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Employment Status and Remuneration of Statutory Officers

The purpose of this paper

1. The Remuneration Authority is often asked about the status of statutory officers and how certain legislative provisions or employment conditions apply to those roles. This paper explains how the remuneration and terms of appointment of statutory officers are determined, and the role of the Remuneration Authority in that process, with a view to helping officials in administering or appointing departments who advise Ministers on the appointment of persons to statutory roles or who administer the terms of appointment of such persons.
2. This paper should be read in conjunction with the Cabinet Office Circular (CO(11)7) entitled “The Role of the Remuneration Authority in Setting Remuneration for Individuals Appointed to Statutory Bodies and Other Positions”.

Summary

3. Under the Remuneration Authority Act 1977¹ the Remuneration Authority determines the remuneration of a range of statutory officers. The Authority also has power to consider remuneration payable to members of certain Crown entities and to determine how any provision of a remuneration determination is to be interpreted or applied or is to operate.²
4. The Authority determines remuneration for statutory officers; it is not the employer of statutory officers. Nor are statutory officers employed by the agencies within which they work.
5. Even though statutory officers are not employees of the organisation within which they work they may be deemed to be employees for some purposes such as income tax liability or for other purposes such as KiwiSaver.
6. It is not the Authority’s role to advise on or determine the extent to which statutory officers can access what may be broadly termed “employment rights”.
7. The Authority takes a total remuneration approach. In order for the Authority to undertake its remuneration role effectively both the statutory officer and the relevant appointing or monitoring agency must advise it of any term of appointment or entitlement that may impact upon its determination of remuneration for the officer in question.

¹ Section 12 Remuneration Authority Act 1977

² Section 12 Remuneration Authority Act 1977

Distinction between “employees” and “statutory officers”

8. Statutory officers are generally appointed by the Governor-General on the advice of Ministers or the House of Representatives.
9. Judges are a very clear example of statutory officers. Judges are specifically declared not to be officers or servants of the Crown.³ Other statutory officers include the State Services Commissioner, the Commissioner of Police, and the Controller and Auditor-General.⁴
10. While the Crown appoints statutory officers it does not act in the role of an “employer” in the sense envisaged by the Employment Relations Act 2000.
11. For example, employers set remuneration for their employees. As noted, the remuneration for statutory officers is set independently by the Remuneration Authority under the Remuneration Authority Act.
12. Terms of appointment are negotiated and agreed between statutory officers and the relevant administering or monitoring agency (generally a government department such as the State Services Commission). The terms will set out relevant elements of the appointment, such as permissible leave arrangements.
13. Agreed appointment terms do not constitute an employment agreement or otherwise give rise to any employment relationship.
14. As a statutory officer is not an employee then he or she has no ability to access employment related rights such as personal grievance rights.⁵
15. However, statutory officers can, for example, agree annual leave arrangements in their terms of appointment, provided such arrangements are made known to the Authority, which will take account of such arrangements in determining the remuneration of the statutory officers whose remuneration it sets.⁶
16. Terms of appointment for statutory officers may also include sick leave, provision for parental leave, and related necessary administrative arrangements, such as how leave is to be taken and recorded and how administrative support services are to be accessed. Terms of appointment may be similar to or modelled on holiday entitlements under the Holidays Act 2003, but statutory officers are not an “employee” for the purposes of that Act.
17. Terms of appointment may also refer to other matters such as the period of appointment, (and how it may be terminated), superannuation entitlements and any expectations associated with the appointment, such as the maintenance of appropriate ethical standards, including avoidance of conflicts of interest.
18. Internal policies applying to employees of the organisation within which the statutory officer is working do not automatically apply to statutory officers. Internal policies generally apply only to employees of the organisation, and a statutory officer is not employed by the organisation.

³ Section 2 Crown Proceedings Act 1950, cited in *O'Rourke v Secretary for Justice* [1996] 2 ERNZ 169 (FC, EC).

⁴ Section 3 of the State Sector Act 1988, s 12 of the Policing Act 2008, and s 7 of the Public Audit Act 2001.

⁵ *O'Rourke v Secretary for Justice* [1996] 2 ERNZ 169 (FC, EC).

⁶ Remuneration Authority Act 1977, s 18(2)(b).

19. Accordingly, unless internal organisational policies can be and are specifically applied to the statutory officer in the relevant terms of appointment, they will not apply to the statutory officer.

Statutory officers' payment of earner liabilities

Personal tax

20. Liability for the payment of income or other taxes will vary depending upon the nature of the appointment and the individual circumstances of the statutory officer. In certain situations some specified statutory officers are treated as if they were employees. The definition of "employment" in the Income Tax Act 2007 specifically includes for the purposes of that Act "the activities performed by the Governor-General, a member of Parliament, or a judicial officer that give rise to an entitlement to receive a PAYE income payment for the activities".⁷
21. However that definition does not mean these or other statutory officers are employees of the Crown for the purposes of employment law generally. Hence the definition of "employee" in the Income Tax Act – "a person who receives or is entitled to receive a PAYE income payment" – is different from the definition used in the Employment Relations Act and the Holidays Act.
22. The fact that the role undertaken by various statutory officers is not an employee role is reinforced by the Income Tax Act definition effectively deeming certain statutory officers to be an employee for PAYE purposes. If the statutory officers in question were otherwise able to be regarded as an employee, the extended Income Tax Act definition would not be necessary.
23. In cases of doubt statutory officers should seek independent advice on their tax position, or contact the Inland Revenue Department for assistance.

KiwiSaver

24. Certain statutory officers may opt into KiwiSaver and access KiwiSaver benefits. That is because the activities of those statutory officers are deemed, for the purposes of the KiwiSaver Act 2006, to be "employment".⁸ The consequence is that an employee who has been appointed to be such a statutory officer may continue an existing contribution to a KiwiSaver Scheme and his or her "superannuation rights" as a member of the KiwiSaver Scheme will remain unaffected.
25. The conclusion that the activities of certain statutory officers are to be treated as "employment" for the limited purposes of the Income Tax Act 2007 and, by extension, the KiwiSaver Act 2006 does not mean that those officers should be considered as an employee for any other purposes.
26. However, if a statutory officer is able to and chooses to contribute to KiwiSaver the amount of any employer subsidy, inclusive of employer superannuation contribution, will be deducted from the officer's remuneration determined by the Authority.

⁷ Section YA1 Income Tax Act 2007

⁸ Section YA1 of the Income Tax Act 2007, section 4 KiwiSaver Act 2006

ACC

27. The Authority is not responsible for determining whether statutory officers are required to pay ACC levies. The answer to that question falls to be determined by others and in accordance with relevant legislation. However if ACC levies are payable by statutory officers then the Authority needs to be advised so that necessary adjustments can be made to remuneration.

Appointment of employee as statutory officer within the same organisation

28. It is not unusual for an employee of an organisation to be appointed as a statutory officer within the same organisation. For example, it is likely the person appointed Police Commissioner will be an existing Police employee. The Policing Act 2008 makes it plain that if this occurs some aspects of the statutory officer's previous employment continue, notwithstanding the statutory appointment. So, a person who holds office as a constable when appointed Police Commissioner continues to hold the office of constable while he or she is Commissioner.⁹
29. In the absence of any statutory continuation of such provisions or agreement they should continue in the agreed terms of appointment, existing employee entitlements should not normally continue when an employee is appointed to a statutory office within that organisation. That is because those entitlements will have been earned by and able to be enjoyed by employees of the organisation. That status comes to an end once the employee is appointed and takes up the statutory officer role.
30. If existing employee entitlements are able to continue and are to do so, then, if the entitlement could impact upon the remuneration the Authority has determined for the statutory officer, the entitlement must be advised to the Authority who will determine whether (and if so to what extent) that entitlement impacts upon the remuneration the Authority has determined for the position.
31. For example, if it is agreed that any accrued leave earned as part of previous employment is to be carried over the officer's statutory role that agreement must be notified to the Authority so it can be taken into account in determining remuneration.

Matters that the Authority takes into account when setting formal remuneration determinations

32. The Authority takes a total remuneration approach, taking into account the criteria in its legislation and valuing salary, superannuation, leave, club and professional fees, motor vehicle entitlement and any other benefit in the nature of an allowance.
33. Any term of appointment that impacts upon the value of remuneration determined by the Authority for the appointment, such as an "employer" superannuation subsidy, including employer superannuation contribution tax, will be deducted from the remuneration determined for the position by the Remuneration Authority.
34. Provision for reimbursement of work-related expenses such as phone rental, car parks, and Koru Club membership is not generally considered part of remuneration and the Authority will not deduct it from the remuneration determined for the appointment.

⁹ Section 12(3) Policing Act 2008

35. The ability of the statutory officer to remain a member of the Government Superannuation Fund is determined by the legislation under which the appointment is made. It is not the Authority's role to determine whether a statutory officer may retain membership but if the officer retains his or her membership, the administering department must advise the Authority so that it may make any necessary adjustments when determining remuneration.
36. Retirement/superannuation provisions are to be taken into account in the remuneration determination and are not part of the conditions of appointment set by the relevant agency. The mechanism for the payment of superannuation is the responsibility of the administering department.

Administrative arrangements in regard to leave, Codes of Conduct relevant to the roles, conflict of interest declarations

37. Performance management processes may be provided by the specific statute for the statutory officer's role or otherwise incorporated into the terms and conditions. The outcome of these processes will not impact upon remuneration determined by the Authority.
38. Variation to conditions of appointment may only be made through a written variation in accordance with applicable legislative provisions (for example s 9B(2) of the Government Communications Security Bureau Act 2003 gives the State Services Commissioner power to determine terms and conditions of the Director of the GCSB). Administrative and terms and conditions of appointment changes that may impact upon remuneration must be communicated to the Authority via Info@RemAuthority.govt.nz to ensure the Authority has the earliest possible opportunity to consider what impact such changes may have on the remuneration it is responsible for determining.
39. In setting remuneration, the Authority takes the same approach that is set out in the Cabinet fees framework (see CO (12)6) at paragraph 59 that statutory officers should not receive income for undertaking other roles in the State sector except when the other role is undertaken in his or her own time. Where there is agreement with the Minister concerned that a statutory officer can accept another appointment, a decision must be made on whether the officer will undertake the involvement in his or her own time (by taking leave or leave without pay) or in the organisation's time. When this occurs, the Authority must be notified by the appointing or monitoring department.

Determinations of Authority to prevail over contracts of service in case of conflict

40. Section 31 of the Remuneration Authority Act provides that every determination of the Authority shall prevail over any contract of service to the extent that there is any conflict between the determination and the contract.

Appendix: Officers whose remuneration is to be determined by the Remuneration Authority

Chief executives and other senior officers in departments

- Director, Government Communications Security Bureau
- Solicitor-General
- State Services Commissioner and Deputy State Services Commissioner
- Director, New Zealand Security Intelligence Service
- Commissioner of Police and Deputy Commissioners of Police
- Chief Parliamentary Counsel
- Chief of Defence Force, Chiefs of Air Force, Army, Navy
- Clerk and Deputy Clerk of the House of Representatives
- General Manager, Parliamentary Service

Officers of Parliament

- Controller and Auditor-General and Deputy Controller and Auditor-General
- Ombudsmen, including Chief Ombudsman
- Parliamentary Commissioner for the Environment

Crown entities

- Broadcasting Standards Authority, Chair and members
- Children's Commissioner
- Commerce Commission, Chair, Deputy, members and associate members, Telecommunications Commissioner, Cease and Desist Commissioners
- Drug Free Sport NZ, Chair and members
- Electoral Commission, Chief Electoral Officer and Chief Executive, Chair, Deputy Chair
- Electricity Authority, Chair, members
 - Rulings Panel, Chair, Deputy Chair, members
- External Reporting Board, members
- Financial Markets Authority, members and associate members
- Health and Disability Commissioner and Deputies, Mental Health Commissioner

- Human Rights Commission, Chief Commissioner, members and alternate members, Race Relations Commissioner, Equal Employment Opportunities Commissioner, Director Human Rights Proceedings or alternate
- Independent Police Conduct Authority, Chair, members
- Law Commissioner, President, Deputy President, members
- New Zealand Productivity Commission, Chair, Commissioners
- Office of Film and Literature Classification, Chief Censor of Film and Literature and Deputy Chief Censor of Film and Literature
- Privacy Commissioner and Deputy Privacy Commissioner
- Retirement Commissioner
- Takeovers Panel, Chair, members
- Transport Accident Investigation Commission, Chief Commissioner, Deputy Chief Commissioner, Commissioner

Tribunals and other bodies

- Chief Community Magistrate
- Court Martial, Registrar
- Employment Relations Authority, Chief and members
- Judicial Conduct Commissioner and Deputy Judicial Conduct Commissioner
- Members of Judicial Conduct Panel (unless appointee is a judge)
- Motor Vehicle Disputes Tribunal, Adjudicators
- New Zealand Parole Board, Chair, Panel Convenors who hold a warrant as a District Court judge or a Judge of the High Court
- Principal Disputes Referee
- Principal Tenancy Adjudicator and Deputy
- Sports Tribunal of New Zealand, Chair, Deputies, members
- Summary Appeal Court of New Zealand, Registrar
- Waitangi Tribunal, members
- Tribunal under the Weathertight Homes Resolution Services Act 2006, Chair
- Maori Trustee
- Masterton Trust Lands Trust, Chair, Committee Chairs, members