SOEs: The Framework

- No Eureka moments
- Why have legislation?
- What kind of legislation?
- Internationalism.
- Dangers and limitations of legislation.
- Expectations of lawyers.
- What the private sector wants.
If legislation is the answer, what is the question?

• Solving particular problems.
• Keeping politicians happy.
• Responding to international pressures.
Solving particular problems

  - to ring fence commitments
  - to give structure or impetus to asset identification and valuation
  - to make it easier to prepare for sale, selldown, or to raise capital
  - to promote debate and get a mandate
Solving particular problems (cont)

• May want Public Enterprises/State Owned Enterprises Act.
  – to impose disciplines on financial, reporting and service performance
  – to give legitimacy and authority to State actions
  – to identify what is not needed: services or assets
  – separate the commercial and the social.
Keeping politicians happy

- Perhaps the PPP Act in Fiji? (but it met the other tests as well)
- “Me too” risk: criminalising cartels.
Responding to international pressures

- No more aid or finance unless sound structures in place.
- Responsible international citizen: money laundering; insolvency; securities.
- Implementing regional agreements.
Is Legislation needed?

- Not always: Kiribati has over 20 SOEs but no SOE Act.
- Why have legislation?
  - to get mandate/ buy in
  - to set the rules
  - to promote action
- Should legislation be minimalist or comprehensive?
- What other tools?
  - SOI and Corporate Plans; Expectation letters; Manuals; Audit disciplines.
What kind of legislation?

• Major drafting issue is the structure.
  – Avoid being slave to precedent.
  – Avoid being unique for no good reason.
  – Applies particularly to securities, companies, insolvency, and insurance areas.
Internationalism

• Europe becoming more international: Pacific going the other way?
• Different points in the cycle. Small states trying to show not followers?
• NZ/Australia
  – voluntary administration regime
  – Commerce Commission common membership
• Courts and Judicial Appointments; consider for directors
Dangers and Limitations

• Making law is not action.
• At best, it is a base for sound action.
• Service delivery is action.
• Asset protection, enhancement, and replacement is action.
• Accounting, reporting and audit should be action; but depends what is done with the product.
• Law is never a substitute for a sound system.
Balancing the Tensions

- Shareholding Ministers/Directors/CEO (get the accountabilities right)
- Provide for social services
  - identification
  - funding
- Land title issues?
- Shareholder ambitions v Directors duties to company
- Shareholder requirements v Director accountability
Balancing the Tensions (cont)

- SOIs: Reporting; Audit; Ombudsmen
  - How much in legislation?
  - NZ has a 50 page (Owner’s Expectations Manual for State-Owned Enterprises as well.
  - Enduring Letter of Expectations.

- SOI etc means Ministers need not be directors.
How not to fail

- Identify and tidy up the assets and liabilities (be blunt)
- Identify the rationale (be blunt)
- Put at least as much effort into the SOE Monitoring Unit (be blunt)
- Allocate human resources carefully (be blunt)
- Find and fund financial and reporting systems; audit and analyse the results (be blunt)
- Resist calls for special exceptions in the legislation (be blunt)
How not to fail (cont)

• Be clear about (and realistic) about:
  – social or CSO roles
  – dividend policies
  – appetite for capital contributions
  – major transaction controls
  – borrowing policies
  – end objectives

Mess + Corporatisation = Mess Company Limited
Rain falls from the sky, stores in lakes, pours down turnstools and spins the steel blades of turbines and when these steel blades are privately owned they feel happy and free and generate more electricity.
What is the lawyers’ role

- Support the rule of law.
- Facilitate national progress.
- Recognise and manage State legal risk.
- Become respected advisers: but know our place.
- Develop our skills and contacts: be indispensable.
- Ensure directors appointed for competence not cronyism
What does the private sector want in legislation – and from us?

- Certainty
  
  uncertainty = risk

  risk = cost

- Familiarity
  
  – does the law look like laws they know?
  
  – unfamiliarity increases transaction costs.
What does the private sector want in legislation – and from us? (cont)

- Integrity
  - the law may look good, but is it administered
    - at all?
  - fairly?
    - Are the regulators subject to inappropriate political control or direction?

- this applies to companies, securities, property, corporate, and criminal law sectors
What does the private sector want in legislation – and from us? (cont)

• Reasonableness
  – not the same as integrity, do not expect the private sector (whether local or international) to do what you know best; eg sort local land title.
  – legislation should not impose liabilities where the parties cannot avoid the liability eg a requirement to register where there is no functioning registry.
  – efficiency is a reasonable expectation. Don’t require registration at Post Offices just to keep them open if online is available.
Conclusion

• The Eureka moment may never have happened; but Archimedes achieved much by
  – thinking
  – trialling and testing the theories
  – attention to detail in implementation
  – overall discipline