



Cabinet Office

CO (13) 4

Circular

12 August 2013

Intended for

All Ministers
All Chief Executives
All Senior Private Secretaries
All Private Secretaries
All Heads of Legal

Crown Entities Act 2004: Section 107 directions to support a whole of government approach

Introduction

- 1 This Circular replaces Cabinet Office Circular CO (06) 6 *Whole of Government Directions under the Crown Entities Act 2004*.
- 2 A direction to support a whole of government approach under section 107 of the Crown Entities Act 2004 (the Act) can be used where the government has decided on a multi-agency approach for some activity, and there are benefits from applying this to some or all Crown entities (except Crown entity subsidiaries and Tertiary Education Institutions), and/or companies listed in Schedule 4A of the Public Finance Act 1989.¹
- 3 This Circular sets out requirements for issuing a section 107 direction.² Cabinet approval must be secured to undertake consultation and issue the direction.

Using a section 107 direction

- 4 The Act was amended in July 2013. The amendments increase the range of purposes for which a section 107 direction can be used, and allow the government to be more selective about the Crown entities to which a direction applies. The intent is that such directions can be more readily used to achieve better results and improve State sector performance e.g., in property, procurement, or ICT.
- 5 Under [section 107\(1\)](#), the Ministers of Finance and State Services may jointly direct Crown entities to support a whole of government approach by complying with specified requirements for any of the following purposes:
 - (a) to improve (directly or indirectly) public services;
 - (b) to secure economies or efficiencies;
 - (c) to develop expertise and capability;
 - (d) to ensure business continuity;
 - (e) to manage risks to the government's financial position.

¹ Unless otherwise noted, references in this Circular to "Crown entities" should be read as including all agencies that a direction can be applied to under sections 107(2) and 107(2A) of the Act.

² All sections referred to in this Circular are sections of the Crown Entities Act 2004.

- 6 While the matters below are not specified in the Act, a section 107 direction should:
- 6.1 reflect a broad interest that is wider than the interests of any individual Crown entity;
 - 6.2 generate benefits from a common approach that may not be achieved through individual decision making; and
 - 6.3 relate to matters that are relevant to the selected Crown entities and be clear about the obligations it imposes.
- 7 A section 107 direction can be given to one or more specified “groups”, “categories” or “types” of entity under [sections 107\(2\) and 107\(2A\)](#), for example, to:
- 7.1 a group including at least three entities, where the entities in the group have in common at least one significant characteristic that relates to the direction; or
 - 7.2 all statutory entities, or all Crown agents, or all autonomous Crown entities, or all independent Crown entities; or
 - 7.3 all Crown entity companies; or
 - 7.4 all companies listed in Schedule 4A of the Public Finance Act 1989; or
 - 7.5 all school boards of trustees; or
 - 7.6 a combination of these categories or types or all of them.
- 8 Except for Crown Research Institutes, Crown entities subject to a section 107 direction must give effect to the direction as soon as it comes into force. [Section 7\(6\)](#) of the Crown Research Institutes Act 1992 specifies that Crown Research Institutes are only required to have regard to a section 107 direction.
- 9 Entities must disclose in their Annual Report that they have been given a direction in writing in that year, and whether previous directions remain in force (see [section 151\(1\)\(f\)](#)).

Limits on scope

- 10 A section 107 direction cannot be given to:
- 10.1 only one or two entities; or
 - 10.2 tertiary education institutions; or
 - 10.3 Crown entity subsidiaries as a category (although a parent entity must ensure that its subsidiaries comply with a direction given to the parent, to the extent that it relates to the subsidiary); or
 - 10.4 State Owned Enterprises, organisations listed in Schedule 4 of the Public Finance Act 1989, or publicly listed companies listed in Schedule 5 of the Public Finance Act 1989.

- 11 The Act also protects statutorily independent decision making by Crown entities. Under [section 113](#), a section 107 direction cannot relate to statutorily independent functions or change how these functions are carried out, or require action in respect of a particular person or persons. A section 107 direction cannot interfere with decisions on particular cases or quasi-judicial decision-making, or affect rights of review or appeal to a court in an entity's Act.
- 12 These limits mean that while a section 107 direction is available in the right circumstances, Ministers should also consider whether the proposed objectives are better achieved in another way, such as through:
- 12.1 legislation, e.g. because the proposed new obligations should be subject to select committee scrutiny and proceeding through all the stages of the House;
 - 12.2 letters conveying Ministerial expectations to be addressed in Statements of Intent;
 - 12.3 direction by a Responsible Minister, where permitted;
 - 12.4 requirements agreed by Cabinet and set out in a Cabinet Office Circular;
 - 12.5 minimum standards of integrity and conduct in a code (or codes) of conduct; or
 - 12.6 regulations or instructions under Part 4 of the Act ([section 173\(1\)\(l\)](#)), the Public Finance Act 1989, or other legislation.

Process for issuing a section 107 direction

- 13 A collective approach to managing section 107 directions is necessary because:
- 13.1 the responsibilities of multiple Ministers are likely to be affected;
 - 13.2 the government needs to manage the number and range of directions that restrict decision making in arm's length agencies; and
 - 13.3 the House of Representatives is able to disapply a direction.
- 14 A summary of the process is outlined in Annex 2. In following this process, Ministers should consider the need for consultation at various stages with the government caucus and with other political parties as appropriate, in accordance with standard Cabinet requirements. Previous directions are available at <http://www.ssc.govt.nz/crown-entities>.

Development

- 15 The process for a section 107 direction may be initiated by any Minister. A department other than the Treasury or State Services Commission working on a proposed direction needs to inform those agencies that development is underway, and work with them to complete advice on the proposal. The proposal should include information on the intended nature and effect of the proposed direction, and other supporting information as noted in Annex 1.

Initial Cabinet approval

- 16 Where a section 107 direction is proposed, the Ministers of Finance and State Services – with the initiating Minister where appropriate – will seek Cabinet approval through the relevant Cabinet Committee to further develop the direction and consult with affected parties.

Consultation with affected parties

- 17 Subject to Cabinet approval, consultation will occur with the entities to which the direction is proposed to apply, and with others the Ministers of Finance and State Services consider represent the interests of those likely to be substantially affected ([section 108\(1\)](#)). The consultation process may be led by the initiating Minister. If this is the case, the initiating Minister will need to satisfy the Ministers of Finance and State Services that the proposed process will meet the legislated requirements.

Final Cabinet approval

- 18 Following consultation, the Ministers of Finance and State Services – with the initiating Minister where appropriate – will report to Cabinet through the relevant Cabinet Committee on the outcome of the consultation and seek Cabinet approval to the final text and scope of the direction, and agreement that the direction be issued.

Issuing the direction

- 19 Subject to Cabinet approval, the Ministers of Finance and State Services will issue the direction, notify the affected entities, and present the direction and any relevant material to the House of Representatives.

Select Committee consideration

- 20 Under [Standing Order 390](#), a section 107 direction presented to the House stands referred to the Finance and Expenditure Committee (FEC). The FEC may retain the direction for examination or refer it to another select committee. Assistance from departmental advisers may be sought during consideration of the direction. The examining committee must report back to the House on the direction no later than 12 sitting days after its referral to the committee.

Publishing the direction

- 21 The direction comes into force 15 sitting days after it is presented to the House unless the House has resolved to disapply it under [section 109](#). If the direction is confirmed, the Ministers of Finance and State Services must ensure the direction is published in the Gazette and on the internet as soon as is practicable.

Process if direction is disallowed

- 22 The House of Representatives may resolve to disallow a direction. If this occurs, the Ministers of Finance and State Services must notify the entities to which the direction would have applied that the direction has been disallowed and will not come into force (see [section 111\(2\)](#)).

Subsequent actions

Monitor

- 23 Compliance with a direction should be appropriately monitored, and information obtained to determine whether the intended benefits have been achieved.

Review

- 24 The direction should be reviewed before the specified expiry date to determine whether it should be maintained. [Section 115A](#) states that a direction without an expiry date must be reviewed after 5 years.

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Checklist for proposal for a section 107 direction

A proposal should include information on:

- a) The issue (problem/opportunity) to be addressed by the direction.
- b) Why the objective is best achieved by this kind of direction rather than an alternative mechanism, and what alternatives have been considered.
- c) The group/category/type of Crown entities the direction is to be applied to, and why entities have been included or excluded, as applicable.
- d) The costs and benefits (or advantages and disadvantages) of the proposed direction, and how costs will be funded.
- e) The result of any preliminary consultation, including the nature of any legal advice received on the proposal.
- f) How formal consultation will be managed and by whom. Consultation needs to be open-minded and carried out at an appropriate level.
- g) The process for managing any disputes, e.g. if a Crown entity objects during consultation to being included in a direction.
- h) Whether there are any implementation concerns, and how these would be managed.
- i) Whether a time limit on the direction is appropriate.
- j) How monitoring of compliance with the direction will occur, and how achievement of the intended benefits will be assessed.

Annex 2

Steps and responsibilities in issuing a section 107 direction

	Step	Who is responsible
1	Development of the proposed direction and compilation of the information identified in Annex 1 of this Circular.	<ul style="list-style-type: none"> ➤ Initiating department, in consultation with Treasury & SSC and relevant agencies; or ➤ Treasury & SSC, in consultation with relevant agencies
2	Initial Cabinet approval to further develop a direction and consult with affected parties. Confirm who will lead and manage the consultation.	<ul style="list-style-type: none"> ➤ Initiating Minister with the Ministers of Finance and State Services, if appropriate; or ➤ Ministers of Finance and State Services
3	Consultation with affected parties , including the Crown entities to which the direction is proposed to apply, and other substantially affected parties.	<ul style="list-style-type: none"> ➤ Initiating department; or ➤ Treasury & SSC
4	Final Cabinet approval of the text and scope, and agreement to issue the direction.	<ul style="list-style-type: none"> ➤ Initiating Minister with the Ministers of Finance and State Services, if appropriate; or ➤ Ministers of Finance and State Services
5	Issuing the direction: notify the affected entities, and present the direction and any relevant material to the House.	<ul style="list-style-type: none"> ➤ Ministers of Finance and State Services
6	Select Committee consideration by FEC or another examining committee.	<ul style="list-style-type: none"> ➤ Initiating department may be asked to assist the examining committee
7	Publishing the direction: if the direction is confirmed by the House it must be published in the <i>Gazette</i> and on the Internet, as soon as is practicable	<ul style="list-style-type: none"> ➤ Ministers of Finance and State Services
8	Process if direction is disallowed: notify the relevant entities that the direction has been disallowed and will not come into force.	<ul style="list-style-type: none"> ➤ Ministers of Finance and State Services
Subsequent actions		
9	Monitor compliance with the direction, and whether the intended benefits are achieved.	<ul style="list-style-type: none"> ➤ Initiating department
10	Review the direction by the specified time, or 5 years after the direction was given.	<ul style="list-style-type: none"> ➤ Ministers of Finance and State Services, with the Initiating Minister