEs should have an audit committee to enhance accountability

It is commendable that, of the SOEs for which the Ministry of Finance is responsible, 100% have an audit committee. In contrast, only 30% of the SOEs monitored by the MPE have created audit committees. It is not clear why there should be such a significant difference between the two portfolios, but it is recommended that all SOEs utilise audit committees to enhance financial accountability and review management practices.

The use of monitoring unit staff as “observers” should be discouraged

The practice of requiring staff from the monitoring unit to sit as observers on SOE boards has both positive and negative consequences. On the positive side, it gives the staff the ability to observe boardroom dynamics first hand, which can only assist in the task of evaluating the performance of the board and its directors. It also assists the staff to understand the operational and strategic issues the SOE faces which, in turn, enables them to provide informed briefings to the minister—especially with regard to the corporate plan and the SCI.

The negative consequences are that the monitoring unit staff could become “deemed” directors. This means that they may end up carrying the risks and liabilities of a director, without the usual protections available to those formally appointed as directors, protections which include professional indemnity insurance cover. If the “observer” provides a comment during the board meeting or in any way influences decisions that the board makes, then they may be held to account for the outcome of those decisions. And if a board makes a decision that is not subsequently supported by the shareholders or the monitoring unit, the “observer” staff member may be compromised in relation to either that decision, or in his or her ability to subsequently provide free and frank advice to the shareholder (which may be contrary to that decision).

Finally, directors, particularly if they are new and inexperienced, will tend to look to the monitoring unit observer for guidance and direction during the board meeting, especially when dealing with difficult or contentious issues. This has several negative consequences: it can give that observer too much influence over the decisions and direction of the board; weaken the accountability of directors for the decisions the board makes, and hinder the growth and development of new directors.

On balance, the formal monitoring tools such as the SCI and corporate plan should be sufficient to enable the monitoring unit to effectively monitor performance and influence future direction. If observers are required, they should be selectively targeted and appointed on a temporary basis. The appointment of observers may sometimes be justified: for example, when an SOE is going through privatization or when an SOE has had a history of significant poor performance. If the view is that they should sit in on all board meetings during this transition period, then they should sit as full directors rather than observers to

39 In Fiji’s Public Enterprise Act 1996, the equivalent document to the SCI is the Statement of Corporate Objectives or SCO.
overcome the problems of becoming a “deemed director”. In all other cases, best practice guidelines would argue against the use of monitoring unit staff as observers on SOE boards.

3. Appointment of SOE CEOs

_Fiji makes effective use of performance-based contracts_

All of the chief executives have written performance-based contracts and, when combined with a moderate bonus incentive structure, this should have the positive effect of encouraging performance within the SOE portfolio.
SUMMARY OF RECOMMENDATIONS

Samoa

Samoa has a comprehensive SOE legal framework but suffers from a lack of implementation. More specifically, Samoa needs to implement the following provisions:

- penalties for breaching the key requirements of (i) operating as a successful business and (ii) meeting the CSO guidelines.
- the general prohibition against public servants and ministers being appointed SOE board members
- the prohibition against the payment of board member fees and allowances to public servants and ministers
- the criteria by which an SOE is deemed to operate as a "successful business."

In terms of the provisions in the Companies Act 2001 and the 2006 Amendment, Samoa should enforce the provisions regarding:

- directors' duties and liabilities
- reporting requirements
- and insolvency

In terms of SOE governance, Samoa needs to:

- authorise the independent monitoring unit to report directly to the shareholding ministers
- like the other jurisdictions, provide clear guidance on what to include in a corporate plan
- like the other jurisdictions, improve parliamentary oversight by the timely tabling of adequately prepared documents
- permit ministers and ministry chief executives to step down from SOE boards
- implement its SOE law regarding the selection and appointment of directors
- restrict or prohibit ministers and public servants from serving on commercial SOE boards
- implement the requirement for an audit committee to enhance the accountability of SOEs
• prohibit CEOs from sitting on their own board(s)
• appoint CEOs on a performance-based contract with a well-designed bonus component to encourage productivity
• provide training or development for directors who are underperforming, or if necessary remove them from the board.

Tonga

In contrast to Samoa, Tonga has a less sophisticated SOE Act, but has adopted progressive governance practices that go beyond the strict requirements of the law. However, Tonga needs to formalize its practices of good governance. More specifically, it is recommended that the SOE Act:

• require SOEs to operate as a successful businesses by being as profitable as comparable private sector businesses
• provide for company and non-company SOEs in terms of governance and reporting requirements
• provide guidelines for identifying, contracting and financing CSOs.
• make the approved CSOs guidelines binding
• provide guidelines regarding who may be appointed as a SOE director and the process to be followed to select and appoint directors
• require the tabling of SCIs to Parliament
• require Audit Reports be tabled as part of the Annual Accounts

Tonga’s governance framework is basically sound but it should:

• develop corporate plans as a separate accountability document
• like the other jurisdictions, provide clear guidance on what to include in a corporate plan
• encourage the use of both SCIs and corporate plans, thus abolishing its “one-document” approach
• like the other jurisdictions, improve parliamentary oversight by the timely tabling of adequately prepared documents
• formalize existing practices regarding the selection and appointment of directors
• ensure the availability of formal induction training for directors
like the other jurisdictions, provide training and development for directors who are underperforming, or if necessary remove them from the board

Fiji

Fiji's SOE legislation meets many of the formal requirements for good SOE law but there are several areas that could be improved. Most notably there should be:

- guidelines for directors, especially with regard to duties and obligations
- penalties for non-compliance

Fiji's Companies Act should be updated to provide additional guidance to board members regarding:

- duty of care
- and insolvency

To improve its governance framework, Fiji should:

- like the other jurisdictions, provide clear guidance on what to include in a corporate plan
- like the other jurisdictions, improve parliamentary oversight by the timely tabling of adequately prepared documents
- provide for a formal director selection and appointment process
- avoid or discourage the use of monitoring unit staff as observers on SOE boards
- ensure the ongoing availability of director training and development
- require the establishment of audit committees in all SOEs to enhance financial accountability
- like the other jurisdictions, provide training or development for directors who are underperforming, or if necessary remove them from the board
## Appendix 1
### Contents of SOE Legislation

<table>
<thead>
<tr>
<th>Topic Covered</th>
<th>Tonga</th>
<th>Samoa</th>
<th>Fiji</th>
<th>New Zealand</th>
</tr>
</thead>
<tbody>
<tr>
<td>Establishment of SOEs</td>
<td>S 7 &amp; 8</td>
<td>S 5, 6</td>
<td>S 6 - 30 &amp; Schedules</td>
<td>S 10, 23 - 29</td>
</tr>
<tr>
<td>Principle Objective of SOEs</td>
<td>S 8, 14</td>
<td>S 43 &amp; KP1</td>
<td>S 4</td>
<td></td>
</tr>
<tr>
<td>Sale of shares or Privatisation of SOE</td>
<td>S 7</td>
<td></td>
<td>S 11</td>
<td>S 80</td>
</tr>
<tr>
<td>Governance</td>
<td></td>
<td></td>
<td>S 5</td>
<td>S 89</td>
</tr>
<tr>
<td>Appointment process for directors</td>
<td>S 12, 14</td>
<td>S 15 &amp; Regs</td>
<td>S 31, 56</td>
<td></td>
</tr>
<tr>
<td>- Number of Directors</td>
<td>S 12</td>
<td></td>
<td>Entity specific legislation</td>
<td></td>
</tr>
<tr>
<td>- Remuneration of Directors</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Attributes for selection</td>
<td>Regs (Schd 3)</td>
<td></td>
<td>S 5 (1)</td>
<td>S 89</td>
</tr>
<tr>
<td>Appointment process for Chairs</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Composition of the board</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Role of Ex-Officio members defined</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>- membership allowed</td>
<td></td>
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<td>- membership prohibited</td>
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<td>- membership allowed conditionally</td>
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<td>- membership as observers</td>
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<tr>
<td>Role of Ministers as board members defined</td>
<td></td>
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<td>- membership allowed</td>
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<tr>
<td>- membership allowed conditionally</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Removal process for directors</td>
<td>S 14</td>
<td>S 25 &amp; Regs</td>
<td>S 5, 14 - 18</td>
<td>S 91</td>
</tr>
<tr>
<td>Topic Covered</td>
<td>Tonga</td>
<td>Samoa</td>
<td>Fiji</td>
<td>New Zealand</td>
</tr>
<tr>
<td>-------------------------------------</td>
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<tr>
<td></td>
<td>Public</td>
<td>Public</td>
<td>Public</td>
<td>State-owned</td>
</tr>
<tr>
<td></td>
<td>Enterprise</td>
<td>Bodies</td>
<td>Enterprise</td>
<td>Enterprises Act 1986</td>
</tr>
<tr>
<td></td>
<td>Regulations</td>
<td>and</td>
<td>Regulations</td>
<td>Crown Companies</td>
</tr>
<tr>
<td>Roles and responsibilities of</td>
<td>S 13,</td>
<td>S 16-19</td>
<td>S 57, 105</td>
<td>S 86-87, 92-95</td>
</tr>
<tr>
<td>directors</td>
<td>15,16, 17</td>
<td></td>
<td>&amp; KP1</td>
<td></td>
</tr>
<tr>
<td>Managing Conflicts of Interest</td>
<td>S 20, 21 &amp;</td>
<td>S 90</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appointment of CEO</td>
<td>S 26</td>
<td>S 34</td>
<td>S 117</td>
<td></td>
</tr>
<tr>
<td>Role of CEO</td>
<td>S 26</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Establishment of Audit Committee</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Establishment of Responsible</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minister</td>
<td></td>
<td></td>
<td>S 2</td>
<td></td>
</tr>
<tr>
<td>Roles and responsibilities of</td>
<td>S 8,9,10,11</td>
<td>As a</td>
<td>S 49, 58,</td>
<td>S 6, 10,</td>
</tr>
<tr>
<td>Responsible Ministers</td>
<td>&amp; 23</td>
<td>shareholding</td>
<td>78, 109 &amp;</td>
<td>11,13</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Min</td>
<td>Schd 2</td>
<td></td>
</tr>
<tr>
<td>Roles and responsibilities of</td>
<td></td>
<td>S 31</td>
<td>S 2, 10, 13,</td>
<td>S 88</td>
</tr>
<tr>
<td>Shareholding Ministers</td>
<td></td>
<td></td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>Roles of Shareholders who are not</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ministers</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Monitoring</td>
<td></td>
<td></td>
<td>S 61 - 67</td>
<td></td>
</tr>
<tr>
<td>Establishment of Monitoring Unit</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Monitoring requirements / Powers</td>
<td>S 26, 28</td>
<td>S 109</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Requirements defining content and</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>approval of:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Business/corporate plans</td>
<td>S 22 &amp; Regs</td>
<td>S 89-92</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Statement of Corporate</td>
<td>S 18</td>
<td>Regs (Schd 5.5)</td>
<td>S 93 - 99</td>
<td>S 13, 14</td>
</tr>
<tr>
<td>Objectives/Intent</td>
<td></td>
<td></td>
<td></td>
<td>137 - 144, 148</td>
</tr>
<tr>
<td>- Annual Report</td>
<td>S 19, 20</td>
<td>S 23 Regs</td>
<td>S 101 - 104</td>
<td>S 15</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(Schd 6)</td>
<td></td>
<td>150 - 157</td>
</tr>
<tr>
<td>- Audit Requirements</td>
<td>S 24</td>
<td>S 27</td>
<td>S 100</td>
<td>S 19</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>156</td>
</tr>
<tr>
<td>- Performance Audit/review</td>
<td>S 24</td>
<td></td>
<td>S 15</td>
<td>S 153</td>
</tr>
<tr>
<td>Reporting requirements to parliament</td>
<td>S 22</td>
<td>S 106</td>
<td>S 17</td>
<td>S 150, 149</td>
</tr>
<tr>
<td>Topic Covered</td>
<td>Tonga</td>
<td>Samoa</td>
<td>Fiji</td>
<td>New Zealand</td>
</tr>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Crown Entities Act 2004 Crown Companies</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CSO defined</td>
<td>S 4</td>
<td>S 9</td>
<td>S 69, 70, 71 &amp; KP1</td>
<td>S 7</td>
</tr>
<tr>
<td>Explicit CSO policy</td>
<td></td>
<td>S 9 -13 and Regs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ability for monitoring agency to recommend policies and procedures binding on SOEs</td>
<td></td>
<td>S 26</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Penalties for non-compliance</td>
<td>S 13, 19, 25</td>
<td></td>
<td></td>
<td>S 171,172</td>
</tr>
<tr>
<td>Sell or dispose of main undertaking or subsidiaries</td>
<td></td>
<td>S 54, 55</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Appendix 2

Analysis of SOE legislation against key requirements

Samoa – Public Bodies (Performance and Accountability) Act 2001

1. How SOEs are established. This is adequately covered.

2. Principal objective of the SOE; which should be a concise statement of what is expected of an SOE that could then guide the board and drive decision-making. The wording of the Samoan Act, which is set out in section 8, is very similar to the New Zealand and Fijian Acts. All of the three Acts, subject to minor wording differences, state that the “principal objective of every (SOE)” shall be to operate as a successful business and, to this end, to be as profitable and efficient as comparable businesses that are not owned by the State. We will discuss this provision in more detail later, but it is worth noting here that the Samoan legislation also adds further requirements such as “meet any commercial services obligations established under the Act” and “comply with the provision of the Labour and Employment Act 1972”, and “exhibit a sense of social responsibility”. The important point to make at this stage is that all of the requirements established under the “principal objective” definition are reasonably quantifiable and do set clear commercial imperatives that are measurable.

The Act also defines the Principal Objective of PBBs (Section 14) which states that they must “provide excellent service to its users and (a) Meet the purposes and objectives of its governing legislation; and (b) Operate in as efficient and effective manner as comparable organizations that are not owned by the State; and (c) Act as a good employer; and (d) Be an organization that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates.

3. Appointment process for directors. The Act requires that every director be appointed or reappointed in accordance with the procedures set out in Schedule 3 of the Public Bodies (Performance and Accountability) Regulations 2002 (the Regulations). Schedule 3 provides quite detailed provisions dealing with the appointment of directors, the highlights being:

a. The person appointed must be someone who, in the opinion of the Committee appointing the director, can assist the PTB achieve its objectives.41

b. No Member of Parliament, Public Servant or Constitutional Office shall be appointed unless Cabinet has certified that such appointment or re-appointment is necessary and (i) is in the national interest, (ii) the qualifications or business experience cannot be found elsewhere.

c. If a Member of Parliament, Public servant or Constitutional Officer is appointed under the preceding exceptions, then the Regulations clearly state that they “shall not receive remuneration or other benefits from the PTB for services as a director”.

d. The Regulations set out the terms and conditions upon which a director can be removed from office.

40 In the Samoan legislation it refers to Public Trading Bodies, in Fijian legislation it is Government Commercial Company, while in the New Zealand legislation the reference is to State Owned Enterprises.

41 This can be compared to the New Zealand provision that states, “the directors of a SOE shall be persons who, in the opinion of those appointing them, will assist the SOE to achieve its principal objective.”
e. Schedule 4 of the Regulations sets out the details of the requirement that directors sign a declaration of pecuniary interests and convictions. This supports the legislative requirement established in Section 20 of the Act.

4. **Removal of Directors.** Both the Act and the Regulations establish clear grounds for the removal of directors for non-performance or for breach of their duties.

5. **Roles and responsibilities of Directors.** It is important that the SOE Act provide a clear statement of roles and responsibilities of directors that are specific to board who govern entities owned by the state and as such can be seen as above and beyond the general responsibilities established under the Companies Act. In the case of the Samoan legislation these additional requirements are very clearly spelt out and they include:

   a. Schedule 8 of the Regulations set out explicit requirements of Directors including achieving the principal objective, establishing audit committees, the standard of care required, requirements in terms of insolvency, obligation to report breaches of the PB Act, Companies Act or the Public Finance Management Act, how interested directors must behalf and how directors use and disclose information received from the PTB.

   b. Section 17 of the Act makes it clear that “every decision by each director…..and each board of Directors of a PTB shall be made solely in compliance with the provisions of the Companies Act 2001 and in accordance with the PB Act, which includes the requirement to ensure that a PTB operates as a successful business”.

   c. To reinforce the requirements set out above, section 18 states that any director who knowingly makes a decision inconsistent with the Companies Act and PB Act shall be liable for a fine of up to 100 penalty units 42.

   d. The roles of PBB directors are set out in section 18 which link the obligations back to the principal objective of PBBs (section 14) and those provisions in Schedule 8 that relate to PBBs.

   Section 6 (7) clearly states that the Board of the PTB shall be accountable to the Shareholding Ministers.

6. **Managing conflicts of interest.** As noted above, Section 20 of the Act requires every director of a PB to provide a declaration of pecuniary interest and convictions upon appointment and then annually thereafter. Furthermore, Section 21 specifically deals with conflicts of interest and establishes a penalty of 100 units for any director who attempts to take part in a decision where the person has a pecuniary or other interest which conflicts with the interests of the PB.

7. **Appointment of CEO.** The Samoan legislation does not deal with the appointment of the CEO. The Act should deal with how the CEO is appointed, for example (i) by the board, or (ii) by the Minister or (iii) by the board after consultation with the Minister, either (i) or (ii) are recommended. An example of a “good practice” provision dealing with the appointment of the CEO can be found in the Tongan SOE Act which covers the basic requirements of appointment, such as (i) there must be a written contract dealing with performance expectations, performance reviews and a job description (ii) delegations to the CEO are established and (iii) the CEO is empowered to employ staff.

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42 Penalty units are not defined in the October 2007 reprint of the Act, but in prior prints the fine was either WST 10,000 or 100 penalty units.
8. **Role and responsibilities of the Responsible Minister.** The Responsible Minister is defined in Section 2 and then the duties and obligations are set out in various parts of the Act, including Sections 6, 9 - 13 (dealing with CSOs) and also in the Regulations.

9. **Role and responsibilities of the Shareholding Minister(s).** The Samoan Act defines the Shareholding Minister/s within Section 2 and then throughout the Act identifies the roles and obligations in a clear manner and establishes a good separation between “ownership” interest and stewardship of the SOE, which is clearly the responsibility of the Board. The Act also contains penalties and consequences for shareholding Ministers (shareholding Minister and responsible Minister) who fail to meet certain of their duties and responsibilities. For example, failure to follow the guidelines in establishing a CSO renders the decision and consequential funding approval “null and void”. Furthermore, if a Minister (or anyone for that matter) tries to direct or attempt to direct a Director to perform a CSO other than in accordance with the Act, that person is liable to a fine or up to 100 penalty units.43

10. **Requirements dealing with the content and approval of:**

   a. **Business or Corporate plans.** The Corporate Plan is the primary planning document for Samoan SOEs and hence the primary “relationship” document as between the owner (shareholding Ministers) and the Board. The procedural requirements are contained in Section 22 of the Act and then the Regulations set out in board terms what the Plan must cover. The Regulations also, importantly, provide for the Treasury (Ministry of Finance) to establish detailed guidelines on content and process. The Ministry of Finance has published very thorough guidelines that are made available to all SOEs, which also cover reporting requirements against the plan. These guidelines are supported by training sessions on Corporate Plans, which are held bi-annually and run by members of the SOEMD. The training is targeted at the senior managers within the SOEs that are responsible for the preparation of the Plans. The key requirements of the Corporate plan are:

      i. That the plan covers in detail the next twelve month period and then the two years thereafter,

      ii. The Board and the shareholding Ministers must agree the content of the Plan. If they cannot agree then it is referred to Cabinet who can then direct the Board to make modifications to the plan,

      iii. The plan is only effective if there is agreement on the content of the plan, or the plan has been changed to reflect the directions of cabinet,

      iv. Every SOE must comply with the approved plan

      v. The provisions dealing with the plan and Statement of Corporate Objectives apply to both PTBs and PBBs.

   b. **Statement of Corporate Intent.** Consistent with the Corporate Plan being the primary planning document, the Statement of Corporate Intent, or in Samoa it is labelled the Statement of Corporate Objectives (SCO) is purely a summary document rather than a primary accountability document and summarises the key points in the plan. However it is the SCO that is tabled in Parliament and as such becomes a key reporting document. To make this effective as a reporting document the SCO should contain sufficient financial and non-financial performance indicators so that Parliament can gauge the

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43 See note (3) above
performance of the SOE against the approved Corporate Plan. It is not clear that this happens.

c. **Annual Reports.** The detail on what is required to be included in the Annual Report and timing is adequately set out in the Regulations (Schedule 6). Two useful provisions are that (a) the Ministry of Finance can ask for additional information and (b) there is a pro-active requirement that the Boards keep the Ministry informed of any matters that may adversely effect the achievement of the objectives in the Plan or SCO. The audited Annual Reports must be tabled in Parliament (Schedule 6.7).

d. **Audit requirements.** The Controller and Chief Auditor is the auditor for the SOEs (Section 27) but the actual audit can be contracted out, which does happen in some cases.

e. **Performance Audit.** The Samoan legislation empowers the shareholding Minister or the “Financial Secretary” to undertake a performance audit of any SOE whenever they consider it appropriate. The grounds for the performance review are not specified in the Act (Section 24) and the powers of investigation are very wide. Bearing in mind the identified poor performance of the Samoan SOEs it is perhaps surprising that this provision has not been used more extensively. It is our understanding that there has never been a performance audit instigated under Section 24.

11. **Reporting requirements to parliament.** The Samoan Act requires that both the audited Annual Accounts and the SCO be tabled in Parliament. It is not clear however whether Parliament is given sufficient time to question and debate the reports and assess performance of the SOEs. The effectiveness of Parliamentary oversight is also impacted if there is any delay in competing the audit (hence a delay in tabling the report), which has been the case in Samoa.

12. **CSO defined.** The Samoan legislation clearly defines what a CSO is and also the process by which they can be approved and funded. The role of the Responsible Minister is also clearly laid down in the legislation. As noted above (under roles of the Responsible Minister) there are penalties that can be levied against the Minister, Board and indeed any party who induces the SOE to undertake a CSO outside of the authorisation process mandated in the legislation. When this is combined with the principal objective to operate as a successful business (Section 8) and the penalties that arise if decisions are made inconsistent with that objective (Section 17), then it is most surprising that any CSO is undertaken that is not approved under the process set out in the Act. To provide further guidance to decision makers and those that might apply for CSO funding, the Regulations contain a detailed step-by-step process. These more detailed guidelines where recently reviewed and updated by Cabinet, which had the effect of making the criteria for approving CSOs even clearer and tighter.

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44 The Financial Secretary is not defined in the legislation but it is interpreted to be the CEO of the Ministry of Finance.

45 The SOEMD drafted updated guidelines that were submitted to Cabinet in June 2007 and approved in that year.
1. **How are SOEs established?** This is adequately covered in the legislation.

2. **Principal Objectives.** The Tongan legislation surprisingly does not include a section that sets out the SOEs principal objective. This is a major oversight as there is no legislative context that would drive the planning focus for the SOEs. For example, when a board establishes its business priorities for the next year, what principle should guide the decision-making? Should the board be profit maximising or should it look for business opportunities that maximise the social benefit? While this deficiency can be covered through the corporate plan and SCI approval process, where the Minister can set the strategic imperative and primary objective for the SOE, clearly this is very dependant on the Minister’s personal views and also the process lacks a degree of objective scrutiny. There is no doubt that under the current administration the SOE portfolio in Tonga is required to operate on primarily commercial grounds with the expectation that each SOE should achieve a 10% ROE. However, the lack of a clearly stated “principal objective” could mean that there will be needless re-litigation with SOEs as to what constitutes an acceptable return and what should drive decision making.

3. **Appointment process for directors.** The legislation covers the appointment process, but provides no assistance to those making the appointment as to what should guide the selection of the directors. The legislation simply states that the Minister, with the consent of the Privy Council, can appoint and it sets out the term of appointment and the maximum and minimum number of directors, but there is no guidance on what skills and attributes should drive the selection and appointment process. The lack of a legislative “principal objective” adds to this weakness. It would be more usual in SOE legislation for the key driver in selecting directors to be “those most likely to assist the SOE in achieving its principal objective”.

The Act is also silent on whether Ministers or public servants can be appointed as directors. The practice in Tonga has been that Ministers are appointed as the Chair of most SOEs, but that public servants generally are not appointed to the boards. The Government has recently announced that all elected members (Ministers) will step down from the boards by the end of calendar 2008. As will be discussed in the section of this paper dealing with Governance, this is a positive step. It is the review teams recommendation that the SOE Act be amended to specifically state that elected members (Ministers) and public servants cannot be appointed as board members to reinforce the decision already made by the Government.

4. **Removal of directors.** Under the Act, board members can be removed (i) for incompetency, incapacity, bankruptcy, neglect of duty, or misconduct, but only on the advice of or after an investigation by the Attorney General, or (ii) where a public enterprise fails to comply with its obligations under Part IV and Part V of the Act. The power to remove is therefore quite restricted. In the first situation, there must be a determination by the Attorney General that the director has exhibited one of the undesirable characteristics listed, while in the second power, apart from the duty of directors listed in Section 13 of Part IV of the Act, all of the other references to directors duties in Parts IV and V are collectively as the “board”. It would therefore be difficult to single a particular director out as “failing to comply with its obligations”.

The main reference to an individual director in Part V is to the Chairman, so it would be possible to identify the chair, in his capacity as a chair, as a director who had failed to carry out his duties, but that would not be possible for directors who were not

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46 Where the term civil servant or public servant appears in this paper it does not include staff or management within the SOEs.
the chair. On balance the Tongan SOE legislation is probably a little restrictive in relation to the grounds upon which a director can be removed from office, however it is noted that the Tongan Companies Act also contains provisions dealing with directors duties and there is no doubt that the shareholding Minister\(^47\) has powers to remove directors for those SOEs that are incorporated companies. Section 6(1) of the Act clearly states that the provisions of the SOE Act apply to Companies registered under the Companies Act 1995 in addition to and not in substitution thereof. Eight of the sixteen SOEs are companies.

5. **Roles and responsibilities of directors.** The Act list three specific roles in Section 13, which briefly stated are:

   a. *Not act, or agree to the SOE acting in a manner that contravenes the law or the constitution of the SOE,*

   b. *Not agree to, or cause or allow the business of the SE to be carried on in a manner likely to create a substantial risk of serious loss to the enterprise’s creditors,*

   c. *Not agree to the SOE incurring obligations unless the director believes at the time on reasonable grounds that the SOE shall be able to perform the obligation when it is required to do so.*

The Act contains other provisions dealing with directors role and responsibilities in relation to the SCI, annual accounts and other reporting matters but the foregoing are the only specific duties listed and while they are very important, fall short of best practice and again this is linked to the absence of the definition of a “principal objective” in the Tongan Act. The accountability of Director’s would be greatly enhanced if it were clearly stated that the directors must always act in a manner that is consistent with and assists the SOE to achieve its “principal objective”. The lack of this clarifying requirement is all the more significant in Tonga as half of the SOEs are not companies and therefore cannot rely on the Companies Act for guidance as to what are the directors duties and obligations beyond those listed above.

6. **Managing conflicts of interest.** The Act is silent on managing conflicts of interest, although it is noted that for those SOEs that are companies, the Companies Act 1995 does contain provisions dealing with conflicts of interest (Sections 138-143). However it would appear that there are no statutory rules and guidelines for non-company SOEs.

7. **Appointment of CEO.** This is adequately covered under Section 26 of the Act, which not only establishes the right of boards to appoint a CEO, but goes on to identify the need to establish a contract of employment which should include (i) the objectives to be achieved by the SOE (ii) the performance expected of the SOE (iii) a review of the CEO’s performance (iv) requirement that the CEO adhere the SOE’s SCI.

8. **Roles and responsibilities of the Responsible Minister.** There is no concept of responsible Minister in the Act

9. **Roles and responsibilities of the Shareholding Minister.** As mentioned above, there is just one shareholding Minister who is the Minister of Finance. The Tongan Act combines the roles of the responsible and shareholding Minister within the single

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\(^47\) In the Tongan SOE act there is just one shareholding Minister, the Minister of Public Enterprises (See 2007 amendment) and although the role of the “responsible” Minister is not defined in the Act, the Minister of Public Enterprises holds the powers normally held by the responsible Minister. Prior to the 2007 amendment to the Act the Minister of Finance was nominated as the sole shareholding Minister, but with the creation of the Ministry of Public Enterprises in October 2006 this change became necessary.
shareholding Minister, which is possibly quite sensible bearing in mind the size of the Tongan Cabinet. The position of Minister of Public Enterprises was established in 2007 at the time the new Ministry was formed, however the Act does not contemplate a Minister of Public Enterprises and as such there is no statutory role for that Minister, which would seem to be a significant oversight as the Minister of Public Enterprises would be expected to be responsible for the Public Enterprise or SOE portfolio. It is probable that there is a written delegation, perhaps contained in the Minister of Public Enterprises’ Warrant, that sets out his duties and obligations and transfers duties and obligations from the Minister of Finance. However, with the establishment of the separate Ministry it would be preferable for the Act to be amended to define the Minister of Public Enterprises’ role, responsibilities and accountabilities as the responsible Minister separate to the Minister of Finance’s role as a shareholding Minister. Having made that recommendation, it is noted that at the moment the Minister of Finance is also the Minister of Public Enterprises, so in the immediate term the point is somewhat moot.

10. Requirements dealing with the content and approval of:

   a. Business or Corporate Plan. The Act is silent on the need for the SOE to develop a corporate or business plan. This is not a major weakness in the legislation as the Minister can require that a corporate or business plan be prepared by the SOE and made available to the Minister (through his monitoring agency, which in this case is the Ministry of Public Enterprises (MPE)) through the “catch-all” provisions of Section 23. This section states that the “board shall supply to the Minister or any other person, such information relating to the affairs of the SOE as the Minister shall direct”. The New Zealand SOE Act also is silent on the requirement for the SOEs to prepare and deliver a business plan to the shareholding or responsible Ministers, however the monitoring agency in New Zealand, the Crown Company Monitoring and Advisory Unit (CCMAU) has always made it a requirement that SOEs deliver their business plans at the same time that they submit their SCIs and they rely on a very similar provision to that contained in the Tongan Act to authorise this request.

   The reason for the separation between business plan and SCI (in the New Zealand context) is that the SCI is the public accountability document and as such contains summarised financial data so that commercially confidential information is not disclosed to potential competitors. The business plan is a more detailed document and contains full budget data and forward financial projections and hence strategy. It is therefore a very valuable “monitoring” document, but could be seen to be “commercially sensitive” and not suitable for public disclosure. The practice in Tonga is to rely upon the SCI as the principle monitoring and accountability document.

   b. Statement of Corporate Intent. The Act covers all of the basic requirements for the preparation of an SCI, which must include detailed financial information for the first twelve-month period and also projections for the two years thereafter. Some matters of note are that;

       i. The Minister cannot direct changes in the SCI. The Minister can request that the board consider changes but the board is at liberty to reject the Minister’s request.

       ii. The Board can make changes to the SCI at any time, but must provide the minister with written notice of the proposed changes.
The Tongan approach to SCIs is consistent with the New Zealand approach in that the Minister can suggest but not direct changes. In Samoa, they have adopted a different approach. The SCI is very much a secondary document and really just summarises the content of the Corporate Plan. While the Samoan Act does not discuss whether the Minister can direct the content of the SCI it does make it clear that the Minister can direct the content of the “parent” document, the Corporate Plan. If we look at the New Zealand Act as the parent or source Act we can see that the more relaxed attitude taken in relation to the SCI, in that the Minister can suggest but not direct, is probably due to the fact that all of the SOEs are companies and the reality is that the shareholders at the AGM can effectively control the future direction of the company through appointing and removing directors and exercising their rights as 100% owners. Through legitimate exercise of the shareholding Ministers “influencing” powers they can achieve everything they need to and as such do not need to rely on a statutory power to direct.

As stated, a different approach was taken in Samoa and the drafters of the legislation thought that Ministers needed to have the power to direct. This could be because not all of the SOEs in Samoa are companies and also their Companies Act is quite out-dated. The Fijian SOE Act also gives the Minister the power to direct under certain circumstances and again their Companies Act is out-dated and seems based primarily on the New Zealand 1955 Act.

Is there a more correct approach? In the New Zealand Crown Entities Act 2004, which deals with predominately non-company corporatised entities, the Minister has the power to direct the content of the SCI. It seems therefore that the key deciding point is whether the entity is subject to the provisions of a Companies Act. Are there shareholders who have clear voting rights and can easily influence the future direction of the entity and therefore need not rely on statutory powers to direct? If the answer is “yes” then the SOE legislation need only require discussion as it recognises that if the shareholding Minister is not happy with the planned future direction he/she can call an AGM or use more subtle influencing skills to achieve the desired outcome. Where the entities are either not registered under a Companies Act, or where there is a mix of company and non-company entities, then a more directive approach may be required, such as is evident in the Samoan and Fijian legislation.

In Tonga we see a mix between company and non-company SOEs and the analysis above would suggest that the more prudent approach would be to provide the responsible or shareholding Minister/s with the power to direct the contents of the SCI, provided that is done in a transparent manner with those directions being tabled in Parliament or Gazetted. The combination of Ministers not being board members, (see discussion above) but providing them with the power to direct in certain matters would be considered close to best practice.

c. Annual Report. The provisions covering the Annual report are adequate. An important requirement which is contained in the Tongan Act (but missing from the Samoan legislation) is that the Annual Report must contain such information as is necessary to enable an informed assessment of the operations of the SOE including the comparison between actual performance and the planned performance contained in the SCI. This is very important as

48 The Samoan legislation refers to the SCI as a Statement of Corporate Objectives or SCO.
49 In Samoa the comparative performance information is required in the semi-annual report, but not the Annual report. This is not sufficient as there is no annual report on annual performance targets and the semi-annual accounts are not audited.
it significantly adds to the effectiveness of the Annual Report as a public accountability document (see section 20(2)).

d. **Audit Requirements.** These are adequately set out in Section 24 of the Act.

e. **Performance Audit.** There is no explicit power within the Act to allow the Minister to undertake a performance audit of an SOE.

11. **Reporting requirements to Parliament.** The Act sets out clear reporting requirements for the Annual Report, which must be tabled in the Legislative Assembly (Section 22), but there appears to be no requirement to table the agreed SCI. The SCI is a key accountability document and should also be tabled in the Legislative Assembly. It has already been noted that the combination of the SCI, and the performance measures contained therein, and the Annual Report, which contains a comparison of actual performance against those targets (Section 20(2)), is a powerful public accountability process. The fact that the Tongan Act does not require the SCI to be tabled significantly weakens this accountability arrangement.

12. **CSO defined.** The Act does not define CSOs but rather establishes a process to deal with them. Section 4 provides that if an SOE is required to provide goods or services at a certain price the SOE and Government shall agree between them that the SOE will provide the services in return for the payment by the Government of the whole or part of the agreed price. This is a direct copy from the New Zealand SOE Act and is entirely unsuitable for dealing with CSO payments. If the Government directs an SOE to provide a good or service on non-commercial terms it should fully compensate that SOE for the cost of providing that service. The provision incorporated in the Tongan Act is only effective in the New Zealand context as all SOEs have the principal objective of acting as a successful business. Therefore all decisions and directions can be measured against that principle. This is missing in the Tongan Act and as a consequence there is nothing to guide decision makers as to what is a fair and proper level of compensation for CSOs. This deficiency could be overcome by the development of binding CSO guidelines that would guide both the Government and also the SOEs.
1. *How are SOEs established?* This is thoroughly covered in the legislation.

2. *Principal Objectives.* The Fijian Act clearly defines the principal objective of every GCCS is to “operate as a successful business and to this end to be as profitable and efficient as comparable businesses what are not owned by the State” (Section 43). This wording is very similar to the New Zealand and Samoan legislation. The definition is further expanded in Section 43(2) by stating that this principal objective is to be achieved through the application of the key principles of public enterprise reform as set out in Schedule 1 of the Act, which provides additional practical guidance for the benefit of all involved in SOE reform and management.

The Act does not provide a definition of the principal objective of CSAs. It would seem that the primary purpose behind establishing an entity as a CSA is to require it to meet the accountability provisions of the Act, such as the requirement to prepare a corporate plan and SCI.

3. *Appointment process for directors.* The Act provides the basic powers for the Minister to appoint and reappoint members to the board, although it is silent on term of appointment and also the factors the Minister should take into consideration when making an appointment. The legislation would be strengthened, for example, if it stated that board members would be selected on the basis that they would assist the SOE achieve its principal objective.

The Act is also silent on the appointment of elected members (Ministers) and Civil Servants to the boards of the SOEs. The practice in Fiji is that Ministers and Civil Servants are not appointed to the boards which, as will be discussed in the Governance section of this paper, represents best practice. It is however noted that Civil Servants can and do sit as observers and this can create potential conflicts of interest, which will also be discussed later. While the Act does not specifically provide for the appointment of observers, it is clear that a number of the provisions dealing with the power to direct and gain access to information could be seen as authorising this practice. It is recommended that the Act be amended to specifically prohibit the appointment of Ministers and Civil Servants to the boards of SOEs.

4. *Removal of directors.* The Act (Section 56) gives the Minister the power to remove directors, but is silent on the grounds for removal.

5. *Roles and responsibilities of directors.* The Act lists five “roles” for the boards of GCCs, which are;

   a. *Responsibility for the GCCs commercial policy and direction*
   
   b. *Appointment of the CEO*
   
   c. *Ensure that the GCC achieves its principal objective*
   
   d. *Ensure that the GCC acts in accordance with its Corporate Plan and carries out the objectives in its SCI*
   
   e. *Account to the Minister of Public Enterprises and the relevant Minister for the GCCs performance as required by the Act ad other laws as applicable*
   
   f. *Ensure that the GCC otherwise performs its functions in a proper, effective and efficient way.*

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50 Section 57
The Act also requires that the Board keep the Minister informed of the operations, financial performance and financial position of the SOE and its subsidiaries. The Board must also proactively inform the Minister if they believe that the SOE may not be able to meet the targets set out in the Corporate Plan or SCI (Section 105). The duties as listed above are further expanded in Schedule 1 of the Act, which sets out the key principles of Public Enterprise reform.

The Act also makes it clear that GCCs are subject to the Companies Act, unless the Companies Act is inconsistent with the provisions of the SOE Act. This means that the duties of directors as set out in the Companies Act also apply to directors of GCCs, however the Fijian Companies Act appears to be based on the New Zealand 1955 Act and as such the additional duties imposed by that Act are quite limited. There is however a duty dealing with conflicts of interest (Section 201), but no general duty of care or solvency test.

CSAs are not Companies and as such are not subject to the Companies Act. That means there are significant gaps in the SOE Act in relation to CSA director's duties and obligations and they would therefore need to be covered in their individual establishing legislation.

6. **Managing conflicts of interest.** The Act is silent on managing conflicts of interest, although it is noted that for those SOEs that are companies, the Companies Act does contain provisions dealing with conflicts of interest (Sections 201). However it would appear that there are no statutory rules and guidelines for non-company SOEs.

7. **Appointment of CEO.** This is really only covered in a transition sense (covering the transition to an SOE) and establishes the requirement that the position be advertised.

8. **Roles and responsibilities of the Responsible Minister.** The Fijian Act establishes the role of the Minister of Public Enterprises who has the primary accountability and powers under the Act. The other Minister established in the legislation is the "relevant Minister" who is nominated by the Prime Minister. The relevant Minister is effectively the Minister of the line Ministry and the Minister of Public Enterprises is required to consult with the relevant Minister in most instances where the Minister of Public Enterprises is exercising his powers. For example, payment of dividends, acquisition or disposal of shares, appointment of directors, giving a direction to a GCC, declaring a CSA, approving the Corporate Plan, and approving the SCI. In many cases the Minister of Finance must also be consulted at the same time as the relevant Minister. The board is also under an obligation to keep the relevant Minister informed (Section 105) on matters that they must disclose to the Minister of Public Enterprises.

The Act clearly establishes the role and responsibilities of the Responsible Minister.

9. **Roles and responsibilities of the Shareholding Minister.** There is no concept of the role of Shareholding Minister in the Fijian Act. The Minister of Public Enterprises and the Minister of Finance nominate the persons who hold the shares in the SOEs (Section 62), who are office holders rather than individuals. Those office holders (for example one must be the CEO of the Ministry of Public Enterprises) then hold those shares on behalf of the State and must (i) consult with the Minister who appointed him before exercising any right as shareholder and (ii) act in accordance with any direction in writing given to him by the that Minister (Section 66). It is not clear why the Act is structured on the basis of the shares being held by nominee permanent secretaries\(^{51}\) rather than by Ministers. It seems to add an unnecessary additional layer, but as there appears to be no adverse impact on effective governance of the SOEs it would seem to be a sound alternative model.

10. **Requirements dealing with the content and approval of;**

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\(^{51}\) Section 63 requires that the nominees be Permanent Secretaries or Supervising Officers.
a. **Business or Corporate Plan.** Both GCCs and CSAs are required under the Act to prepare Corporate Plans. The Act is very clear on the need to produce Corporate Plans and the process that the SOEs need to go through to have the Plan approved. The Act provides high level guidance on the content of the Plan (Section 89 (3)) and provides for the Minister of Public Enterprises to issue guidelines on the format of the Plan (Section 89 (1)). The Plan covers the immediate next twelve months and the two years thereafter. The Minister cannot direct the content of the Plan, but it is noted that Section 58 gives the Minister the power to give directions to a GCC in the public interest. This is a general power, not specific to the Corporate Plan, but would enable the Minister to direct a GCC to include or exclude something from the Corporate Plan, if it were in the Public Interest. There is no similar provision for CSAs. The Corporate plan must be consistent with the SCI. Generally the provisions dealing with the Corporate Plan provide the correct balance between the role of Directors and the role of Ministers as “owner” representatives.

b. **Statement of Corporate Intent.** The Act covers all of the basic requirements for the preparation of an SCI. The SCI however covers only a twelve-month period and as such is a subset of the Corporate plan which covers three financial years. Some matters of note are that:

i. The Minister can direct changes in the SCI (Section 98). The Minister also direct changes or modifications during the term of the SCI (99).

ii. The Board can request changes to the SCI at any time, but must provide the minister with written notice of the proposed changes and after consultation with the relevant Minister the Minister of Public Enterprises must approve or otherwise the proposed changes.

iii. Both GCCs and CSAs are subject to the provisions dealing with SCIs

The provisions dealing with who ultimately controls the content of the Corporate Plan and SCI is a fine balancing point. Does the Minister have too much control and hence risk politicising the SOEs decision-making process, or does the board have too much discretion thereby lessening the legitimate “ownership” oversight. The review team would suggest that in the case of the Fijian Act, the balance is about right for CSAs, but a little too far in favour of the Minister’s powers for GCCs. As the GCCs are registered Companies, the Minister should be more reliant on the powers he has as owner to influence the direction of the SOE, rather than being able to direct through the SCI and Corporate Plan. While the legislation requires any direction from the Minister to be in writing, the practical reality is that as the Minister has the power he can, more often than not, can exert sufficient influence or control without having to put pen to paper. A better balance of power would be to require the Minister to exercise his rights as shareholder to influence direction, if that is thought necessary. This has been the approach adopted in New Zealand for SOEs and has worked effectively for over twenty years. However for non-company corporate entities, which are covered in the New Zealand Crown Entities Act, the Responsible Minister does have the power to direct.**

c. **Annual Report.** The provisions covering the Annual report are adequate and set out clearly what is required to be included in the Annual Report and when it must be made available. A important requirement which is contained in the Fijian Act is that the Annual Report must contain such information as is necessary to enable an informed assessment of the operations of the SOE

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52 Section 103 and 147 New Zealand Crown Entities Act 2004
including the comparison between actual performance and the planned performance contained in the SCI (Section 103(2)). A similar provision can be found in the Tongan SOE At, but is absent from the Samoan legislation. One area of weakness in the Fijian Act is Section 104, which allows the SOE to request information to be deleted from the Annual Report if it is considered to be too commercially sensitive. The review team find it hard to identify any matter that should legitimately be included in an Annual Report that would be too commercially sensitive. In fact as SOEs are often monopolies and always deal with public money there is an argument that the level of disclosure should be higher than private sector companies. It will be important that this provision is not misused to try and hide important information from the public.

For GCCs, the Annual Reports must also comply with the Companies Act.

d. 
**Audit Requirements.** These are adequately set out in Section 100 of the Act. The Minister of Finance has the power to appoint the Auditor, who more often than not is the Auditor General. If the Minister of Finance does not appoint the Auditor, or give a direction to the board as to who they must appoint, the board is authorised to appoint the Auditor of their choice (Section 100(3)(b)).

e. 
**Performance Audit.** The Act empowers the Minister of Public Enterprises and the Relevant Minister to instigate an investigation and report on any matter relating to the SOE or a subsidiary thereof (Section 109). The powers of investigation are quite wide and the Minister can direct the SOE to provide “any information” about the SOE; provide access to specified records and the Minister can take whatever steps considered necessary or desirable for the investigation.

11. **Reporting requirements to Parliament.** The Act sets out clear reporting requirements for the Annual Report and SCI. Both must be tabled in Parliament and any modification to the SCI that occurs during the year must also be tabled (Section 106). The Act goes on to require any that regulations made, and the reasons for the regulations, that make the SOEs subject to other laws be tabled in Parliament (Section 109(3)(a)).

12. **CSO defined.** The Act does clearly defines CSOs and calls them “non-commercial obligations”, however the provisions dealing with CSOs only relate to GCCs. Presumably this is because the Government is of the view that, as CSAs are not required to operate as successful businesses, they suffer no opportunity cost if they undertake CSOs on other than a fully funded basis. Two ‘best practice’ requirements in the Fijian legislation dealing with CSOs are;

a. The costing, funding and other arrangements to make adjustments relating to the CSO must be identified in the SCI(Section 69 and 95), and

b. As the performance measures in the SCI must be reported upon as part of the Annual Accounts, a thorough reporting should also include performance measures relating to the delivery of the CSO.

The Fijian legislation also gives good guidance on the how much the Government should pay the SOE for the delivery of the CSO if agreement cannot be reached on the calculation and payment of the cost (section 71).

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53 Section 109 of the Act provides that the Ministers can delegate their powers to investigate to the Permanent Secretary or Supervising Officer of a Department.