

The guidelines also stress the need for public consultation when the state is developing and updating the ownership policy.¹⁸⁵ Various measures are provided which include consultation with the general public and its representatives and more importantly, consultation with private sector representatives, including investors and market service providers, and trade union representatives.¹⁸⁶

3.1.4 The State's role as an owner

Under this, the state should act as an informed and active owner and establish a clear and consistent policy, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with the necessary degree of professionalism and effectiveness.¹⁸⁷ Here the government will have to ensure that aspects such as remuneration, audits, board nominations and monitoring systems are adequately implemented and effective. It is important for the government to keep away from the day to day management of SOEs and allow them full operational autonomy.¹⁸⁸ The state should also let SOE boards exercise their responsibilities and should respect their independence.¹⁸⁹

The guidelines also provide that governments should simplify and standardise legal forms under which SOEs operate.¹⁹⁰ This should be done because SOEs may have different legal forms from other companies. This may reflect specific objectives and or societal considerations as well as special protection granted to certain stakeholders.¹⁹¹ It is important for governments to base themselves in corporate law that is applicable to private companies and avoid creating a legal form or granting SOEs a privileged status or special protection when this is not necessary for the achievement of public policy objectives.¹⁹²

¹⁸⁵ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 32.

¹⁸⁶ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 32.

¹⁸⁷ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 20.

¹⁸⁸ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 20.

¹⁸⁹ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 20.

¹⁹⁰ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 20.

¹⁹¹ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 35.

¹⁹² Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 36.

The exercise of the ownership right should be centralised in a single ownership entity or carried out by a co-ordinating body.¹⁹³ This helps in clarifying the ownership policy and its orientation and it also helps ensure its consistent implementation.¹⁹⁴ The ownership entity should be held accountable to the relevant representative bodies and have clearly defined relationships with relevant public bodies such as the state supreme audit institutions.¹⁹⁵

In regards to the above, it is clear that the government of Zimbabwe has not entirely followed this principle since there has been government intervention in day to day operations of most SOEs. This is the case in SOEs such as Air Zimbabwe, which in 2012 had a debt of about US\$ 140 million, but had recently acquired two new airplanes that were almost the same value of the debt, without any explanation as to how this occurred and in Zimbabwe this usually points to political interference.¹⁹⁶

3.1.5 State-owned enterprises in the marketplace

The legal and regulatory framework of SOEs should ensure a level playing field and fair competition in the marketplace when SOEs undertake economic activities.¹⁹⁷ There should be a clear separation between the state's ownership function and other functions that may influence conditions for SOEs particularly the regulatory function.¹⁹⁸ It is also provided that stakeholders and other interested parties including creditors and competitors should have access to efficient redress through unbiased legal or arbitration processes when their rights have been violated.¹⁹⁹ SOEs undertaking economic activities should not be exempt from the application of general laws, tax codes and regulations.²⁰⁰ Where SOEs combine economic

¹⁹³ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 38.

¹⁹⁴ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 38.

¹⁹⁵ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 39.

¹⁹⁶ Nyandoro T 'State-owned enterprises need good management' *NewsDay* 12 December 2012 available at <https://www.newsday.co.zw/2012/12/12/state-owned-enterprises-need-good-management/> (accessed 19 June 2015).

¹⁹⁷ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 22.

¹⁹⁸ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 22.

¹⁹⁹ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 22.

²⁰⁰ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 22.

activities and public policy objectives high standards of transparency and disclosure regarding their cost and revenue structures must be maintained.²⁰¹

3.1.6 Equitable treatment of shareholders and other investors

Where SOEs are listed or include non-state investors among its owners, the state and the enterprises must recognise the rights of all shareholders and in accordance with the principles of the OECD must ensure equitable treatment and access to corporate information.²⁰² This principle enunciates a very important principle of governance in any corporation, it is important that minority shareholders perceive their treatment as equal to or as important as that of the major shareholder. This is so because the relationship between the state as controlling shareholder and the minority shareholders is particularly delicate, especially in commercial companies which are listed.²⁰³ The state, as a dominant shareholder may be in a position to abuse minority shareholders as it is able to make decisions at the annual general meetings without the approval of the minority shareholders.²⁰⁴ Apart from being in a position to control the board's composition, the state may also pursue political or policy objectives, which if implemented, may be at the cost of the minority shareholders.²⁰⁵

To guard against the abovementioned incidents, SOEs should observe a high degree of transparency and should also develop an active policy of communication and consultation with all shareholders.²⁰⁶ Participation of minority shareholders in general meetings should be facilitated in order to allow them to take part in important decisions such as board election.²⁰⁷ The guidelines also provide that national corporate governance codes should be adhered to by all listed and, where practical, unlisted SOEs.²⁰⁸

²⁰¹ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 48.

²⁰² Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 24.

²⁰³ Centre for Economic Studies ifo Group Munich *Corporate Governance: Relationship of state-owned enterprises with other shareholders* (2007) 28.

²⁰⁴ Centre for Economic Studies ifo Group Munich *Corporate Governance: Relationship of state-owned enterprises with other shareholders* (2007) 28.

²⁰⁵ Centre for Economic Studies ifo Group Munich *Corporate Governance: Relationship of state-owned enterprises with other shareholders* (2007) 28.

²⁰⁶ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 24.

²⁰⁷ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 24.

²⁰⁸ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 24.

3.1.7 Stakeholder relations and responsible business

Stakeholders are central to the overall operations of any business and it is important that relations with the various stakeholders are maintained. The term stakeholder refers to individuals or groups that can affect or are affected by a corporation's activities and these include investors, employees, customers, suppliers and communities.²⁰⁹ The stakeholder strategy is based on the notion that companies and society are interdependent, therefore, company success is connected to the well-being of local and global communities and all of a company's other stakeholders.²¹⁰ The principle provides that, the state ownership policy should fully recognise the enterprises' responsibility towards stakeholders and that it requires the enterprises to report on their relations with stakeholders.²¹¹ The ownership policy should also make clear any expectations the state has in respect of responsible business conduct by SOEs.²¹²

In any company stakeholders are diverse, for SOEs these may include the general public or a particular part of the public depending on the objectives of the enterprise. These relations may then be critical for those SOEs that are involved in the fulfilment of general service obligations or those whose activities may be vital for the economic development of the communities in which they operate.²¹³ In other cases, stakeholders may not have a direct relationship with the company, but it will still be important that the company takes heed of the rights of such groups.

Research has shown that stakeholders are not fully involved in corporate governance issues in Zimbabwe. In a working paper by McGee it was shown that there is no stakeholder involvement in corporate governance but it does not provide any recommendations as to how this should be remedied.²¹⁴ It also does not examine the corporate governance instruments in

²⁰⁹ Svendsen A *The Stakeholder Strategy: Profiting from Collaborative Business Relationships* (1998) 1.

²¹⁰ Svendsen A *The Stakeholder Strategy: Profiting from Collaborative Business Relationships* (1998) 4.

²¹¹ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 25.

²¹² Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 25.

²¹³ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 60.

²¹⁴ McGee R *Corporate Governance in Developing and Transition Economies: A Case Study of Zimbabwe* (2010) 12.

Zimbabwe but instead it uses descriptive information obtained from the World Bank on the state of corporate governance in Zimbabwe.²¹⁵

The implementation of this guideline in Zimbabwe has been at an all-time low and employees who are arguably the most important stakeholders have been in bad relations with some of the SOEs. It has become very common that employees are either not paid in full, not paid at all or are sent on unpaid leave as was the case at the Grain Marketing Board (GMB).²¹⁶ It was reported in 2014 that a total of 3 600 GMB employees were ordered to go on compulsory two weeks leave each month as the company struggled with finances.²¹⁷ The GMB had not paid its employees in four months and it owed US\$ 37 million to farmers who had delivered grain in the 2013/14 season.²¹⁸ The farmers and employees are both important stakeholders and non-payment of the monies due to them is a sign of failed relations, with these parties disgruntled proper functioning of the enterprise may have been jeopardised.

More importantly the guidelines state that SOEs must not be used as vehicles for financing political activities and that they should not make political campaign contributions.²¹⁹ This is a prevalent practice in Zimbabwe as SOEs are known to fund political campaigns and trips abroad for those in government.²²⁰ More recently the struggling SOEs were ordered to pay between US\$ 35 000 and US\$ 120 000 in contributions to the first lady's birthday fundraising dinner.²²¹ Such activities will not end anytime soon if the current government is in power and this leaves the future uncertain for SOEs.

3.1.8 Disclosure and Transparency

It is important that state-owned enterprises observe high standards of transparency. This is usually in regards to information on company financials and other pertinent issues. SOEs should observe high standards of transparency and be subject to the same high quality

²¹⁵ McGee R *Corporate Governance in Developing and Transition Economies: A Case Study of Zimbabwe* (2010) 11.

²¹⁶ Nleya F 'GMB workers to go on unpaid leave' *NewsDay* 22 December 2014 available at <https://www.newsday.co.zw/2014/12/22/gmb-workers-go-unpaid-leave/> (accessed 20 June 2015).

²¹⁷ Nleya F 'GMB workers to go on unpaid leave' *NewsDay* 22 December 2014 available at <https://www.newsday.co.zw/2014/12/22/gmb-workers-go-unpaid-leave/> (accessed 20 June 2015).

²¹⁸ Nleya F 'GMB workers to go on unpaid leave' *NewsDay* 22 December 2014 available at <https://www.newsday.co.zw/2014/12/22/gmb-workers-go-unpaid-leave/> (accessed 20 June 2015).

²¹⁹ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 35.

²²⁰ Rusvingo S 'The rot in the state-owned enterprises in Zimbabwe: A cause for concern' (2014) 14 (7) *Global Journal of Human Social Science* 39.

²²¹ Zhangazha M 'Companies forced to sponsor First Lady' *Zimbabwe Independent* 24 July 2015 available at <http://www.theindependent.co.zw/2015/07/24/companies-forced-to-sponsor-first-lady/> (accessed 22 October 2015).

accounting, disclosure, compliance and auditing standards as listed companies.²²² SOEs must observe these standards in disclosing material and non-material information in areas of significant concern to the state as an owner and the general public.²²³ The information that should be disclosed includes (a) a clear statement to the public of enterprise objectives and their fulfilment, (b) enterprise financial and operating results, (c) the remuneration of board members and key executives and (d) board member qualifications, selection process, roles on other company boards and whether they are considered as independent by the SOE board.²²⁴

SOEs should also provide information on key issues relevant to employees and other stakeholders that may materially affect the financial and non-financial performance of the enterprise or have significant impacts on the stakeholders.²²⁵ Financial statements of SOEs must also be subject to an independent external audit that is based on high standards.²²⁶ The ownership entity should also make use of web-based communications to develop and publish annually an aggregate report on SOEs.²²⁷

Zimbabwe has managed to maintain a moderate level of disclosure in terms of auditing, the Comptroller and Auditor-General's offices have managed to produce annual reports that have revealed gross public finance maladministration.²²⁸ However, it has been argued that the legislation that enables the functions of the Comptroller and Auditor-General did not give power to the office of the Comptroller and Auditor-General to compel Ministers and departments to observe and comply with the treasury instructions.²²⁹ This has resulted in delayed submissions and in other instances total failure by ministries to produce certain

²²² Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 26.

²²³ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 26.

²²⁴ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 26.

²²⁵ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 67.

²²⁶ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 67.

²²⁷ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 68.

²²⁸ Mambo E 'State enterprises bleed to death' *The Independent* 24 October 2014 available at <http://www.theindependent.co.zw/2014/10/24/state-enterprises-bleed-death/> (accessed 20 June 2015).

²²⁹ Zinyama T 'Efficiency and Effectiveness in Public Sector Auditing: An Evaluation of the Comptroller and Auditor-General's Performance in Zimbabwe from 1999 to 2012' (2013) 3 (7) *International Journal of Humanities and Social Science* 276.

returns and statements required for the audit.²³⁰ Published reports reflected a uniformity of audit observations that rose from year to year, which meant that little or no actions followed on observations and recommendations made.²³¹

3.1.9 The Responsibilities of the Boards of State-Owned Enterprises

The board of directors of a company can be defined as a group of persons elected by the shareholders of a company to govern the affairs of the company.²³² In state-owned enterprises these individuals are usually appointed by the state and there is an expectation that they will act in good faith and in the best interests of the company. The guidelines provide that the boards of SOEs “should have the necessary authority, competencies and objectivity to carry out their function and monitoring of management.²³³ They should act with integrity and be held accountable for their actions.”²³⁴

The boards should carry out their functions subject to the objectives set by the government and the ownership entity and they should have the power to appoint a Chief Executive Officer (CEO).²³⁵ They should also be composed in a manner that allows them objective independent judgement and there should be separation of the roles of Chairman and CEO.²³⁶ One important aspect of any SOE board is that it retains autonomy over any decisions that are within its scope, as this will prevent political interference and for this reason it is important that SOE boards are nominated through a transparent process. SOE boards should also be able to set up specialised committees that support the board in performing its functions in areas such as auditing, remuneration and risk management.²³⁷

²³⁰ Zinyama T ‘Efficiency and Effectiveness in Public Sector Auditing: An Evaluation of the Comptroller and Auditor-General’s Performance in Zimbabwe from 1999 to 2012’ (2013) 3 (7) *International Journal of Humanities and Social Science* 276.

²³¹ Zinyama T ‘Efficiency and Effectiveness in Public Sector Auditing: An Evaluation of the Comptroller and Auditor-General’s Performance in Zimbabwe from 1999 to 2012’ (2013) 3 (7) *International Journal of Humanities and Social Science* 276.

²³² Mynhardt R ‘Universal Corporate Governance Standards: Recommendations for the Composition of a Board of Directors’ (2014) 12 (1) *Corporate Ownership and Control* 243.

²³³ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 28.

²³⁴ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 28.

²³⁵ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 28.

²³⁶ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 28.

²³⁷ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 29.

Irresponsible boards have plagued Zimbabwean SOEs for a considerable amount of time and this has immensely contributed to the large scale failures that have been seen over the years. In 2014 it was revealed that in most SOEs there were obscene salaries, corruption, tender manipulation and general mismanagement that was aided and abetted by insufficient oversight.²³⁸ This resulted in the firing of the boards of the ZBC, ZMDC, MMCZ and Marange Resource Boards, Air Zimbabwe and Zinara among others.²³⁹ The parastatal board system in the country is known to be driven by cronyism and patronage and members of the public have lost faith in the system altogether.²⁴⁰ This points to the fact that SOE boards have been highly dysfunctional and this is not in tandem with the abovementioned principle of corporate governance.

If the guidelines are followed, they would provide for a good model of corporate governance for Zimbabwe. The next part of this chapter will examine the main pieces of legislation that govern corporate governance in SOEs in Zimbabwe and attempt to evaluate their adherence to the OECD guidelines.

3.2 An Overview of the Corporate Governance Framework of Zimbabwe

Companies are generally formed through two major avenues in Zimbabwe. The first is through the Companies Act (Chapter 24:18) which provides the ways in which a company may be registered. The commanding provision is section 7 which gives right to any persons to subscribe their names to a memorandum of association for the purpose of forming an incorporated company.²⁴¹ The second avenue in which companies are formed is through separate Acts. This mainly includes companies that are formed through Acts of parliament, which are the subject of this research, namely State-owned Enterprises. These entities are brought into being by Acts such as the Broadcasting Services Act (Chapter 12:06) which is the enabling Act for the Zimbabwe Broadcasting Corporation. Other companies are also formed through conduct as outlined in the Companies Act. Section 4 provides that the Act applies to every company which shall be deemed to be duly incorporated and registered under the Act.²⁴² This means that any company to which the Act is applicable, but was not officially

²³⁸ Chabwinja S 'Ministers must not appoint cronies to boards' *The Independent* 18 February 2014 available at <http://www.theindependent.co.zw/2014/02/18/ministers-must-appoint-cronies-boards/> (accessed 21 June 2015).

²³⁹ Chabwinja S 'Ministers must not appoint cronies to boards' *The Independent* 18 February 2014 available at <http://www.theindependent.co.zw/2014/02/18/ministers-must-appoint-cronies-boards/> (accessed 21 June 2015).

²⁴⁰ Chabwinja S 'Ministers must not appoint cronies to boards' *The Independent* 18 February 2014 available at <http://www.theindependent.co.zw/2014/02/18/ministers-must-appoint-cronies-boards/> (accessed 21 June 2015).

²⁴¹ Companies Act (Chapter 24:03).

²⁴² Companies Act (Chapter 24:03).

registered as such will be regarded as registered and incorporated under the Act, and this is usually owing to the manner in which it operates.

In Zimbabwe corporate governance is regulated by the Companies Act,²⁴³ the Zimbabwe Stock Exchange Act²⁴⁴ and the listing requirements but these are applicable to listed companies. In the public sector corporate governance is regulated by the Public Finance Management Act (PFMA),²⁴⁵ the Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities (Corporate Governance and Remuneration Policy Framework) and the recently launched National Code on Corporate Governance Zimbabwe (ZIMCODE) which applies to both the public and private sectors. State enterprises are further regulated by their enabling Acts such as the Air Zimbabwe Corporation Act²⁴⁶ and the Broadcasting Services Act.²⁴⁷ This section of the work will evaluate the Acts and codes that are most relevant to corporate governance in SOEs.

3.2.1 The Companies Act

The Zimbabwean Companies Act forms the basic foundation for the formation, registration and management of companies. The Act regulates most of the activities of companies that are incorporated under it from the conduct of directors to issues of shares. One can conclude that the Act includes aspects of corporate governance as it regulates the conduct of directors and matters of accounts and audit even though the term corporate governance is not specifically referred to. It is however important to note that the Act is mainly applicable to companies that are incorporated under the Act as stipulated in section 4 (1).²⁴⁸

The government managed to commercialise and privatise some of the old parastatals and these became subject to the Companies Act and are also governed by strict rules of the Zimbabwe Stock Exchange.²⁴⁹ This study will not focus on these companies but on those in

²⁴³ Companies Act (Chapter 24:03).

²⁴⁴ Zimbabwe Stock Exchange Act (Chapter 24:18).

²⁴⁵ Public Finance Management Act (Chapter 22:19).

²⁴⁶ Air Zimbabwe Corporation Act (Chapter 13:02).

²⁴⁷ Broadcasting Services Act (Chapter 12:06).

²⁴⁸ Companies Act (Chapter 24:03).

²⁴⁹ The Herald 'Editorial Comment: Proposed ZIMCODE Bill Progressive' *The Herald* 20 June 2014 available at <http://www.herald.co.zw/editorial-comment-proposed-zimcode-bill-progressive/> (accessed 16 September 2015).

which the government retained 100 per cent ownership.²⁵⁰ These are the state-owned enterprises brought into existence by enabling Acts of parliament and their regulation of operations is outlined in these Acts. These are the enterprises in which most of the problems discussed in this paper have transpired.

3.2.2 The Public Finance Management Act

According to the Act its purpose is to secure transparency, accountability and sound management of the revenues, expenditure, assets and liabilities of entities that are specified in section 4 (1).²⁵¹ Section 4 then provides that the Act shall apply to ministries, designated corporate bodies and public entities, constitutional entities and statutory funds.²⁵² State-owned enterprises fall under corporate bodies and public entities. The Act defines a public entity as any corporate body that is established by or in terms of any Act for special purposes, a company in which the state has a controlling interest by virtue of shares or by right of appointment of members to the controlling body, a local authority and any partnership or joint venture between the state and any person which is prescribed by the Minister.²⁵³

In regards to corporate governance the Act merely states that all public entities must adhere to and implement sound principles of corporate governance procedures, policies and practices.²⁵⁴ This was perhaps done in order to leave space for corporate governance specific codes such as the Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities. In this respect it is not possible to measure it against most of the core corporate governance guidelines of the OECD. It is however necessary that its accounting, reporting and disclosure procedures be examined in order to determine if they are effective enough for SOEs in Zimbabwe.

The Act provides for the formation of accounting authorities for public entities, which may be the board of the said entity and where there is no board the CEO or the person in charge of the entity, or a person so appointed by the Treasury.²⁵⁵ Section 42 lays out the fiduciary duties of the accounting authority which include exercising utmost care to ensure reasonable protection of the assets and records for the public entity and the disclosure of material facts to

²⁵⁰ The Herald 'Editorial Comment: Proposed ZIMCODE Bill Progressive' *The Herald* 20 June 2014 available at <http://www.herald.co.zw/editorial-comment-proposed-zimcode-bill-progressive/> (accessed 16 September 2015).

²⁵¹ Section 3 Public Finance Management Act (Chapter 22:19).

²⁵² Section 4 (1) (a)-(d) Public Finance Management Act (Chapter 22:19).

²⁵³ Section 2 Public Finance Management Act (Chapter 22:19).

²⁵⁴ Section 50 Public Finance Management Act (Chapter 22:19).

²⁵⁵ Section 41 (1)-(3) Public Finance Management Act (Chapter 22:19).

the Minister that may influence his decisions.²⁵⁶ The most important being the duty to “act with fidelity, honesty, integrity and in the best interests of the public entity in managing the affairs of the public entity.”²⁵⁷ This is in line with the OECD guidelines which require board members to act in the best interest of the company²⁵⁸ and it particularly applies where the accounting authority is the board. This part of the Act functions well when there is an accounting authority that is honest and has integrity. This has, however proved not to be the case in some of the SOE boards in Zimbabwe.

The Act goes further by placing a duty on regular employees to ensure effective, efficient, economical and transparent use of financial and other resources.²⁵⁹ It is then alarming that the authority and persons entrusted with the protection of the assets of the entity are the same ones that grab the very same assets for themselves. This was made clear by the cases of boards of SOEs such as the ZBC and PSMAS that approved hefty salaries for board members and management that were even above private sector rates.²⁶⁰ In this case, the legislation has a commendable clear and straightforward intent, but this was defeated by the accounting authorities themselves. It is clear that what is needed in such situations is more rigorous screening procedures for persons who will sit on these boards as well involvement of public interest groups.

One of the key issues that the Act seeks to tackle is that of conflict of interest. Section 42 (3) (a) of the PFMA stipulates that all accounting authorities (the board or other controlling body or the chief executive) have a fiduciary duty to “disclose to the other members of the accounting authority any direct or indirect personal or private business interests that the member or any spouse, partner or close family relation may have in any matter before the accounting authority.”²⁶¹ The intent of this provision is clearly to avoid instances where members of the board or their close connections engage in business activities with a public entity for their own benefit.

²⁵⁶ Section 42 (1) (a) and (c) Public Finance Management Act (Chapter 22:19).

²⁵⁷ Section 42 (1) (c) Public Finance Management Act (Chapter 22:19).

²⁵⁸ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 28.

²⁵⁹ Section 45 (b) Public Finance Management Act (Chapter 22:19).

²⁶⁰ Mambo E ‘State enterprises bleed to death’ *Zimbabwe Independent* 24 October 2014 available at <http://www.theindependent.co.zw/2014/10/24/state-enterprises-bleed-death/> (accessed 11 March 2015).

²⁶¹ Section 42 (3) (a) Public Finance Management Act (Chapter 22:19).

Normally the board of directors should not be in the business of micro-managing the corporation that they serve.²⁶² The board provides direction in the form of directives and it is the duty of the management to ensure proper management of the corporation.²⁶³ This possibly means that it is not every transaction that an enterprise engages in that receives the full attention of the board. The PFMA in its provision that requires disclosure of any instances of conflict of interest specifically mentions that these should be matters that come before the accounting authority.²⁶⁴ It can be argued that this provision is not sufficient for it only refers to matters that are before the accounting authority and not all dealings with the enterprise. Perhaps the wording could have been ‘any dealings with the state enterprise or parastatal.’ In as much as this may present a cumbersome exercise it is necessary for Zimbabwean SOEs because of the level that corruption and mismanagement have reached.

The above wording would provide a more rigorous disclosure requirement as there have been strong tendencies in management and boards alike to engage in activities that benefited them or their close associates.²⁶⁵ The situation was escalated by the fact that there was also a culture of fear in the manner in which some state enterprises were being run. The state managed to appoint former army generals to the boards of SOEs such as the National Railways of Zimbabwe, Grain Marketing Board, Broadcasting Authority of Zimbabwe and Zimpapers.²⁶⁶ This has been referred to by some authors as the ‘militarisation’ of SOEs which has greatly contributed to the rot in these enterprises.²⁶⁷ This results in the boards being run by individuals of considerable power and it is never in the best interests of any board member to disagree with such members and that is if they are not in cahoots with the same individuals.

In terms of the transparency and disclosure guideline of the OECD, the Act does provide for somewhat adequate accounting measures for there is emphasis on using standards that are

²⁶² David Berry ‘The Debate: Oversight vs Micromanagement’ available at http://www.iclifgovernance.org/file/0025_oversight_vs_micromanagement.pdf (accessed 16 September 2015) 1.

²⁶³ David Berry ‘The Debate: Oversight vs Micromanagement’ available at http://www.iclifgovernance.org/file/0025_oversight_vs_micromanagement.pdf (accessed 16 September 2015) 1.

²⁶⁴ Section 42 (3) (a) Public Finance Management Act (Chapter 22:19).

²⁶⁵ Zvavahera P and Ndoda G ‘Corporate Governance and ethical behaviour: The case of the Zimbabwean Broadcasting Corporation’ (2014) 9 *Journal of Academic and Business Ethics* 3.

²⁶⁶ Karombo T ‘Zimbabwe spending too much on defence and the military’ available at http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=28074:zimbabwe-spending-too-much-on-defence-and-the-military-&catid=54:Governance&Itemid=118 (accessed 16 September 2015).

²⁶⁷ Mutanda D ‘The impact of the Zimbabwean crisis on parastatals’ (2014) 5 (5.2) *International Journal of Politics and Good Governance* 5.

generally acceptable as well as transparency in all matters of accounting.²⁶⁸ However, there have been numerous cases of late and in some cases, total failure of disclosure of returns and statements required for audits by the Comptroller and Auditor-General.²⁶⁹ The Comptroller and Auditor General is responsible for auditing government ministries and state enterprises with powers enabled by the Audit Office Act (Chapter 22:18). The Audit Office Act works hand in hand with the PFMA. The Audit Office has been unable in certain instances to produce annual reports and meet statutory deadlines for parliament because the legislation that enables it does not provide for powers to compel Ministers and government departments to comply with treasury instructions.²⁷⁰

There is a need to ensure that all the legislation on accounting and reporting has adequate measures to enforce the contained provisions. The disclosure requirements can also be tweaked to bring them in line with the standards of the OECD as this will bring much needed transparency.

3.2.3 The Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities

The Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities (Corporate Governance and Remuneration Policy Framework) was introduced in 2014 in order to tackle the rot in state enterprises. This framework, particularly addresses three main issues which are board appointments, management and performance; CEO appointment and performance and measures to deal with complex issues of salaries, allowances and procurement practices of public enterprises and local authorities.²⁷¹ Since the framework has a narrow scope, it will only be possible to evaluate it against a select number of the OECD guidelines. The framework was introduced amidst public disclosures of the salary gate scandal. It is, however alarming that until 2014 the government had seen no need to introduce such measures to curb excesses that it clearly was aware of as these parastatals report to line ministries.

²⁶⁸ Section 45 (b) and 49 (1) (b) Public Finance Management Act (Chapter 22:19).

²⁶⁹ Zinyama T 'Efficiency and Effectiveness in Public Sector Auditing: An Evaluation of the Comptroller and Auditor-General's Performance in Zimbabwe from 1999 to 2012' (2013) 3 (7) *International Journal of Humanities and Social Science* 276.

²⁷⁰ Zinyama T 'Efficiency and Effectiveness in Public Sector Auditing: An Evaluation of the Comptroller and Auditor-General's Performance in Zimbabwe from 1999 to 2012' (2013) 3 (7) *International Journal of Humanities and Social Science* 276.

²⁷¹ Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

The OECD guidelines discussed above highlight the need for a competent board and it also provides the responsibilities of such boards.²⁷² The framework provides that board members must be selected on grounds of merit, based on a clearly defined capability matrix and skills mix, in areas such as legal, finance, marketing, audit, technical, human resources, strategic and economic planning.²⁷³ The board members must also be inducted and trained by the Corporate Governance and Delivery Agency, which agency will be established within the office of the President and Cabinet to coordinate and monitor compliance with the ZIMCODE.²⁷⁴ This is commendable because if followed in practice it will make way for people who are adequately qualified to sit on SOE boards, which is also in line with the OECD guidelines.

The Corporate Governance and Remuneration Policy Framework also provides for performance contracts for CEOs and other senior management.²⁷⁵ These contracts are important because the OCED guidelines indicate that there is a link between performance and remuneration.²⁷⁶ It is however not clear if these contracts apply to all members of the board. In addition to performance contracts, there is also provision for the evaluation of the performance of the CEO on a quarterly basis by the board and the communication of the results to the line Minister.²⁷⁷ The framework also provides for the establishment of board committees such as those on audit, finance, human resources and remuneration and this is in line with the OCED guidelines.²⁷⁸

As stated in the OECD guidelines, the framework allows for the board of directors to be involved in the process of appointing a CEO.²⁷⁹ According to the framework the board conducts interviews with the assistance of professional human resource consultants and select three possible candidates which will be selected from by the Minister and approved by the

²⁷² Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 72.

²⁷³ 1 (i) Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

²⁷⁴ 1 (iii) Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

²⁷⁵ 2 (iii) Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

²⁷⁶ Jesover F and Kirkpatrick G 'The Revised OCED Principles of Corporate Governance and their Relevance to non-OECD Countries' (2005) 13 (2) *Corporate Governance: An International Review* 133.

²⁷⁷ 2 (v) Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

²⁷⁸ 1 (xx) Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

²⁷⁹ 2 (i) Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

President.²⁸⁰ The framework is however not clear in terms of the boards' role in the dismissal of the CEO. It only states that if CEOs do not meet the minimum requirements of their performance contracts this will constitute grounds for termination of office.²⁸¹

The framework goes further by stating that a 50:50 gender representation and regional spread should be factored into the selection criteria of board members.²⁸² In essence, this seeks to address a social issue of gender representation in high profile positions in the nation and this is in line with some of the reasons for the formation of SOEs mentioned in the previous chapter. This is in line with the OECD guidelines since they provide that it is considered good practice to strive towards diversity in board composition, including with regards to gender, age, geographical, professional and educational background.²⁸³

In as much as the framework has commendable provisions one main issue is seemingly not addressed. This is the issue of board independence, the OECD guidelines provide that it is important that SOEs have strong boards that can act in the interest of the company and effectively monitor management without undue political interference.²⁸⁴ One cannot emphasise enough the importance of board independence in SOEs especially in a country such as Zimbabwe where political interference is the order of the day.²⁸⁵ In a paper by the United Nations it was highlighted that political governance standards may spill over into the area of commerce.²⁸⁶ It is a matter of concern that the framework only prohibits Permanent Secretaries from being members of the board as this should also extend to Ministers and other government officials.²⁸⁷ The framework provides for multiple reporting mechanisms to the line Ministers but does not provide for any provision restraining the Minister from interfering with the activities of the board.

²⁸⁰ 2 (i) Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

²⁸¹ 2 (vii) Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

²⁸² Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

²⁸³ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 72.

²⁸⁴ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 72.

²⁸⁵ News, analysis and comment on Africa 'Zimbabwe- greed, political interference and mismanagement feed pension crisis' available at <http://africajournalismtheworld.com/2015/08/07/zimbabwe-greed-political-interference-and-mismanagement-feed-pensions-crisis/> (accessed 21 September 2015).

²⁸⁶ United Nations Economic Commission for Africa: *Overview of Corporate Governance and Accountability in Southern Africa* (2007) 22.

²⁸⁷ 1 (viii) Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

According to the framework, most decisions of the board and the CEO must be communicated either to the Minister or the Permanent Secretary. It further provides that line Ministers can appoint members from their ministries to sit through board deliberations and report to the ministry.²⁸⁸ This can be taken as the state exercising its ownership function and ensuring that the operations of the board are in line with its mandate. However, if the same framework does not guarantee independence of the board and CEO to at least carry out their duties without undue political interference, this could be a cause for concern. It is necessary for board independence to be promoted in all SOEs through measures that allow boards sufficient autonomy.

3.2.4 The National Code on Corporate Governance Zimbabwe (ZIMCODE)

The ZIMCODE was introduced this year (2015) as the first code of corporate governance of its kind in Zimbabwe. The National Code of Corporate Governance applies to both the public and private sectors. The ZIMCODE has taken the ‘apply or explain’ approach which means that it is voluntary, but it recommends that the Corporate Governance and Remuneration Policy Framework should be enacted into law so as to make it compulsory.²⁸⁹ The code has not seen much implementation yet, especially in the case of SOEs, but it is expected to be fully implemented in due course.²⁹⁰

The code has been divided into different chapters, each containing several principles and this section of the work will go through each chapter. Since this is a holistic corporate governance code its principles will be evaluated against most of the OECD Guidelines on Corporate Governance of State-Owned Enterprises. The ZIMCODE will also be evaluated against the definition of corporate governance considered the most relevant for SOEs in this study and the stakeholder theory of corporate governance.

3.2.4.1 Ownership and Control

Under this chapter, the ZIMCODE provides for the rights of different classes of shareholders and it states that there must be a balance of power between the shareholders who provide capital, the managers and the board of directors.²⁹¹ It is provided further that corporate power should not be concentrated in one person or a small group of persons because this will have a

²⁸⁸ 1 (viii) Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

²⁸⁹ Chapter 1.6 National Code on Corporate Governance Zimbabwe.

²⁹⁰ Tambo B ‘Conflicting roles and responsibilities of SOEs’ *Sunday News Online* August 2 2015 available at <http://www.sundaynews.co.zw/conflicting-roles-and-responsibilities-of-soes/> (accessed 21 September 2015).

²⁹¹ Chapter 2.8 National Code on Corporate Governance Zimbabwe 2014.

negative impact on effective and ethical corporate leadership.²⁹² Additionally, it states that corporate power which is represented by the right to vote on a one share one vote basis must always be aligned with economic rights.²⁹³ The ZIMCODE recommends that the right to vote should be extended to all shareholders, rights of minority shareholders must be respected and that there must be timely and transparent disclosure of annual reports.²⁹⁴

Most of this chapter addresses an array of shareholder issues from ownership, voting rights, information given to shareholders and shareholder meetings, and this is adequately done. This aligns the chapter with the OECD guideline on equitable treatment of shareholders as it manages to cover most of the shareholder issues especially the rights of minority shareholders. A notable aspect of this chapter is the statement that “the community in which a company operates should benefit from its operations.”²⁹⁵ This alludes to the stakeholder theory of corporate governance, which is very important for Zimbabwe but this will be fully addressed in the following sections of this chapter.

3.2.4.2 Boards of Directors and Directors

The preamble of this chapter provides that a company acts through natural persons, mainly the board of directors, which is the governing and controlling body of the company. Therefore the board of directors must possess certain qualities, play certain roles and perform certain functions and duties.²⁹⁶ The principles state that the board of directors should provide effective corporate and entrepreneurial leadership.²⁹⁷ The principles further provide that the leadership of the board must be based on:

- (a) ethics, profession and good morality;
- (b) the notion that strategy, risk, performance and sustainability are inseparable;
- (c) prudent and effective controls which make it possible for risk to be assessed and managed properly;
- (d) complete compliance with, and respect for, applicable laws, especially the Bill of Rights as set out in the Constitution and adherence to non-binding rules, codes and best practice standards; and

²⁹² Chapter 2.9 National Code on Corporate Governance Zimbabwe 2014.

²⁹³ Chapter 2.10 National Code on Corporate Governance Zimbabwe 2014.

²⁹⁴ Chapter 2.11, 12, 13 National Code on Corporate Governance Zimbabwe 2014.

²⁹⁵ Chapter 2.20 National Code on Corporate Governance Zimbabwe 2014.

²⁹⁶ Chapter 3.52 National Code on Corporate Governance Zimbabwe 2014.

²⁹⁷ Chapter 3.53 National Code on Corporate Governance Zimbabwe 2014.

- (e) the recognition that the best interests of the company and the stakeholders must always be promoted.²⁹⁸

The above principles encapsulate the duties and responsibilities of the board of directors and they provide a suitable yardstick for how directors should conduct themselves. They also seek to address the issue of inadequately qualified executives who lacked good ethics who had been sitting on numerous boards.²⁹⁹ There is also need to change the general public perception that all SOE boards are riddled with corruption, mismanagement and fraud.³⁰⁰ The ZIMCODE also places on directors the legal duties of good faith, loyalty, care, skill and diligence in the discharge of their duties.³⁰¹ Apart from these duties directors are also implored to act with honesty and integrity, and there is a duty to act morally that is supplemented by an array of recommendations.³⁰² The moral duty is very important for Zimbabwean SOEs because it was clearly lacking among some of the boards such as those of the ZBC and PSMAS.³⁰³

The chapter further provides for the qualities, membership criteria and qualifications of board members. The principle states that the board should be composed of members with good leadership qualities and core competencies required by the company such as accounting, legal and managerial experience.³⁰⁴ In terms of the composition of the board, it is provided that company boards should have a majority of non-executive directors, the majority of whom should be independent.³⁰⁵ It is also stated that the independent non-executive director must be independent in character and judgment and should not have relationships or circumstances which are likely to affect, or appear to affect their independence.³⁰⁶

This chapter is very much in tandem with the OECD guideline on the responsibilities of the boards. In addressing the issue of board independence, it however does not specifically refer to the issue of political interference in the boards of SOEs. It manages to ensure the appointment of individuals who are independent in character and judgment but there still is

²⁹⁸ Chapter 3.54 (a)-(e) National Code on Corporate Governance Zimbabwe 2014.

²⁹⁹ Ncube F and Maunganidze L 'Corporate Governance and executive Compensation in Zimbabwe State Owned Enterprises: A Case of Institutionalised Predation' (2014) 4 (6) *Management* 137.

³⁰⁰ Zvavahera P and Ndoda G 'Corporate Governance and ethical behaviour: The case of the Zimbabwean Broadcasting Corporation' (2014) 9 *Journal of Academic and Business Ethics* 2.

³⁰¹ Chapter 3.61 National Code on Corporate Governance Zimbabwe 2014.

³⁰² Chapter 3.57 and 65 National Code on Corporate Governance Zimbabwe 2014.

³⁰³ Obert S, Suppiah SDK, Tendai MJ, Desderio CM and Martin D 'Corporate board failure in Zimbabwe: Have non-executive directors gone to sleep?' (2014) 16 *IOSR Journal of Business and Management* 78.

³⁰⁴ Chapter 3.79 National Code on Corporate Governance Zimbabwe 2014.

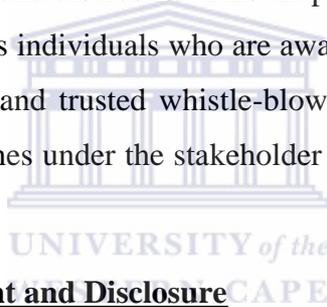
³⁰⁵ Chapter 3.87 National Code on Corporate Governance Zimbabwe 2014.

³⁰⁶ Chapter 3.109 National Code on Corporate Governance Zimbabwe 2014.

need to insulate SOEs from undue influence of the state. The chapter is also not clear on whether or not state officials are allowed to sit on SOE boards apart from the Permanent Secretaries that are precluded from sitting on boards by the Corporate Governance and Remuneration Policy Framework. Such a measure would be important to prevent instances of the so called ‘militarisation’ referred to above.³⁰⁷

3.2.4.3 The Governance of Risk

The code provides that business leaders should understand risk and how it can be measured, eliminated or mitigated and that risk management systems must be independently assured.³⁰⁸ The code implores directors to establish an efficient and effective system for the day to day supervisions of the company’s financial and business operations.³⁰⁹ In addition to this there are numerous other measures that are alluded to in the code that include risk assessment, internal and external audits, audit committees and whistle blower policies. These allude to the OECD guideline on transparency and disclosure. This chapter is commendable because of the whistle blower policy for it allows individuals who are aware of the misuse of funds to report anonymously to an independent and trusted whistle-blowing system.³¹⁰ This policy is also encouraged in the OECD guidelines under the stakeholder relations and responsible business guideline.³¹¹



3.2.4.4 Information Management and Disclosure

The preamble of this chapter explicitly states that disclosure of all company information and its accessibility to all stakeholders is crucial to the culture of building confidence, accountability and trust within the company.³¹² It goes further to state that the disclosure of information is important for stakeholders for it assists them in making informed decisions.³¹³ The inclusion of stakeholders is a step towards fulfilling the stakeholder theory of corporate governance that was alluded to in the previous chapter and this is a laudable effort.

The principles in this chapter make room for information management and disclosure and they provide that the board should ensure that information is properly managed and is made

³⁰⁷ See 3.2.2.

³⁰⁸ Chapter 4.188 National Code on Corporate Governance Zimbabwe 2014.

³⁰⁹ Chapter 4.189 National Code on Corporate Governance Zimbabwe 2014.

³¹⁰ Chapter 4.225 National Code on Corporate Governance Zimbabwe 2014.

³¹¹ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 59.

³¹² Chapter 5.261 National Code on Corporate Governance Zimbabwe 2014.

³¹³ Chapter 5.261 National Code on Corporate Governance Zimbabwe 2014.

available timeously.³¹⁴ The chapter contains multiple disclosure principles and recommendations that seek to address disclosure deficiencies highlighted above in the section on the Public Finance Management Act.³¹⁵ Since this is a corporate governance code it is not in its scope to provide measures that compel Ministers and government departments to produce information needed for audits by the Comptroller and Auditor General. This means that the disclosure principles and recommendations available do not carry enough legislative might to ensure or compel the disclosure of such information.

Chapter 5 recommends that the company's remuneration policy and directors' remuneration, including salary, benefits, bonuses, stock options and pensions should be included in the information disclosed by the company. This is a bold move, especially in regards to SOEs where boards have been ridiculously remunerating themselves at the expense of all other stakeholders.³¹⁶ This would in turn promote the principle of transparency and disclosure as per the OECD guidelines. The chapter also makes provisions for integrated and sustainability reporting. It provides that integrated reporting includes the company's strategy, governance, financial performance, and future outlook in one report.³¹⁷ It states that the integrated report should be guided by the Global Reporting Initiative's Integrated Reporting Council and any other reputable international reporting framework.³¹⁸

As far as corporate governance can go this chapter provides adequate disclosure measures that are in line with the OECD guideline on transparency and disclosure. It is important that these measures are followed since the legislation does not provide the power to compel the disclosure of audit information.³¹⁹

3.2.4.5 Corporate Conflict Prevention and Resolution

This chapter seeks to address the issue of conflict prevention and resolution since conflicts are inherent in business.³²⁰ As stated in the code, the prevention and resolution of corporate conflict makes it possible to protect the rights of shareholders and to protect the property and

³¹⁴ Chapter 5.262 (a) and (b) National Code on Corporate Governance Zimbabwe 2014.

³¹⁵ Public Finance Management Act (Chapter 22:19).

³¹⁶ Mutanda D 'The impact of the Zimbabwean crisis on parastatals' (2014) 5 (5.2) *International Journal of Politics and Good Governance* 3.

³¹⁷ Chapter 5.316 National Code on Corporate Governance Zimbabwe 2014.

³¹⁸ Chapter 5.316 National Code on Corporate Governance Zimbabwe 2014.

³¹⁹ Zinyama T 'Efficiency and Effectiveness in Public Sector Auditing: An Evaluation of the Comptroller and Auditor-General's Performance in Zimbabwe from 1999 to 2012' (2013) 3 (7) *International Journal of Humanities and Social Science* 276.

³²⁰ Chapter 6.324 National Code on Corporate Governance Zimbabwe 2014.

business reputation of the company.³²¹ The chapter makes provisions for the establishment of a corporate conflict resolution (CCR) committee by the board in order to deal with and prevent conflict.³²² This measure complements the OECD guidelines for they provide that mechanisms should be implemented to avoid conflicts of interest.³²³

This chapter also implores directors and employees not to use their positions for an improper purpose or take advantage of company opportunities to further their own interests.³²⁴ There is recommendation against one person taking the position of chairperson of the board and CEO as supervising oneself is a typical conflict of interest.³²⁵ Notably the chapter recommends that the remuneration committee should be fully composed of non-executive directors and that they should not determine their own remuneration but this must be done by an independent company.³²⁶

3.2.4.6 Compliance and Enforcement

This chapter explains the reason behind adopting the ‘apply or explain’ approach which is that the approach “...reflects an appreciation of the fact that it is often not a case of whether to comply or not, but rather a case of considering how the principles of a code and recommendations contained in it can be applied in the particular circumstances of a given enterprise.”³²⁷ This approach allows boards upon concluding that a recommendation is not in the best interests of a company the opportunity to apply the provision differently or apply another practice and still achieve the same objectives.³²⁸

There is acknowledgement that the ‘apply or explain’ approach has a bias towards indirect coercion.³²⁹ The code then relies on disclosure principles to encourage compliance through linkage with membership to sector associations, professional bodies and to support the legal license to remain in business.³³⁰ Voluntary codes rely on the market as a mechanism for encouraging compliance and the codes provide a major source of corporate governance in addition to the law. It is the norm that corporate governance codes are voluntary in the private

³²¹ Chapter 6.325 National Code on Corporate Governance Zimbabwe 2014.

³²² Chapter 6.328 National Code on Corporate Governance Zimbabwe 2014.

³²³ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 73.

³²⁴ Chapter 6.339 National Code on Corporate Governance Zimbabwe 2014.

³²⁵ Chapter 6.341 National Code on Corporate Governance Zimbabwe 2014.

³²⁶ Chapter 6.357 and 358 National Code on Corporate Governance Zimbabwe 2014.

³²⁷ Chapter 7.370 National Code on Corporate Governance Zimbabwe 2014.

³²⁸ Chapter 7.371 National Code on Corporate Governance Zimbabwe 2014.

³²⁹ Chapter 7.372 National Code on Corporate Governance Zimbabwe 2014.

³³⁰ Chapter 7.372 National Code on Corporate Governance Zimbabwe 2014.

sector. However there is need for a mandatory comprehensive code of corporate governance for SOEs as stated in this code that the Corporate Governance and Remuneration Policy Framework should be enacted into law. Incorporation of some on the major principles in the ZIMCODE should precede the enactment of the Corporate Governance and Remuneration Policy Framework.

3.2.4.7 Governance of Stakeholder Relations

This is one major aspect that had not been entirely addressed in the past by existing legislation as indicated above.³³¹ In the governance of a company it is important to create a balance between the maximisation of shareholder value and the protection and promotion of the interests of other stakeholders.³³² For the purposes of this paper stakeholders have been defined as “those groups who affect and/or are affected by the organisation and its activities.”³³³ In the ZIMCODE stakeholders are defined as parties that can or are affected by the operations of a company which is in line with the aforementioned definition.³³⁴ The code provides that stakeholders include shareholders, institutional investors, creditors, lenders, suppliers, customers, regulators, employees, trade unions, the media, analysts, consumers, society in general, communities, auditors and potential investors.³³⁵

The principles of the code are set on the identification, recognition, respect and promotion of the legitimate rights of stakeholders by the company in its endeavours.³³⁶ It provides for mechanisms for engagement and transparency between the company and its stakeholders. The principles and recommendations in this chapter are consistent with the OECD guidelines which state that there should be recognition of the enterprises’ responsibility towards stakeholders and that it requires the enterprises to report on their relations with stakeholders.³³⁷ The code does indeed provide that companies must report on their relations with stakeholders through its integrated report.³³⁸ This will enable any interested parties to track the stakeholder relations of each company and this brings a new dimension of transparency for Zimbabwe.

³³¹ See 3.1.6.

³³² Chapter 8.392 National Code on Corporate Governance Zimbabwe 2014.

³³³ Solomon J *Corporate Governance and Accountability* 2 ed (2007) 14.

³³⁴ Chapter 8.393 National Code on Corporate Governance Zimbabwe 2014.

³³⁵ Chapter 8.393 National Code on Corporate Governance Zimbabwe 2014.

³³⁶ Chapter 8.395 National Code on Corporate Governance Zimbabwe 2014.

³³⁷ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 25.

³³⁸ Chapter 8.429 National Code on Corporate Governance Zimbabwe 2014.

The code is also in line with the stakeholder theory of corporate governance that was referred to in the previous chapter as it focuses on parties outside the shareholders and the realisation of their rights.

3.2.4.8 Role of Government in Corporate Governance

According to this chapter government plays both an administrative and coordinating role through its agencies at every level.³³⁹ It is the role of the government to provide an environment that is conducive for the private and public sector. Since the government is the biggest employer in the country, it is fundamental that it observes good corporate governance practices in government Ministries, Parastatals and State-controlled companies.³⁴⁰ This chapter mainly implores the government to respect laws and regulations and to play a meaningful role in instilling good values and ethics.³⁴¹ This is of outmost importance in Zimbabwe because many have lost faith in the government itself and do not believe that SOEs will be run effectively.³⁴²

This is an important chapter for the government to implement. It has been alleged that the state's ownership policy which is exercised through multiple actors such as line ministries and a number of other government bodies over and above the board of directors is complex.³⁴³ Such complexity is known to be a challenge in matters of ensuring efficient decisions and good corporate governance.³⁴⁴ It is then argued that the state's ownership functions and its policy making and regulatory functions arise and leave the SOEs vulnerable to be used to achieve short term goals at the expense of efficiency.³⁴⁵

The above is not consistent with the OECD guideline on rationales for state ownership. The guidelines provide that the exercise of ownership rights must be clearly identified within the state administration.³⁴⁶ Such exercise of ownership would be facilitated by setting up a

³³⁹ Chapter 9.437 National Code on Corporate Governance Zimbabwe 2014.

³⁴⁰ Chapter 9.439 National Code on Corporate Governance Zimbabwe 2014.

³⁴¹ Chapter 9.449 and 449 National Code on Corporate Governance Zimbabwe 2014.

³⁴² Tambo B 'Conflicting roles and responsibilities of SOEs' *Sunday News Online* August 2 2015 available at <http://www.sundaynews.co.zw/conflicting-roles-and-responsibilities-of-soes/> (accessed 21 September 2015).

³⁴³ Tambo B 'Conflicting roles and responsibilities of SOEs' *Sunday News Online* August 2 2015 available at <http://www.sundaynews.co.zw/conflicting-roles-and-responsibilities-of-soes/> (accessed 21 September 2015).

³⁴⁴ Tambo B 'Conflicting roles and responsibilities of SOEs' *Sunday News Online* August 2 2015 available at <http://www.sundaynews.co.zw/conflicting-roles-and-responsibilities-of-soes/> (accessed 21 September 2015).

³⁴⁵ Tambo B 'Conflicting roles and responsibilities of SOEs' *Sunday News Online* August 2 2015 available at <http://www.sundaynews.co.zw/conflicting-roles-and-responsibilities-of-soes/> (accessed 21 September 2015).

³⁴⁶ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 31.

coordinating entity or by the centralisation of the ownership function.³⁴⁷ According to the above the Zimbabwean state has not been able to establish a clear ownership policy and this might be one of the major causes of the problems that befall the management of SOEs.

3.3 Conclusion

This chapter indicates the importance of the OECD guidelines in the management of SOEs. It is important that when regulators or legislators are drafting legislation or codes infuse the different principles to enhance the productivity of SOEs. It is imperative that guidelines such as those on rationales for state ownership and the state's role as owner be considered in Zimbabwe's corporate governance regime. The state needs a clear ownership policy in order to avoid the use of SOEs for the achievement of short term goals at the expense of efficiency. The lack of clarity in the ownership policy can also lead to excessive state intervention in the operation of SOEs. This is true for Zimbabwe for SOEs are at used as an organ of the political parties and there is need to do away with this.

The country needs a central ownership agency that will exercise the state's right of ownership. Such a body would clarify the ownership policy and it will ensure that the policy is consistently implemented. It will be of great importance that the agency be held accountable to relevant representative bodies and have relationships with public bodies such as the office of the Comptroller and Auditor-General. APE

The office of the Comptroller and Auditor-General needs sufficient powers to compel the disclosure of information when it wishes. There must be sufficient power for it to carry out random audits in order to stamp out corruption which has riddled the state enterprises. There is need for greater accountability and disclosure of the finances of SOEs. Responsible Ministers and boards should be held accountable for any corrupt behaviour, for it is alarming that with the level of state intervention in Zimbabwe line Ministers state that they were unaware of excessive remuneration practices when they occur. Application of the OECD guidelines in these instances would promote efficiency.

The current regime clearly does not comply with the OECD guidelines, but the ZIMCODE is the only instrument that embodies most of the principles. There are issues that might need to be adequately addressed such as that of financial reporting as highlighted in the section on the Public Finance Management Act. The ZIMCODE however, provides for sufficient measures

³⁴⁷ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 31.

in regards to reporting but it is not mandatory and this might be used as a means to circumvent its principles and recommendations. This issue is stressed on because one has to understand the operating atmosphere in Zimbabwe.

Shortly after the salary gate scandal the government responded by capping salaries of executives to only US \$6 000 a month with other circumstances considered in a move to restore sanity.³⁴⁸ It is, however alarming that months later a newly appointed senior management member of PSMAS who had replaced the previous CEO was earning US \$40 000 which is four times the US \$11 000 he should have been earning.³⁴⁹ This was being done while the company was still struggling to pay service providers and workers.³⁵⁰

This points to a culture of good laws but no implementation of such laws. This is the operating atmosphere in most activities in which the government is involved. The country only scored 20 out of 100 for the 2013 and 2014 periods on the corruption perceptions index compiled by Transparency International.³⁵¹ The scores reflect the level of corruption in public sectors and the organisation adds that “bribes and backroom deals don’t just steal resources from the most vulnerable- they undermine economic justice and economic development, and destroy public trust in government and leaders.”³⁵² There is also a strong need to end the culture of ‘militarising’ SOE boards, implementation of the ZIMCODE will prevent such tendencies.

It is important that the ZIMCODE is implemented because it will provide the public with much needed confidence in the system that has been lost over the years. It is in line with most of the OECD principles and it provides a good yardstick for corporate governance as it embodies the corporate governance definition referred to in the previous chapter. The code propagates a culture of transparency and accountability which is of utmost importance. There is however need to advocate for the insulation of the boards of SOEs to ensure that even

³⁴⁸ Ndlovu P ‘CEO Pay Capped: Revealed: What top parastatal bosses earned’ *Chronicle* March 19 2014 available at <http://www.chronicle.co.zw/ceo-pay-capped-revealed-what-top-parastatal-bosses-earned/> (accessed 9 October 2015).

³⁴⁹ Ndlovu P ‘CEO Pay Capped: Revealed: What top parastatal bosses earned’ *Chronicle* March 19 2014 available at <http://www.chronicle.co.zw/ceo-pay-capped-revealed-what-top-parastatal-bosses-earned/> (accessed 9 October 2015).

³⁵⁰ Ndlovu P ‘CEO Pay Capped: Revealed: What top parastatal bosses earned’ *Chronicle* March 19 2014 available at <http://www.chronicle.co.zw/ceo-pay-capped-revealed-what-top-parastatal-bosses-earned/> (accessed 9 October 2015).

³⁵¹ Transparency International ‘Corruption Perceptions Index 2014’ available at <http://www.transparency.org/cpi2014/results> (accessed 9 October 2015).

³⁵² Transparency International ‘Corruption is threatening economic growth for all’ available at <http://www.transparency.org/cpi2014/results> (accessed 9 October 2015).

though they take instructions from the state they are free from undue political influence. As stated in the code some of the principles and recommendations must be made mandatory for SOEs with the hope that new boards will adopt a culture of implementation.

The next chapter will undertake a comparative analysis of the corporate governance of SOEs in New Zealand. This will be done in order to provide an example from which valuable lessons can be derived for the Zimbabwean public sector.



CHAPTER 4

STATE-OWNED ENTERPRISE GOVERNANCE IN NEW ZEALAND

4.1 Introduction to New Zealand and its State-owned Enterprises

The previous chapter illustrated that Zimbabwe has had numerous problems in the management of its SOEs. In view of this, the corporate governance structure of Zimbabwe was analysed and it is necessary that lessons be derived from another jurisdiction. This chapter will begin by providing insight into the reasons why New Zealand has been chosen for this study. It will also examine the history and modern day structure of SOEs in New Zealand as well as its corporate governance structure. The chapter will also point at other aspects of New Zealand's SOE structure from which guidance can be derived for purposes of this study.

4.1.2 Why New Zealand?

New Zealand has been chosen for this study due to its membership of the OECD and its relatively successful SOEs.³⁵³ New Zealand joined the OECD in 1973 and has been an active member since then.³⁵⁴ Since this study has utilised the OECD Guidelines on Corporate Governance of State-owned Enterprises it is only fitting that a country that is part of the OECD be used for comparative purposes. It is also noteworthy that New Zealand has managed to infuse tenets of the OECD guidelines in its corporate governance structure.³⁵⁵ Apart from the OECD guidelines, this country has also been chosen for its culture towards corruption especially in the public sector.

As of June 2010, 17 of New Zealand's SOEs had a combined asset value of \$ 53 billion and revenues of over \$ 13 billion.³⁵⁶ This level of success provides sufficient reason for the need to understand how this nation has managed to reach this point in the governance of its SOEs. One outstanding factor of New Zealand's public sector is the low level of corruption which is ranked second lowest in the world according to Transparency International.³⁵⁷ The low levels

³⁵³ Asia Pacific Interdisciplinary Research in Accounting 'Re-examining the Financial Returns from New Zealand's SE Sector; Re-evaluating Privatisation' available at <http://www.apira2013.org/proceedings/pdfs/K203.pdf> (accessed 12 October 2015) 3

³⁵⁴ OECD 'List of OECD member countries- Ratification of the Convention on the OECD' available at <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> (accessed 12 October 2015)

³⁵⁵ Financial Markets Authority 'Corporate Governance in New Zealand: Principles and Guidelines' 2014

³⁵⁶ TEARA 'Story: State-owned enterprises' available at <http://www.teara.govt.nz/en/state-owned-enterprises/page-1> (accessed 13 October 2015)

³⁵⁷ Transparency International 'Corruption Perceptions Index 2014: Results' available at <http://www.transparency.org/cpi2014/results> (accessed 12 October 2015)

of corruption can be attributed to government openness and effectiveness.³⁵⁸ Low level corruption countries have also been known to have strong and active civic activism and social trust, strong transparency and accountability mechanisms in place allowing citizens to monitor their politicians and hold them accountable for their decisions.³⁵⁹ If Zimbabwe can emulate such standards in regards to public sector management the benefits could be innumerable since the country has lost a lot to corruption and cronyism.³⁶⁰

For the abovementioned reasons New Zealand will provide noteworthy lessons for Zimbabwe. It will also be important to note that no two jurisdictions are the same and the same measures cannot always be readily applied from one jurisdiction to another. Caution will be exercised in the recommendations to be provided. The most important concern is that of the political climate in Zimbabwe and this paper will be cautious on this issue.

4.1.3 History of State-owned Enterprises in New Zealand

It is important to note that New Zealand's public sector includes parliament, the courts, police and armed forces.³⁶¹ These organisations together with government departments that are publicly funded and directly responsible to a minister are referred to as the country's 'core public service'.³⁶² Beyond this there are other government organisations and departments that are funded by the government but are not directly responsible to or controlled by the government.³⁶³ Under this category there are crown entities, SOEs and other government businesses.³⁶⁴ Crown entities are quasi-autonomous organisations such as commissions, review committees and tribunals, which are established to exercise public power or advise Ministers outside the ambit of the central government.³⁶⁵ SOEs are basically large trading

³⁵⁸ Transparency International 'What makes New Zealand, Denmark, Finland, Sweden and others 'cleaner' than most countries' available at <http://blog.transparency.org/2011/12/07/what-makes-new-zealand-denmark-finland-sweden-and-others-%E2%80%9Ccleaner%E2%80%9D-than-most-countries/> (accessed 13 October 2015).

³⁵⁹ Transparency International 'What makes New Zealand, Denmark, Finland, Sweden and others 'cleaner' than most countries' available at <http://blog.transparency.org/2011/12/07/what-makes-new-zealand-denmark-finland-sweden-and-others-%E2%80%9Ccleaner%E2%80%9D-than-most-countries/> (accessed 13 October 2015).

³⁶⁰ Chabwinja S 'Ministers must not appoint cronies to boards' *The Independent* 18 February 2014 available at <http://www.theindependent.co.zw/2014/02/18/ministers-must-appoint-cronies-boards/> (accessed 21 June 2015).

³⁶¹ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 67.

³⁶² Mulgan R *Politics in New Zealand* 3 ed (1997) 79.

³⁶³ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 67.

³⁶⁴ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 67.

³⁶⁵ The Treasury 'Other Crown Owned Companies' available at <http://www.treasury.govt.nz/commercial/ownership-framework/croc/> (accessed 12 October 2015).

departments within government, which are subsequently corporatised and established as state legal entities with a strong commercial focus.³⁶⁶ Other government-owned businesses are those outside the scope of crown entities and SOEs, but which have a significant crown shareholding.³⁶⁷ This study will, however focus only on New Zealand's SOEs.

Before 1984 the New Zealand government owned a large range of essential commercial trading activities such as coal mining, petrochemicals, banks, insurance companies and an airline.³⁶⁸ During this period there were state-run organisations with boards and an example is the New Zealand Railways Corporation, which had a board whose powers and functions could be reviewed by the responsible Minister.³⁶⁹ This meant that the Minister of Railways retained the authority to make decisions. This practice also applied to other government-owned commercial entities, but in varying degrees.³⁷⁰ Government departments and ministries were also responsible for the delivery of social and regulatory functions.³⁷¹

In 1984 the New Zealand economy was underperforming and the treasury produced a comprehensive analysis of the economic situation.³⁷² This analysis found that the performance of the entities owned by the government was a substantial contribution to the economic situation.³⁷³ Their main findings showed that the entities were poorly governed, consuming large amounts of capital and other resources, and producing low to negative returns.³⁷⁴ In a paper published in 1984 (Economic Management) by the treasury the main reasons for the failure of SOEs included:

- a) their lack of clear, non-conflicting objectives;
- b) their operating environment i.e. the special assistance they received and restraints on competition;

³⁶⁶ The Treasury 'State-Owned Enterprises' available at <http://www.treasury.govt.nz/commercial/ownership-framework/soe/> (accessed 12 October 2015).

³⁶⁷ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 68.

³⁶⁸ The Board Room Practice Limited 'Corporate Governance in new Zealand Government-owned Companies: A Stock-Take' (2005) 1.

³⁶⁹ The Board Room Practice Limited 'Corporate Governance in new Zealand Government-owned Companies: A Stock-Take' (2005) 1.

³⁷⁰ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 64.

³⁷¹ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 64.

³⁷² New Zealand Treasury 'State-owned Enterprises: History of Policy Development and Implementation' (1996) 6.

³⁷³ New Zealand Treasury 'State-owned Enterprises: History of Policy Development and Implementation' (1996) 8.

³⁷⁴ Mulgan R *Politics in New Zealand* 3 ed (1997) 79.

c) the incentives arising from existing arrangements from monitoring performance.³⁷⁵

Despite the presence of government commercial structures before 1987 there was little or no mention of corporate governance as a field of enquiry.³⁷⁶ At this time there were commercial companies that were governed by the Companies Act of 1955 but there was little or no public debate about the quality of governance.³⁷⁷ This debate only gained momentum when there was a significant number of state-owned enterprises and an environment that encouraged performance focus.³⁷⁸

Eventually the limited liability company was chosen as the most effective vehicle for the management of the government commercial and trading operations.³⁷⁹ Various government departments with a strong trading function were corporatised and held as SOEs or privatised in a move to steer them away from ministerial control and government interference.³⁸⁰ It was at this time that the government decided to treat commercial management and risk the same way that the private sector did.³⁸¹ This also led to the deregulation of the SOE's market as well as special assistance which had been provided when trading agencies were within government agencies.³⁸² Progressive deregulation was in the rail and electricity sectors and this meant that SOEs now faced competition from private sector companies.³⁸³ More importantly boards were appointed from the private sector and civil servants were excluded and this is still the case.³⁸⁴ Similar to the private sector directors were also not appointed to represent any community interests.³⁸⁵ These reforms were in line with the ongoing international trend of aligning public sector management with that of the private sector.³⁸⁶

³⁷⁵ New Zealand Treasury 'State-owned Enterprises: History of Policy Development and Implementation' (1996) 7-8.

³⁷⁶ The Board Room Practice Limited 'Corporate Governance in new Zealand Government-owned Companies: A Stock-Take' (2005) 2.

³⁷⁷ New Zealand Treasury 'State-owned Enterprises: History of Policy Development and Implementation' (1996) 7.

³⁷⁸ New Zealand Treasury 'State-owned Enterprises: History of Policy Development and Implementation' (1996) 8.

³⁷⁹ The Board Room Practice Limited 'Corporate Governance in new Zealand Government-owned Companies: A Stock-Take' (2005) 2.

³⁸⁰ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 68.

³⁸¹ The Board Room Practice Limited 'Corporate Governance in new Zealand Government-owned Companies: A Stock-Take' (2005) 2.

³⁸² McKinnon M *Treasury: The New Zealand Treasury, 1840-2000* (2003) 369.

³⁸³ McKinnon M *Treasury: The New Zealand Treasury, 1840-2000* (2003) 369.

³⁸⁴ Mulgan R *Politics in New Zealand* 3 ed (1997) 81.

³⁸⁵ Mulgan R *Politics in New Zealand* 3 ed (1997) 81.

³⁸⁶ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 68.

The treasury was very much responsible for the development of the policy that led to the formation of the modern day SOE. It argued that setting up enterprises as separate legal entities under the Companies Act 1953 would reduce the likelihood of lenders assuming an implicit government guarantee.³⁸⁷ More importantly, it argued that giving SOE boards the same powers as those of private sector boards would limit the scope for detailed ministerial intervention in the management of the enterprise.³⁸⁸ The Companies Act would then provide the legal basis for managerial autonomy.³⁸⁹ This is important because corporatisation results in insulation because company laws usually limit the rights of shareholders to directly manage the enterprise.³⁹⁰ This would be very valuable for Zimbabwe as there is need to insulate SOE boards from political interference.

Initially nine SOEs were formed in 1987 under the State-Owned Enterprises Act 1986 (SOE Act) and were to be governed by the Companies Act 1953 in an attempt to emulate the private sector.³⁹¹ One exception to this is KiwiRail which is a statutory corporation established by its own legislation and is a SOE under the SOE Act but is not a company under the Companies Act.³⁹² The primary function of SOEs is to act as successful business enterprises that actually make profits.³⁹³ Some sections of the SOE Act did allow the government to pursue non-commercial objectives as long as they were clearly identified and separately paid for rather than being hidden in the total budget.³⁹⁴ Despite the presence of this clause most of New Zealand's SOEs have acted as fully commercial enterprises, thus neglecting the social objectives.³⁹⁵

In each SOE there are two shares, one held by the Minister of SOEs and one held by the Minister of Finance on behalf of the crown with the former being the executive shareholder

³⁸⁷ New Zealand Treasury 'State-owned Enterprises: History of Policy Development and Implementation' (1996) 18.

³⁸⁸ The Treasury 'State-Owned Enterprises' available at <http://www.treasury.govt.nz/commercial/ownership-framework/soe/> (accessed 12 October 2015).

³⁸⁹ New Zealand Treasury 'State-owned Enterprises: History of Policy Development and Implementation' (1996) 18.

³⁹⁰ Vigliasindi M *The effectiveness of Boards of Directors of State-owned Enterprises in Developing Countries* (2008) 3.

³⁹¹ Mulgan R *Politics in New Zealand* 3 ed (1997) 80.

³⁹² The Treasury 'State-Owned Enterprises' available at <http://www.treasury.govt.nz/commercial/ownership-framework/soe/> (accessed 12 October 2015).

³⁹³ Mulgan R *Politics in New Zealand* 3 ed (1997) 79.

³⁹⁴ Section 7 State-Owned Enterprises Act 1986.

³⁹⁵ Mulgan R *Politics in New Zealand* 3 ed (1997) 81.

for day-to-day overview.³⁹⁶ During the transition period the Minister of SOEs formed two advisory groups in addition to the usual advice from the treasury. One was the SOE Unit, which reported directly to the Minister as a part of his office.³⁹⁷ The purpose of this Unit was to provide complementary and board appointment advice to the Minister in addition to that of the treasury which he did not want to solely depend on.³⁹⁸ The other was the SOE Steering Committee which was made up of highly skilled directors and it actively provided the Minister and the SOE unit with informed advice on governance and board appointment issues.³⁹⁹

During this period there were establishment boards which had no legal standing and were formed to prepare the first business plans, contracts, the draft Statement of Corporate Intent (SCI) and the appointment of the CEO-select.⁴⁰⁰ The SCI is the document that the government exercises its control through.⁴⁰¹ The statement is prepared by the board in consultation with the shareholding Minister and it covers issues such as the type of business to be engaged in, the composition of the balance sheet and how the board will set its annual dividend.⁴⁰²

These boards assisted with the incorporation process of the SOEs. The boards were involved in shaping the future of the businesses and were tasked with selecting which departmental staff would be taken into the new business.⁴⁰³ The state sector also benefited from the fact that skilled private sector directors accepted appointments to the establishment and company boards.⁴⁰⁴ This is attributed as one of the major factors for the success of the commerciality process. It is also important to note that since appointments were made by the Minister under-

³⁹⁶ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 74.

³⁹⁷ The Board Room Practice Limited 'Corporate Governance in new Zealand Government-owned Companies: A Stock-Take' (2005) 3.

³⁹⁸ The Board Room Practice Limited 'Corporate Governance in new Zealand Government-owned Companies: A Stock-Take' (2005) 3.

³⁹⁹ New Zealand Treasury 'State-owned Enterprises: History of Policy Development and Implementation' (1996) 78.

⁴⁰⁰ The Board Room Practice Limited 'Corporate Governance in new Zealand Government-owned Companies: A Stock-Take' (2005) 3.

⁴⁰¹ TEARA 'Story: State-owned enterprises' available at <http://www.teara.govt.nz/en/state-owned-enterprises/page-1> (accessed 13 October 2015).

⁴⁰² TEARA 'Story: State-owned enterprises' available at <http://www.teara.govt.nz/en/state-owned-enterprises/page-1> (accessed 13 October 2015).

⁴⁰³ The Board Room Practice Limited 'Corporate Governance in new Zealand Government-owned Companies: A Stock-Take' (2005) 4.

⁴⁰⁴ New Zealand Treasury 'State-owned Enterprises: History of Policy Development and Implementation' (1996) 22.

performing directors could be reappointed to boards for political reasons.⁴⁰⁵ This is a down side of giving political figures the power to appoint board members.

In the dual model of ownership the two shareholding Ministers were advised by the New Zealand Treasury for the Minister of Finance and the Crown Company Monitoring Advisory Unit (CCMAU) for the Minister of SOEs and were accountable to parliament for the performance of their duties.⁴⁰⁶ The Treasury primarily advised SOEs on matters of financial performance, economic issues and balance sheet matters and the CCMAU provided advice on commercial performance matters.⁴⁰⁷ Since 2009 New Zealand has moved from the dual ownership model to a centralised one. The old structure was replaced by the Crown Ownership Management Unit (COMU) which is an integral part of the treasury that brings together the ownership monitoring, appointments and governance functions of SOEs.⁴⁰⁸

Present boards are composed of seven to nine directors who are appointed based on their business skills and experience who are accountable to the shareholding Minister.⁴⁰⁹ Most SOEs are subject to Ministerial direction in relation to the content of certain aspects of the company's statement of corporate intent and the level of dividend payable to the Crown.⁴¹⁰ It has also been stated that the SOE framework intends for Ministers to have an advisory role only and not interfere with the operations of SOEs.⁴¹¹ This will provide the necessary insulation from government interference that is essential for SOEs. In the case of KiwiRail, the two shareholding Ministers may jointly remove board members at any time entirely at their discretion.⁴¹² This as a result may be vesting too much power in the Ministers as it cannot be up to an individual member's discretion to remove board members. It would be preferable if set procedures are in place that would assist and govern such dismissals and open them to scrutiny for appropriateness.

⁴⁰⁵ The Board Room Practice Limited 'Corporate Governance in new Zealand Government-owned Companies: A Stock-Take' (2005) 4.

⁴⁰⁶ TEARA 'Story: State-owned enterprises' available at <http://www.teara.govt.nz/en/state-owned-enterprises/page-1> (accessed 13 October 2015).

⁴⁰⁷ The Treasury 'Crown Company Monitoring Advisory Unit' available at <http://www.treasury.govt.nz/publications/abouttreasury/soi/2008-13/09.htm> (accessed 20 October 2015).

⁴⁰⁸ OECD *State-Owned Enterprises Governance Reform: An Inventory of Recent Change* (2005) 17.

⁴⁰⁹ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 74.

⁴¹⁰ The Treasury 'State-Owned Enterprises' available at <http://www.treasury.govt.nz/commercial/ownership-framework/soe/> (accessed 12 October 2015).

⁴¹¹ Luke B *Strategic entrepreneurship in New Zealand's state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 74.

⁴¹² The Treasury 'State-Owned Enterprises' available at <http://www.treasury.govt.nz/commercial/ownership-framework/soe/> (accessed 12 October 2015).

These are among the other reforms that have been implemented by New Zealand over the years from the inception of the State-Owned Enterprises Act 1986. The SOE reforms have received extensive support from researchers and commentators from other countries.⁴¹³ The reforms have been referred to as an exemplar of new public management breaking from the bureaucratic paradigm of public administration.⁴¹⁴ Various foreign governments have even visited New Zealand to learn from its SOE sector success.⁴¹⁵ New Zealand SOE boards basically run companies without political intrusion but are only expected to abide by the ‘no surprises’ convention in regards to major issues.⁴¹⁶ This has enabled a well-functioning SOE sector that has had numerous benefits for the government and stakeholders at large.

4.2 Overview of New Zealand’s Corporate Governance Structure

In New Zealand SOEs are established by the State-Owned Enterprises Act 1986, are incorporated as companies and as a result are bound by the provisions of the Companies Act 1993.⁴¹⁷ The State-Owned Enterprises Act is also referred to as the ‘umbrella statute’ because it encompasses all the necessary powers to establish and transfer assets to SOEs.⁴¹⁸ The Companies Act basically regulates most of the activities of private sector companies from how they are incorporated and managed and other issues that come along with operating in the private sector. In their operation as private sector companies the SOEs will also be subject to the corporate governance code. Corporate Governance in New Zealand: Principles and Guidelines compiled by the Financial Markets Authority is the corporate governance code for New Zealand. This section will highlight the most important aspects of the corporate governance framework.

4.2.1 The State-Owned Enterprises Act 1986

The State-owned Enterprises Act which is the founding Act for all of New Zealand’s SOEs provides that the principal objective of every SOE shall be to operate as a successful business and to that to that end it must be:

⁴¹³ Luke B *Strategic entrepreneurship in New Zealand’s state-owned enterprises: Underlying elements and financial implications* (Unpublished PhD thesis, Auckland University of Technology, 2009) 75.

⁴¹⁴ O’Flynn J ‘From new public management to public value: Paradigmatic change and managerial implications’ (2007) 66 (3) *Australian Journal of Public Administration* 353.

⁴¹⁵ Cullen M ‘Cullen at induction seminar for SOE directors’ available at <http://www.beehive.govt.nz/speech/cullen-induction-seminar-soe-directors> (accessed 20 October 2015).

⁴¹⁶ The Board Room Practice Limited ‘Corporate Governance in new Zealand Government-owned Companies: A Stock-Take’ (2005) 15.

⁴¹⁷ The Treasury ‘State-Owned Enterprises’ available at <http://www.treasury.govt.nz/commercial/ownership-framework/soe/> (accessed 12 October 2015).

⁴¹⁸ New Zealand Treasury ‘State-owned Enterprises: History of Policy Development and Implementation’ (1996) 17.

- (a) as profitable and efficient as comparable businesses that are not owned by the crown;
and
- (b) a good employer; and
- (c) an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.⁴¹⁹

This section provides the most important provisions in the SOE sector reforms of New Zealand. The government departments were transformed into SOEs for the purpose of creating profit making enterprises that would also be good employers.⁴²⁰ The Act states that directors shall be persons who will assist the SOEs to achieve their principal objectives.⁴²¹ Directors are given the role of making all decisions in relation to the operation of the SOE in accordance with the statement of corporate intent and their accountability to shareholding Ministers is also set out.⁴²²

The Act makes provision for the performance on non-commercial activities. When the Crown wishes that a SOE provide goods or services to a person, there shall be an agreement in regards to this and payment must be made in part or in full by the Crown.⁴²³ The shareholding rights of the Minister of Finance and the responsible Minister is established by this Act. It is provided that these Ministers may from time to time on behalf of the Crown subscribe for or acquire shares or equity bonds or both in companies specified in Schedule 2 of the Act.⁴²⁴ Schedule 2 provides a list of 14 SOEs that include KiwiRail, Airways Corporation of New Zealand Limited and Animal Control Products Limited. The number of shares or equity bonds to be held by the shareholding Ministers must be equal.⁴²⁵ The Ministers are empowered to exercise all rights and powers attached to the shares they hold in a SOE.⁴²⁶

The Act encompasses accountability measures firstly through the statement of corporate intent (SCI). The SCI shall be delivered by every SOE board to the shareholding Ministers not later than one year before the commencement of each financial year of the SOE.⁴²⁷

⁴¹⁹ Section 4 (1) (a)-(c) State-Owned Enterprises Act 1986.

⁴²⁰ Section 4 (2) State-Owned Enterprises Act 1986.

⁴²¹ Section 5 State-Owned Enterprises Act 1986.

⁴²² Section (2) and (3) State-Owned Enterprises Act 1986.

⁴²³ Section 7 State-Owned Enterprises Act 1986.

⁴²⁴ Section 10 (1) State-Owned Enterprises Act 1986.

⁴²⁵ Section 10 (2) State-Owned Enterprises Act 1986.

⁴²⁶ Section 22 (3) State-Owned Enterprises Act 1986.

⁴²⁷ Section 14 (1) State-Owned Enterprises Act 1986.

Section 14 delves into the array of information to be included in the SCI such as the objectives of the group, the nature and activities to be undertaken and the accounting policies.⁴²⁸ It further provides for the delivery of annual and half yearly reports, and financial statements as well as information that should be tabled before the House of Representatives for purposes of accountability.⁴²⁹ The Auditor General is appointed as the auditor of state enterprises and subsidiaries and state enterprises are also designated as public entities under the Public Audit Act 2001.⁴³⁰

Section 30 of the Act provides that “notwithstanding anything in the Companies Act 1993, the Reserve Bank of New Zealand Act 1989 or any other enactment or rule of law, a company in which all the shares are applied for by Ministers may be registered under the Companies Act 1993...”⁴³¹

4.2.2 The Companies Act 1993

The Companies Act 1993 is a very broad Act that addresses numerous issues in regards to New Zealand’s company law. Major issues addressed in the Act include director powers and duties, shareholder rights and liabilities and the disclosure of different types of information. The Act does not specifically refer to the term corporate governance but the measures it contains contribute to proper corporate governance. Directors are mandated to act in good faith and in the best interests of the company in discharging their duties.⁴³² Directors may not act or agree to the company acting in a manner that contravenes the Companies Act or the constitution of the company.⁴³³ Such a provision would directly apply to the issue highlighted in the previous chapter of SOEs being forced to contribute money to the first lady’s birthday celebrations.⁴³⁴ Furthermore directors must exercise the duty of care, skill and diligence that a reasonable director would exercise in the same circumstances when exercising their powers.⁴³⁵

According to the Act, if a director commits an offense or exercises their powers and duties in bad faith knowing that the conduct will cause serious loss to the company they will be liable

⁴²⁸ Section 14 (2) (a),(b),(d) State-Owned Enterprises Act 1986.

⁴²⁹ Section 15, 16, 17 State-Owned Enterprises Act 1986.

⁴³⁰ Section 19 (1) State-Owned Enterprises Act 1986.

⁴³¹ Section 30 (1) State-Owned Enterprises Act 1986.

⁴³² Section 131 (1) Companies Act 1993.

⁴³³ Section 134 Companies Act 1993.

⁴³⁴ See 3.1.7 Companies Act 1993.

⁴³⁵ Section 137 Companies Act 1993.

to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$ 200 000.⁴³⁶ In Zimbabwe such provisions are generally not included in the enabling Acts of SOEs such as the Broadcasting Services Act⁴³⁷ and the Air Zimbabwe Corporation Act.⁴³⁸ Harsh prison sentences and fines are a necessary deterrent for the behaviour that has plagued SOE boards in Zimbabwe. It has become common that board members and public officials commit serious offences and only walk away with a mere dismissal because of their political connections.⁴³⁹ Where a board member has consciously prejudiced a company it is essential that they face fitting punishment.

The Act makes provision for the disclosure of instances of conflict of interest. It is provided that a director upon becoming aware of the fact that he or she is interested in a transaction or proposed transaction, must cause to be entered in the interests register the monetary value of the transaction or the nature and extent of that interest.⁴⁴⁰ In this Act failure to comply with the disclosure provisions will result in an offence and liability to a penalty.⁴⁴¹ The remuneration and payment of any benefits to a director must be authorised by the board.⁴⁴²

Shareholders are given the right to inspect company information at any time they deem necessary.⁴⁴³ The board is mandated to ensure that accounting records are present at all times and the records must show that the company's accounting methods comply with generally accepted accounting practice.⁴⁴⁴ Some of the provisions in regards to auditing do not apply to public entities because of the Public Audit Act.

4.2.3 The Public Audit Act 2001

The purpose of the Act is to establish the office of the Controller and Auditor-General and reform and restate the law relating to the audit of public sector organisations.⁴⁴⁵ The Act implores the Auditor-General to act independently in the exercise and performance of his or her functions, duties and powers.⁴⁴⁶ The Auditor-General is the auditor of all public entities and must from time to time audit the financial statements, accounts and other information that

⁴³⁶ Section 138A (1) and 373 (4) Companies Act 1993.

⁴³⁷ Broadcasting Services Act (Chapter 12:06).

⁴³⁸ Air Zimbabwe Corporation Act (Chapter 13:02).

⁴³⁹ Pindula 'Willowgate Scandal' available at http://www.pindula.co.zw/Willowgate_Scandal (accessed 16 June 2015).

⁴⁴⁰ Section 140 (1) (a) and (b) Companies Act 1993.

⁴⁴¹ Section 140 (4) Companies Act 1993.

⁴⁴² Section 161 (1) Companies Act 1993.

⁴⁴³ Section 178 (1) Companies Act 1993.

⁴⁴⁴ Section 194 (1) (b) Companies Act 1993.

⁴⁴⁵ Section 3 (a) and (b) Public Audit Act 2001.

⁴⁴⁶ Section 9 Public Audit Act 2001.

a public entity is required to have audited.⁴⁴⁷ The Auditor-General also has the power to examine at any time:

- (a) the extent to which a public entity is carrying out its activities effectively and efficiently:
- (b) the public entity's compliance with its regulatory obligations:
- (c) any act or omission of a public entity, in order to determine whether waste has resulted or may have resulted or may result:
- (d) any act or omission showing or appearing to show a lack of probity or financial prudence by a public entity or 1 or more of its members, office holders, and employees.⁴⁴⁸

The Auditor-General may enquire, either on his or her own initiative or on request into any matter concerning a public entity's use of its resources.⁴⁴⁹ Any matters that arise out of the performance and exercise of the Auditor-General's functions, duties and powers must be reported to the House of Representatives on an annual basis.⁴⁵⁰ The Auditor-General has the duty to publish by way of a report to the House of Representatives, the auditing standards that are or intended to be applied to the conduct of audits and enquiries.⁴⁵¹

The Act provides the Auditor-General with the power to require a public entity or any person to produce a document in the entity's or person's custody, care or control or to provide the Auditor-General with information or an explanation about any information.⁴⁵² This measure in essence compels those in possession of information to produce such information to the Auditor-General. The previous chapter highlighted that the Zimbabwean Audit Office has been unable to produce audit reports because its enabling legislation does not provide for powers to compel ministers and government departments to comply with treasury instructions.⁴⁵³ Such a measure could cure the defect in the Zimbabwe legislation that was alluded to in this instance.

⁴⁴⁷ Section 14 (1) and 15 (1) Public Audit Act 2001.

⁴⁴⁸ Section 16 (1) (a)-(d) Public Audit Act 2001.

⁴⁴⁹ Section 18 (1) Public Audit Act 2001.

⁴⁵⁰ Section 20 Public Audit Act 2001.

⁴⁵¹ Section 23 (1) Public Audit Act 2001.

⁴⁵² Section 25 (1) (a) and (b) Public Audit Act 2001.

⁴⁵³ See 3.2.2.

4.2.4 Financial Markets Authority Corporate Governance in New Zealand: Principles and Guidelines

Corporate governance guidelines were first published in New Zealand in the form of a handbook by the Securities Commission in 2004. The handbook was a shortened version of a fuller report, Corporate Governance in New Zealand: Principles and Guidelines published in 2004 as well.⁴⁵⁴ The report and handbook set out the nine principles that form the basis of the corporate governance code. The code utilises a system of principles rather than taking a prescriptive approach. This allows boards to explain how they comply with each principle rather than ‘comply or explain why not.’⁴⁵⁵ This was done to allow for flexibility in reporting since there are entities that may also need to comply with other corporate governance principles. This approach is different from that of the ZIMCODE which prescribes how its principles can be fulfilled. The principles of this code complement those of the OECD. The code is applicable to listed issuers, other issuers of securities, state-owned enterprises and may also include other companies.⁴⁵⁶

4.2.4.1 Ethical Standards

Directors are mandated to set high standards of ethical behaviour, model this behaviour and hold management accountable for delivering these standards throughout the organisation.⁴⁵⁷ A code of ethics should be adopted that is a meaningful statement of its core values. It should set expectations for ethical decision making in regards to acting with honesty and integrity, proper use of an entity’s property, not participating in illegal or unethical activity, among other issues.⁴⁵⁸ The code of ethics should be communicated to the employees and training and whistleblowing procedures should be provided.⁴⁵⁹ The code provides that a code of ethics is not effective unless there are consequences for directors and employees who breach it.⁴⁶⁰ This is an important aspect that also needs to be implemented in Zimbabwe’s ethics codes for SOEs.

4.2.4.2 Board Composition and Performance

Similar to the OECD Guidelines on Corporate Governance of State-Owned Enterprises the code advocates for a board that has a balance of independence, skills, knowledge, expertise

⁴⁵⁴ Corporate Governance in New Zealand: Principles and Guidelines 2014 3.

⁴⁵⁵ Corporate Governance in New Zealand: Principles and Guidelines 2014 3.

⁴⁵⁶ Corporate Governance in New Zealand: Principles and Guidelines 2014 5.

⁴⁵⁷ Corporate Governance in New Zealand: Principles and Guidelines 2014 8.

⁴⁵⁸ Corporate Governance in New Zealand: Principles and Guidelines 2014 9.

⁴⁵⁹ Corporate Governance in New Zealand: Principles and Guidelines 2014 9.

⁴⁶⁰ Corporate Governance in New Zealand: Principles and Guidelines 2014 9.

and experience.⁴⁶¹ There should be an appropriate balance of executive and non-executive directors and should include directors who meet the formal criteria for independent directors.⁴⁶² Directors are mandated to act in the best interest of the company and its roles must be clearly set out in a formal charter that sets out responsibilities and roles of the board, including any formal delegations to management.⁴⁶³ More importantly the chairperson of a publicly owned entity should be independent and no director may hold the roles of board chairperson and chief executive unless there are extenuating circumstances.⁴⁶⁴ The process of appointment should be rigorous so as to give the board a range of relevant skills and expertise. It is also important that boards carry out self and individual assessments in order to enhance effectiveness.⁴⁶⁵

4.2.4.3 Board Committees

Board committees should be utilised where they will enhance effectiveness in key areas while still retaining board responsibility.⁴⁶⁶ Board committees should have clear, formal charters that set out their roles and delegated responsibilities.⁴⁶⁷ Audit committees should be composed of all non-executive directors all of whom are independent, at least one director who is a qualified accountant and a chairperson who is independent and not the chairperson of the board.⁴⁶⁸ The code encourages the appointment of different committees such as the remuneration committee but these should be set up according to company needs.⁴⁶⁹

4.2.4.4 Reporting and Disclosure

The board should demand integrity in the financial reporting and in the timeliness and balance of corporate disclosures.⁴⁷⁰ The financial and annual reports of all entities should in addition to all information required by law, include sufficient, meaningful information to enable investors and stakeholders to be well informed.⁴⁷¹ Boards must maintain an effective system of internal controls for reliable financial reporting and accounting records.⁴⁷² Entities should adhere to high standards of reporting and disclosure to ensure proper accountability

⁴⁶¹ Corporate Governance in New Zealand: Principles and Guidelines 2014 11.

⁴⁶² Corporate Governance in New Zealand: Principles and Guidelines 2014 12.

⁴⁶³ Corporate Governance in New Zealand: Principles and Guidelines 2014 12.

⁴⁶⁴ Corporate Governance in New Zealand: Principles and Guidelines 2014 12.

⁴⁶⁵ Corporate Governance in New Zealand: Principles and Guidelines 2014 15.

⁴⁶⁶ Corporate Governance in New Zealand: Principles and Guidelines 2014 16.

⁴⁶⁷ Corporate Governance in New Zealand: Principles and Guidelines 2014 17.

⁴⁶⁸ Corporate Governance in New Zealand: Principles and Guidelines 2014 17.

⁴⁶⁹ Corporate Governance in New Zealand: Principles and Guidelines 2014 19.

⁴⁷⁰ Corporate Governance in New Zealand: Principles and Guidelines 2014 20.

⁴⁷¹ Corporate Governance in New Zealand: Principles and Guidelines 2014 21.

⁴⁷² Corporate Governance in New Zealand: Principles and Guidelines 2014 21.

between the entity and its investors and stakeholders.⁴⁷³ Reporting and disclosure requirements are more significant for public sector entities. The continuous disclosure regime should be observed in order to maintain a high standard of information disclosure.⁴⁷⁴

4.2.4.5 Remuneration

The remuneration of directors and executives should be transparent, fair and reasonable.⁴⁷⁵ The board should have a clear policy for setting remuneration of executives and non-executive directors that are fair and reasonable in a competitive market for the skills, knowledge and expertise required.⁴⁷⁶ Publicly owned entities should publish their remuneration policies on their websites.⁴⁷⁷ This should be adopted in Zimbabwe since SOEs have been involved in numerous remuneration scandals. The issues to be considered in establishing remuneration are complex and can only be viewed in the context of each entity.⁴⁷⁸ A distinction must be drawn between the packages of executives and non-executive directors and for efficiency reasons it is important to tie executive director compensation to entity performance.⁴⁷⁹

4.2.4.6 Risk Management

Directors should have a sound understanding of the key risks faced by the business and they should regularly verify that the entity has appropriate processes that identify and manage potential and relevant risks.⁴⁸⁰ The board should receive and review regular reports on the operation of the risk management framework and internal control processes, including any developments in relation to key risks.⁴⁸¹ The code encourages processes such as enterprise wide risk management frameworks which are useful in identifying, monitoring and managing risk.⁴⁸²

⁴⁷³ Corporate Governance in New Zealand: Principles and Guidelines 2014 22.

⁴⁷⁴ Corporate Governance in New Zealand: Principles and Guidelines 2014 23.

⁴⁷⁵ Corporate Governance in New Zealand: Principles and Guidelines 2014 24.

⁴⁷⁶ Corporate Governance in New Zealand: Principles and Guidelines 2014 25.

⁴⁷⁷ Corporate Governance in New Zealand: Principles and Guidelines 2014 25.

⁴⁷⁸ Corporate Governance in New Zealand: Principles and Guidelines 2014 26.

⁴⁷⁹ Corporate Governance in New Zealand: Principles and Guidelines 2014 26.

⁴⁸⁰ Corporate Governance in New Zealand: Principles and Guidelines 2014 27.

⁴⁸¹ Corporate Governance in New Zealand: Principles and Guidelines 2014 28.

⁴⁸² Corporate Governance in New Zealand: Principles and Guidelines 2014 28.

4.2.4.7 Auditors

The principle provides that boards should ensure the quality and independence of the external audit process.⁴⁸³ Boards must inform themselves fully on the responsibilities of external auditors and be rigorous in its selection of auditors on professional merit.⁴⁸⁴ There is also need that the board ensures that there is no relationship between the independent auditors and the subject entity of the audit or any related persons and the auditor must confirm this.⁴⁸⁵ It is the responsibility of the audit committee to select and recommend board and shareholder appointment of auditors, and to oversee all aspects of their work.⁴⁸⁶

4.2.4.8 Shareholder Relations

The board should promote constructive relationships with shareholders that encourage them to engage with the entity.⁴⁸⁷ The guidelines encourage widely-held entities to have clear published policies for shareholder relations and to regularly review practices aiming to communicate the goals, strategies and performance of the entity.⁴⁸⁸ Shareholders have certain rights as owners and boards should take necessary steps to ensure shareholder involvement in issues that need their approval.⁴⁸⁹ In giving effect to this the board must ensure that information is more accessible to shareholders, shareholders are given sufficient time and detail to enable them to participate in decisions and that shareholder meetings are held in places that are convenient for the shareholders.⁴⁹⁰

4.2.4.9 Stakeholder Interests

The board should respect the interests of stakeholders taking into account the entity's ownership type and its fundamental purpose.⁴⁹¹ Boards should have clear policies for the entity's relationships with significant stakeholders, bearing in mind the distinction between public, private and Crown ownership.⁴⁹² Public sector entities report at least annually to inform the public of their activities and performance since stakeholder interests have a

⁴⁸³ Corporate Governance in New Zealand: Principles and Guidelines 2014 30.

⁴⁸⁴ Corporate Governance in New Zealand: Principles and Guidelines 2014 31.

⁴⁸⁵ Corporate Governance in New Zealand: Principles and Guidelines 2014 31.

⁴⁸⁶ Corporate Governance in New Zealand: Principles and Guidelines 2014 32.

⁴⁸⁷ Corporate Governance in New Zealand: Principles and Guidelines 2014 34.

⁴⁸⁸ Corporate Governance in New Zealand: Principles and Guidelines 2014 34.

⁴⁸⁹ Corporate Governance in New Zealand: Principles and Guidelines 2014 36.

⁴⁹⁰ Corporate Governance in New Zealand: Principles and Guidelines 2014 36.

⁴⁹¹ Corporate Governance in New Zealand: Principles and Guidelines 2014 37.

⁴⁹² Corporate Governance in New Zealand: Principles and Guidelines 2014 38.

particular significance in these entities.⁴⁹³ Advancing the interests of stakeholders such as employees and customers will often further the interests of an entity and its shareholders.⁴⁹⁴

4.3 How New Zealand has infused the OECD Guidelines on Corporate Governance of State-Owned Enterprises into its corporate governance structure

A number of OECD countries have realised the need to utilise a centralised system of the ownership function.⁴⁹⁵ In line with the OECD guideline on the state's role as an owner, New Zealand has centralised its ownership function. This has been done through centralising the ownership model under which ownership is now the responsibility of a specialised unit. The specialised unit is known as the Crown Ownership Management Unit (COMU) which is an integral part of the treasury.⁴⁹⁶ It is responsible for ownership monitoring, appointments and governance functions of SOEs.⁴⁹⁷ Under this guideline New Zealand has also managed, through provisions of the State-Owned Enterprises Act, to create an arms-length relationship between the government and SOEs by distancing management tasks from political control.⁴⁹⁸

The above ties in with the rationales for state ownership guideline. According to this guideline the ownership policy should be subject to appropriate procedures for political accountability and should be disclosed to the public.⁴⁹⁹ There should not be multiple or contradictory rationales for state ownership as these can lead to either passive conduct of ownership functions or excessive intervention in matters or decisions which should be left to the enterprise and its organs.⁵⁰⁰ New Zealand's ownership policy is clear in terms of the mandate of the Crown Ownership Management Unit (COMU) and is published to the public on the treasury's website.

In terms of the transparency and disclosure guideline New Zealand has made more efforts to enhance transparency in the management of its SOEs. In January 2010 shareholding Ministers initiated a continuous disclosure regime for the largest 7 SOEs.⁵⁰¹ This was done in

⁴⁹³ Corporate Governance in New Zealand: Principles and Guidelines 2014 38.

⁴⁹⁴ Corporate Governance in New Zealand: Principles and Guidelines 2014 39.

⁴⁹⁵ OECD *State-Owned Enterprises Governance Reform: An Inventory of Recent Change* (2005) 7.

⁴⁹⁶ OECD *State-Owned Enterprises Governance Reform: An Inventory of Recent Change* (2005) 17.

⁴⁹⁷ OECD *State-Owned Enterprises Governance Reform: An Inventory of Recent Change* (2005) 17.

⁴⁹⁸ Sokol D *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises* (2009) 1757.

⁴⁹⁹ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 31.

⁵⁰⁰ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 31.

⁵⁰¹ OECD *State-Owned Enterprises Governance Reform: An Inventory of Recent Change* (2005) 17.

an effort to keep the public constantly informed on matters that may have a material effect on each of the 7 companies' commercial value.⁵⁰² This measure is in line with the OECD guideline on transparency and disclosure which requires SOEs to publish all material and non-material information to the state as an owner and the general public.⁵⁰³

Incorporating these guidelines into the corporate governance structure of New Zealand has enhanced the structure and ensured well governed enterprises that are profit making.⁵⁰⁴ New Zealand's corporate governance structure embodies the OECD guidelines in many aspects, the above have been highlighted for their importance for Zimbabwe.

4.4 Conclusion

New Zealand realised early that its government owned entities were underperforming as a result of the manner in which they were owned and controlled. These entities were poorly governed, consumed large amounts of capital and produced low to negative returns which is nearly the same situation in Zimbabwe's SOEs. In its reforms New Zealand created a corporate governance structure that would leave Ministers with an advisory role and SOE boards with the necessary independence and freedom to manage their operations. Zimbabwe needs to free its SOEs from heavy government intervention as this has not proved to be of any benefit.

SOEs in New Zealand are insulated from most of the state's bureaucratic tendencies by their incorporation under the Companies Act 1993. This allows them to operate as and compete with private sector companies. This transition was made more fluent by the highly skilled directors that were recruited from the private sector who were willing to join the boards of the new SOEs. Company law provided a suiting alternative to the manner in which these entities were previously controlled. It is worthwhile to explore the potential benefits of corporatising Zimbabwe's SOEs since the country has slightly more efficient company laws. Apart from providing insulation from government interference this model could also change the public's perception of what a SOE is and restore the faith that has been lost. This model could also be a solution to the bureaucratic paradigm of public administration which stifles growth that the country is stuck in.

⁵⁰² OECD *State-Owned Enterprises Governance Reform: An Inventory of Recent Change* (2005) 7.

⁵⁰³ Organisation for Economic Co-operation and Development *OECD Guidelines on Corporate Governance of State-owned Enterprises* (2015) 26.

⁵⁰⁴ See 4.1.2.

According to Transparency International New Zealand has the second lowest level of public sector corruption in the world. As mentioned in the chapter this can be attributed to government openness and effectiveness. Other factors include civic activism, social trust transparency and accountability mechanisms allowing citizens to monitor politicians and hold them accountable for their decisions. Most of the factors mentioned here do not necessarily exist in Zimbabwe and where they exist they do not have a considerable effect. The government has made efforts to stamp out corruption but these have been in vein because it allowed these activities to take root for a long time that they are now engrained in most economic sectors. Change required in this matter goes further than the corporate governance structure and would lead this paper to encroach into a political debate.

It is important to note that since New Zealand is a member of the OECD, its corporate governance structure mirrors most of the OECD guidelines. In its ownership role New Zealand created a centralised system. The Crown Ownership Management Unit assumes responsibility for ownership monitoring, appointments and governance functions of SOEs. This helps clarify the ownership policy and it ensures its consistent implementation. A centralised ownership policy is crucial for Zimbabwe because there is need for a clear ownership policy that is not complex. In following this guideline the Zimbabwean state should also create an arms-length relationship with SOEs by distancing management tasks from political control.

The ownership policy of Zimbabwe should also be clear in terms of the mandate of the ownership body if it is to be established. There will be need to ensure that the public is well aware of the ownership policy and that it is subject to appropriate procedures for political accountability. This will be very important because there is a strong need to restore public faith in the accountability mechanisms of SOEs.

In following the OECD guidelines New Zealand Ministers enhanced transparency in the management of SOEs. This was done by establishing the continuous disclosure regime for its 7 largest SOEs. The importance of such a measure for Zimbabwe cannot be stressed enough. Zimbabwean SOEs do not always publish information to the public that may be material or non-material to the general public. This measure can be implemented in most SOEs to ensure that information is not being kept from the state or members of the public.

The corporate governance structure of New Zealand is more or less the same as that of Zimbabwe except for one major difference which is that of New Zealand's umbrella statute

that birthed its SOEs. A number of lessons can be derived from its Acts such as the Public Audit Act 2001 on the issue of adding provisions that compel ministers and government departments to provide information needed by the Comptroller and Auditor-General to perform audits.

New Zealand's corporate governance code utilises a system of principles which allows for flexibility and this is good in instances where companies already have a culture of compliance. The ZIMCODE has broader principles and recommendations which have the effect of prescribing how certain aspects should be followed. This is fitting for Zimbabwe because there is a need to provide direction.

The next chapter will conclude this paper and provide recommendations on the problems highlighted in the previous chapters.



CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter provides a conclusion and summary of the recommendations emanating from chapters 2 to 4. The recommendations are aligned in order to provide a unified proposal in regards to the weaknesses in the SOE corporate governance structure of Zimbabwe. The recommendations additionally take into account the lessons derived from the corporate governance reforms of New Zealand. The premise of this discussion is outlined in the previous chapters.

5.2 Conclusion

In order to ensure the profitability and sustainable growth of an enterprise it is important that robust corporate governance measures be in place. State-owned enterprises still form an integral part of the economies of developing nations. In the year 2014 Zimbabwe had about 78 SOEs most of which were either operating at a loss or had become dysfunctional. The media and recent studies have made it clear that this has been due to poor corporate governance standards. In the past two years the media has gone on to unveil the level of corruption and maladministration in these enterprises. The exposures reached their peak when the ridiculous remuneration packages of board members and management of a number of SOEs were exposed.

The abovementioned events form the premise of this study. This led to the need to understand the corporate governance atmosphere in Zimbabwe through assessing the strengths and weaknesses of the corporate governance regime. This assessment indicates that the corporate governance regime of Zimbabwe which went for a long time without a corporate governance code was a breeding ground for the abuses of office. The regime that has been assessed includes the Public Finance Management Act (Chapter 22:19) and the Corporate Governance and Remuneration Policy Framework for Chief Executive Officers of Parastatals, State Enterprises and Local Authorities 2014.

The assessment utilised the OCED Guidelines on Corporate Governance for State-Owned Enterprises. These guidelines have become popular among OECD and non-OECD countries and have been endorsed by international organisations such as the Financial Stability Board and the World Bank. They provide a basis for establishing a good corporate governance

framework for SOEs. An assessment of Zimbabwe's current regime indicated that it does not embody some of the guidelines and this renders it inadequate. There is a deficiency in guidelines such as those on rationales for state ownership and the state's role as an owner. Non-compliance with these guidelines leads to a lack of clarity in the state's ownership policy which can also lead to excessive state intervention which is the case in Zimbabwe.

The assessment also revealed that the office of the Comptroller and Auditor-General does not have sufficient power to compel Ministers and government departments to comply with treasury instructions. The result of this is delayed submissions and at times total failure to submit statements needed for the audit. However the audit requirements of the Public Finance Management Act are not entirely inadequate. The Act has adequate measures for the transparent disclosure and management of the funds of the enterprises. The problem lies in individuals who are bent on non-compliance with the said legislation. This has been apparent in the actions of boards of directors that have circumvented the directions of the statute to benefit themselves.

One of the major issues that have been raised in this paper is that of board insulation from undue influence of the state. According to the OECD guidelines boards require sufficient autonomy to enable them to carry out their mandate. This issue has not been particularly addressed in any of the legislation or codes of corporate governance in Zimbabwe. This is a matter of concern because a number of issues have been pointed out in the previous chapters. These include the use of SOE resources to fund political events and the militarisation of SOE boards.

More recently, Zimbabwe published the ZIMCODE which is its first corporate governance code and it is applicable to the public and private sectors. The code embodies most of the OECD guidelines and it is quite progressive. It is still to be implemented and in this code lies the hope for the restoration of sanity in SOEs. The major concern is the issue of having good laws and no implementation of these laws in actual fact. The previous chapters indicated that there is a recent case of directors still not abiding by the salary cap introduced by government in response to the salary gate scandal. It is a troubling matter that those who still assume these leadership positions do not have much regard for proper corporate governance.

The comparative analysis with New Zealand brings into light some of the preconditions for successful SOEs. The reforms that New Zealand implemented transformed its SOEs from inefficient government departments to profit making corporations. This was made possible by

the corporatisation of SOEs under the Companies Act 1993 and levelling them with private sector companies. The recruitment of highly skilled private directors and less ministerial interference enabled these enterprises to function properly. The country's success can also be attributed to the low levels of corruption in the public sector. As indicated in the previous chapter, in 2014 New Zealand had the second lowest levels of corruption worldwide in the public sector according to Transparency International. This creates a governance environment that allows for efficiency and proper use of enterprise resources.

New Zealand has incorporated most of the OECD guidelines into its corporate governance structure and this has enhanced its system of governance. In its incorporation of the guidelines it now makes use of a centralised system of ownership through the Crown Ownership Management Unit. The shareholding Ministers initiated a continuous disclosure regime for the largest 7 SOEs whereby material and non-material information is regularly disclosed to the government and the general public.

A number of lessons can be derived from its Acts such as the Public Audit Act 2001 on the issue of adding provisions that compel ministers and government departments to provide information needed by the Comptroller and Auditor-General to perform audits. The corporate governance code of New Zealand utilises a system of principles which allows for flexibility. This is a good approach when dealing with enterprises that already comply with good corporate governance practices. The manner of the ZIMCODE of principles and extensive guidelines suits the needs of the public sector in Zimbabwe since there is need for proper guidance.

5.3 Recommendations

The weaknesses of Zimbabwe's corporate governance structure have been highlighted above and it is important that recommendations are provided for the way forward. There is need to infuse the OECD guidelines and the lessons derived from New Zealand's SOE corporate governance regime into the core corporate governance structure of Zimbabwe.

5.3.1 Insulate State-Owned Enterprises from Excessive State Intervention

State-owned enterprises need to be insulated from excessive state intervention and this paper suggests that SOEs should be incorporated and governed under the Companies Act (Chapter 24:03). This is similar to the system used in New Zealand. The major advantage of this is that SOEs will now be treated as private sector entities which are clearly more efficient. This

measure needs to be supported by the recruitment of private sector directors who have vast skills and experience in the running of companies. Recruitment of highly skilled individuals will address the issue of militarisation of the boards of SOEs. As corporate entities, SOEs will have to face competition from other private sector companies and both will have a level playing field. Such insulation will also protect the entities from excessive state intervention since this is one of the major issues in the governance of Zimbabwean SOEs. Incorporation is also a means to protect SOEs from the state's bureaucratic tendencies and align public sector management with private sector management.

This measure ties in with the OECD guideline on rationales for state ownership. Under this the state should have clear and non-contradictory rationales for state ownership in order to avoid excessive intervention in matters that should be left to the enterprise and its organs. In light of this Zimbabwe needs to establish a clear ownership policy that does not result in complexity of the ownership structure. This will be solved by creating a centralised ownership model that has a clear mandate. In implementing this model the state will have to establish a central agency. This agency should be accountable to relevant representative bodies and should have relationships with public bodies such as the office of the Comptroller and Auditor-General. Similar to the Crown Ownership Management Unit of New Zealand this body can be responsible for ownership monitoring, appointments and governance functions.

In addition, the OECD guideline on the state's role as owner calls for governments to steer away from the day to day management of SOEs and allow them full operational autonomy and the centralised ownership entity should emphasise this issue.

5.3.2 Enhance Transparency and Disclosure

Zimbabwe's transparency and disclosure mechanisms can be enhanced in order to restore public trust in the manner in which SOEs are managed. The continuous disclosure regime of New Zealand which enhances the OECD principle of transparency and disclosure can be adopted for all SOEs. This regime was implemented in New Zealand in order to constantly inform the public on issues that may have a material effect on each of the 7 largest SOEs. In Zimbabwe this measure can be adopted for all SOEs depending on the costs of continuous disclosure to each SOE. Information to be disclosed will include material and non-material information and it will be disclosed to the state and the general public.

5.3.3 Strengthen Powers of the Comptroller and Auditor-General

The previous chapters indicated the need for the power to compel Ministers and government departments to disclose information that is needed for audits. The Comptroller and Auditor-General should be given power to compel Ministers and SOEs to disclose audit information to avoid cases of late or non-disclosure. This aspect is linked to the OECD principle on transparency and disclosure which provides that information on enterprise financial and operating results should be published. The Public Audit Act 2001 of New Zealand provides the Auditor-General with the power to require a public entity or person to produce a document in the entity's or person's custody, care or control or to provide the Auditor-General with information or an explanation about any information. Such a measure can be infused into the Public Finance Management Act (Chapter 22:19) of Zimbabwe to provide the compelling power for the Comptroller and Auditor-General.

The success of SOEs in Zimbabwe is very important because they form an integral part of the economy. Good corporate governance fosters an environment that is needed to operate an efficient enterprise. New Zealand's SOEs are subject to a robust corporate governance regime and this is arguably one of the major reasons for their success. SOEs in Zimbabwe have fallen prey to mismanagement and poor corporate governance practices. This has created serious inefficiencies and financial problems. This study makes it clear that the current corporate governance regime in Zimbabwe is not adequate. The measures proposed in this study can improve the situation in Zimbabwe's SOEs. These measures can be implemented in addition to the ZIMCODE.

[Word count: 25 123 Text excluding footnotes]

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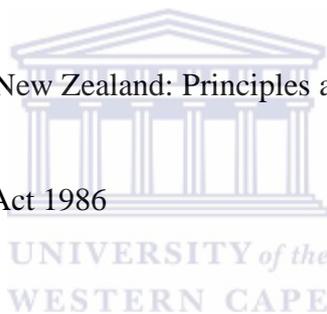
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