

GOVERNMENT TRADING ENTERPRISES BILL 2022

Committee

Resumed from 16 May. The Deputy Chair of Committees (Hon Sandra Carr) in the chair; Hon Stephen Dawson (Minister for Emergency Services) in charge of the bill.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

Hon Dr STEVE THOMAS: Last night we had progressed apace to clause 1. We were coming towards the end of the clause 1 issues. I had left a couple of issues. I would like to focus on the substantive issue of accountability to government ministers, which in theory is the intent of the bill before us—to improve accountability and make it more so. I had asked a question about ministers’ access to information. I thought I might have to make another second reading contribution for an hour to bring us all back to where we were, but we will move through. I want to recap where we were trying to get to on the clause 1 debate. I had asked questions around the level of access ministers effectively had to the functioning of the board. Within the actual clauses of the bill, we will get to ministers’ capacity to give direction under various statements of corporate intent et cetera. Last night I asked: how does a minister ensure that the information they need in order to make the best decisions is being supplied by the board, and at what point can the minister force or request from a government trading enterprise information that may well be critical but the government trading enterprise has not automatically volunteered? The debate had taken us to this point: a board of a government trading enterprise puts out an annual report and a statement of corporate intent. If there is an issue about which a minister needs to be aware, apart from the board seeking to hold a meeting, what other power is available? Is the minister going to check *Hansard* to see whether that is what we were talking about?

Hon Stephen Dawson: No, it is just handy to have in the debate.

Hon Dr STEVE THOMAS: Okay. What power will the portfolio minister and the GTE minister have to seek information? I know we are dealing with a separate act but I will just read in some of the existing GTE legislation around this. I will start with the Electricity Corporations Act 2005. When the old Western Power was broken up in 2005 into Synergy, Western Power and Verve, and Horizon Power was the separate one, I was in the other house. It was an interesting debate but I am not sure we got it 100 per cent right at the time. It was a driving issue. When that occurred, the Electricity Corporations Act 2005 came along. Section 116 of that act is titled “Minister to have access to information”. I will read some of it in, and some other parts. I want to get to the point, which is that I want ministers to have the information they need because I, as a member of the opposition and a member of the public, want to be able to ask ministers questions and hold them to account for the information they have. It would be highly unfair if they did not have the information because someone on the board decided to withhold that information. This is a debate that comes up in a lot of places, including in local government when chief executive officers sometimes give the elected representatives the information that the CEOs think they should have rather than the information that is available to them. I think this is really important. Section 116 is probably the most relevant section in the Electricity Corporations Act. It states —

(1) In this section —

document includes any tape, disk or other device or medium on which information is recorded or stored mechanically, photographically, electronically or otherwise;

information means information specified, or of a description specified, by the Minister that relates to the functions of the corporation.

(2) The Minister is entitled —

- (a) to have information in the possession of a corporation and any subsidiary; and
- (b) where the information is in or on a document, to have, and make and retain copies of, that document.

(3) For the purposes of subsection (2) the Minister may —

- (a) request the chief executive officer or the board of a corporation to furnish information to the Minister;
- (b) request the chief executive officer or the board of a corporation to give the Minister access to information;
- (c) for the purposes of paragraph (b) make use of the staff of a corporation and any subsidiary to obtain the information and furnish it to the Minister.

There are a few other bits to that. Subsection (5) states —

The chief executive officer or the board of a corporation is to —

- (a) comply with a request under subsection (3); and
- (b) make staff and facilities available to the Minister for the purposes of subsection (3)(c).

I read that to mean that under the Electricity Corporations Act, the minister has access to basically any document or any piece of information that the board has. I will start with this: under the existing legislation, is it the case that the Minister for Energy, who would be the minister under this particular act, will have access across the board? In a minute, we will get to whether the new bill will either enhance or reduce the power for the minister to have access to information.

Hon STEPHEN DAWSON: The honourable member said the existing act. Is he talking about the Electricity Corporations Act?

Hon Dr Steve Thomas: Yes.

Hon STEPHEN DAWSON: I do not have advisers with me who can answer questions about that. However, I bring the member's attention to clause 88 on page 55 of the bill before us now, headed "Right to request, obtain and retain information". It states —

- (1) A relevant Minister is entitled —
 - (a) to be given, and to retain, information in the possession of a GTE or any subsidiary of the GTE; and
 - (b) if the information is in or on a document, to be given, and to make and to retain copies of, that document.
- (2) For the purposes of subsection (1) the relevant Minister may —
 - (a) request the GTE in writing to give specified information to the Minister; and
 - (b) request the GTE to give the Minister access to specified information;

It goes on. I also draw the member's attention—I mentioned this last night—to clause 90. Essentially, under clause 90 of the bill before us, the GTE has a positive obligation to keep the minister informed and the minister has the right to retain and request information et cetera, which I referred to under clause 88 a minute ago. I do not know how that lines up with the Electricity Corporations Act, or indeed any of the other establishing acts for the GTEs that are captured by the legislation before us.

Hon Dr STEVE THOMAS: I had other examples of legislation establishing corporations. It seems to be a commonly repeated section. It will be a little bit hard to assess whether there will be a change if we are not sure what the original legislation says. We possibly should do this when we get to clause 88, but I will ask now to get it out of the way first so we can move on from clause 1. Will the documents that can be obtained by either the portfolio minister or the GTE minister be limited? Are there any documents that the GTE may hold that the GTE could say will not be given to either the portfolio minister or the GTE minister?

Hon STEPHEN DAWSON: Any document can be requested, but the GTEs may identify some documents that must not be shared further—things that may be commercial in confidence or subject to legal professional privilege. Going back to the member's earlier comment, although I cannot comment about what is in the other acts, I can say that what is in the bill before us is a positive obligation. The member mentioned this yesterday. If a minister does not know what to ask for, they do not know what to ask for. This clause will turn that on its head. There will be a positive obligation for the GTE to advise the minister of issues. Hopefully, that will iron out any problems we have had previously.

Hon Dr STEVE THOMAS: Thank you for that. If members have been around long enough, they might remember a couple of wonderful episodes of *Yes Minister* in which the minister says, "I don't know the question to ask." Bernard is prepared to give the information, but, of course, the minister has to know exactly which question to ask. In one of those episodes relating to foreign affairs, the Prime Minister asks Bernard, "Who knows the information?" Bernard replies, "Only the Kremlin." We may have been operating under those circumstances before but we will not operate under those circumstances in the future under this bill, which is good.

I note that we are not repealing the establishing legislation. The section I read from the Electricity Corporations Act 2005, to give it its proper title, would therefore still exist in tandem with section 88 of the GTE act when it becomes an act. I presume that both those pieces of legislation will apply. There is a double bite at this. There are two versions of legislation that demand the supply of information as requested by the minister. There will be a positive drive in the new act, which is this bill, that will sit on top. This is one of the issues with leaving the establishing legislation in place. We will have two versions of that. I presume that there will not be a conflict, and I do not read it as conflicting, but they will both apply. I presume that something under one act would be the equivalent under the second act. It is a really confusing part of the legislation.

Hon STEPHEN DAWSON: By the way, while I think of it, a new series of *Utopia* is about to start on the ABC. Given that the member spoke about *Yes Minister*, obviously it is very close to the bone.

Hon Dr Steve Thomas: Did you watch the one on the Ord?

Hon STEPHEN DAWSON: I did.

In answer to the member's question about the two acts and their interrelationship, this bill relates to a GTE's establishing act to be read with this legislation as though they were a single act. The previous inconsistencies have been fixed in this legislation before us.

Hon Dr Steve Thomas: I think you're right, but it's just a really complex piece of law when you've got two bits of legislation kind of saying the same thing. I don't think it conflicts, but it just makes it a complicated debate.

Hon STEPHEN DAWSON: I am told that any potential conflicts were addressed in the consideration of the consequential amendments that are included in this bill.

Hon Dr STEVE THOMAS: I thank the minister for that. It is a complex piece of legislation.

The minister said that a minister should have access to any documents that the board of a government trading enterprise has. Will that extend, for example, to the internal operations of the board? Will the minister have access to directions given by a director general or the CEO of the board? Will the minister be able to access, for example, board minutes to confirm that the discussions that occurred were appropriate?

Hon STEPHEN DAWSON: I am told that the minister could ask for formal decisions or formal correspondence of the board. Hon Dr Steve Thomas spoke about the director general. Obviously, there will be a director general or an executive officer or whatever, but they will be separate from the chair of the board. The chair of the board will be different from the director general in all those GTEs. Conversations that happen at the board level would not necessarily be documented. Only decisions of the board would be documented. The minister could certainly ask for copies of those decisions or to be briefed on those decisions.

Hon Dr STEVE THOMAS: I always take the position that a good set of minutes does not include the ramblings of all members of a board or their various opinions and discussions. Having taken many minutes over many years, I know that the expression "discussion ensued" is one of the most valuable tools in minute taking. Interestingly, the board minutes of the Reserve Bank of Australia are carefully worded but contain much more than simply the decisions that have been made. Picking an electricity corporation, I assume that if the board of Synergy had a formal set of minutes, the minister could say, "I want to see why you made the decision to turn off a power station and turn on another one"—I am making stuff up—"I'm not convinced that that was the best decision; therefore, I would like to see all the documentation in relation to that decision." If it was a board decision, it should be minuted. The minister would have access to those minutes, but not necessarily to the scribbled notes and bits and pieces that might be around.

Hon STEPHEN DAWSON: The minister could ask for a copy of anything that had been prepared for the board to make a decision on.

Hon Dr STEVE THOMAS: Excellent. I probably took the long way, but that was the answer I was chasing. I want the minister to have access. I mean no disrespect to the public servants at the table, but I do not want the minister to be prevented from gaining access to the formal discussion papers of these organisations. We had questions before about the Griffin Coal agreement and the discussions around that. I have been a bit cheeky—it might surprise members that I am on occasion—in seeking comments on things that are not formal minutes, but the reality is that in this case, it is critically important that the formal documentation of the board, including of the CEO, be available, and presumably to both ministers. Will there be a process in which one minister will pass it on, or could both the portfolio minister and the GTE minister seek that?

Hon STEPHEN DAWSON: Both ministers could receive the information.

Hon Dr STEVE THOMAS: That almost brings us to the end of my discussion of clause 1, which is good. We can now do most things under other clauses. I just want to add to the clause 1 debate that I have a little bit of information. I may have inadvertently misled the house yesterday when I said that this goes back a fair time. I did not then have a more accurate description of how far back this goes, but, in the meantime, I have become aware that a large amount of work was done as far back as 2013. This process has now gone on for a full decade. As much as I would like to blame the current government for everything, this process has now gone on for a long time.

Hon Stephen Dawson: I am told that it might go back even further than that, and that in fact some consideration may well have been given to it as far back as the 1990s.

Hon Dr STEVE THOMAS: Yes. I can give the minister a bit more information on that, too. My research continued last night when I could not sleep very well. The initial reviews and inquiries, which date back to 1992, recommended umbrella legislation for Western Australia's government enterprises. I think government trading enterprises were established about 10 years before that. Most of them date back to the 1980s. But even in 1992, we were looking at umbrella legislation to cover this. It has only taken 30 years or so!

Hon Stephen Dawson: If we pass this bill this week, it will be an extraordinary achievement.

Hon Dr STEVE THOMAS: I am trying to get there.

Hon Stephen Dawson: Let's keep moving.

Hon Dr STEVE THOMAS: Yes. I understand that there is equivalent umbrella legislation in pretty much every other jurisdiction. Are we the last to establish this? Will there be a significant difference between our umbrella legislation and what happens in the eastern states? Are there issues that they have had that we should be aware of?

Hon STEPHEN DAWSON: Yes, we are the last. When we were considering this legislation, we spoke to the various jurisdictions about what works and what does not work in their pieces of legislation, so we have learnt from that. I am further advised that a number of jurisdictions are now reviewing their legislation.

Hon Dr STEVE THOMAS: I note that in the chamber that shall not be named there was a lack of surety about adding extra government trading enterprises into the bill. We might consider this under the clause that identifies which ones are included. There is a regulation-making power as part of the bill, but it appears that we would have to change the legislation because the corporations are listed at the start of the legislation, as well as whatever regulations that would have to be done going forward.

Hon STEPHEN DAWSON: Yes, if we wanted further GTEs to be captured, it would require a further tranche of legislation. It could not be done by regulation; we would need legislation.

Hon Dr STEVE THOMAS: I think we might be able to forgo clause 1. It has not been a long and detailed discussion of clause 1, but there will be plenty of opportunities for that as we go forward. I am happy to start to proceed through the bill.

Clause put and passed.

Clause 2 put and passed.

Clause 3: Terms used —

Hon Dr STEVE THOMAS: I refer the minister to line 3 on page 3 of the bill —

GTE means a body corporate established under 1 of the following —

Was consideration given to a wide definition of GTE so that it could be simply added in by regulation? I think that this is the provision that requires a legislative change to add in other GTEs. It seems like a slightly clumsy way to do it, or was it done because the establishing legislation of alternative GTEs was a bit more complex and further away and it was thought that this would give it a minimum standard or a drive? It seems like it would be really simple just to add it all in by regulation. I am not sure why this legislation did not go down that path.

Hon STEPHEN DAWSON: The GTEs that have not been included in this legislation are already captured by the Financial Management Act. There are additional controls for those GTEs; there is a difference between that group and this group of GTEs. It is simply the case that we need to go through each piece of legislation line by line to work out what needs to be changed.

Hon Dr Steve Thomas: So it comes down to the complexity of the legislation.

Hon STEPHEN DAWSON: It is quite complex and so it was decided to go with these 12 now, and further work will take place on a second tranche.

Clause put and passed.

Clause 4: Term used: subsidiary —

Hon Dr STEVE THOMAS: Is there a reason the term “subsidiary” was put in a separate clause? There are obviously a number of subsidiaries to GTEs, but why does it require that wider definition as opposed to simply referring to them under clause 3, “Terms used”? It seems somewhat complex and clumsy.

Hon STEPHEN DAWSON: I am told it provides a clarity as to the types of subsidiaries included.

Hon Dr STEVE THOMAS: Can the minister give us an example of a subsidiary that needs that level of clarity and having the term separately listed in the bill?

Hon STEPHEN DAWSON: A minor shareholding in a subsidiary would be included.

Hon Dr Steve Thomas: Do you have an example at all?

Hon STEPHEN DAWSON: One does not exist at the moment. I guess it is a futureproofing provision.

Hon Dr STEVE THOMAS: If it is a useful clause, then it is quite forward looking, I suppose. It seems odd that we would separate out a particular definition in a bill for a circumstance that does not exist. I am trying to get my head around this. Let us make the assumption that the Water Corporation starts investing in local desalination plants, for example, and invests in a technology company that delivers it, which I guess is feasibly possible. If it bought

a 49 or 51 per cent share, that would be a subsidiary and that might be why we would have a separate definition within the act. Is that roughly what we are looking at? I know it is a hypothetical situation.

Hon STEPHEN DAWSON: The member is correct. Obviously we cannot comment on the Water Corporation, but it is that type of thing.

Hon Dr STEVE THOMAS: It is always hard to do hypotheticals, but I appreciate that we are trying to get this through. I think we should just put the clause.

Clause put and passed.

Clause 5: Relationship to GTEs' Establishing Acts —

Hon Dr STEVE THOMAS: This process will speed up. There are 300 clauses in the bill and I will not go this slowly all the way through. Clause 5 states —

This Act is, in relation to a GTE's Establishing Act, to be read with the Establishing Act as if they were a single Act.

Can the minister confirm that the government is unaware of any conflict between the establishing acts in the GTEs on the list and this legislation? I want that on the record please.

Hon STEPHEN DAWSON: I can confirm that that is our understanding. As I have previously pointed out, the inconsistencies should have been fixed as part of the legislation before us.

Clause put and passed.

Clause 6 put and passed.

Clause 7: GTE's purpose —

Hon Dr STEVE THOMAS: The minister may not have the answer to this but is this one of those grand statements of intent? The clause states —

A GTE's purpose is to advance the public benefit through the performance of its functions.

Is there a definition of "public benefit" or is it simply a visionary statement?

Hon STEPHEN DAWSON: The government of the day can decide what it believes is the public benefit, but this is commonly understood terminology.

Clause put and passed.

Clause 8 put and passed.

Clause 9: Performance of GTE's functions —

Hon Dr STEVE THOMAS: I will talk about clauses 9 and 10 together. Clause 9(1) states —

A GTE must perform its functions in accordance with its statement of expectations and annual performance statement and, in particular, must —

- (a) endeavour to pursue performance objectives and ...
- (b) endeavour to achieve financial outcomes that are consistent with forecasts and forward year estimates ...

Obviously, the government has the capacity to make significant variations to those by changing policy. We can roll it into clause 10(1), which states —

The fact that a GTE has a function given to it by its Establishing Act or any other written law —

Which presumably includes this bill when it becomes an act —

does not impose a duty on it to do any particular thing.

First off, clause 9 says that the GTE is required to "endeavour" to deliver outcomes based on its statement of intent and key performance indicators et cetera, but under clause 10 the fact that a GTE has been given a function to do does not impose a particular duty on it to do any particular thing. It seems like the GTE is required to aim for its goals, but it is not actually required to do a specific thing to get there. It seems like a slightly complex way of perhaps saying that the goal of the government is somewhere out here, and the GTE is supposed to try to get there but it does not have to do any specific thing to make it happen.

Hon STEPHEN DAWSON: I will touch on clause 10 that emphasises that subject to any specific direction or expectations conveyed through provisions of this legislation, GTEs have the ability to exercise their discretion in how they operate, undertake their functions, pursue opportunities and manage risks. If the member refers to page 7,

clause 10(2) states that a GTE has a discretion that is subject to the rules, essentially. The rules are established by government, the act and the direction of the minister, but subject to those, they have got the ability to —

Hon Dr STEVE THOMAS: That is what I am trying to pin down as part of the process. I might ask a question around it. Say there is a statement of corporate intent et cetera, setting out where the GTE thinks it is going to go and the minister potentially communicates to the GTE that he or she is expecting a particular outcome. It just appears that clause 10 kind of contradicts clause 9 in that it says the GTE has some sort of freedom. I apologise for melding two clauses together, but it is the comparison of the two that is probably critical. This might be the cleverest way to phrase it: in what circumstances could a board rely on clause 10 to override clause 9?

Hon STEPHEN DAWSON: The member was talking about the two clauses together. Clause 9 states that a GTE must perform its functions in accordance with its statement of expectations and annual performance statement. Clause 10 states that they may act at their discretion, but not if it contravenes the guidance or direction that has been given by the government previously. That is the gospel. Outside of that, they can use their discretion—except if it contravenes the rules that have been established.

Hon Dr STEVE THOMAS: I think I have got that. It sort of does not read as though that is the intent.

Hon Stephen Dawson: By way of interjection, clause 9 says “must” and clause 10 says “may”, but importantly, clause 10(2) says that a GTE has discretion when it performs its functions, subject to the act, establishing act or any direction given.

Hon Dr STEVE THOMAS: So we can read this as clause 9 effectively overriding clause 10, unless there is no effective direction under the various corporate intents under clause 9. They are free under their own discretion, unless clause 9 applies.

Hon STEPHEN DAWSON: I will say it this way: clause 9 trumps clause 10.

Hon Dr STEVE THOMAS: I will take that—500 play.

Clause put and passed.

Clause 10 put and passed.

Clause 11: Board to be GTE’s governing body —

Hon Dr STEVE THOMAS: Clause 11 basically says that a GTE must have a board et cetera. What about the unusual circumstance where a board might be sacked for some malfeasance? For example, under lots of previous legislation I have dealt with, the minister was able to act as the board. If a board is removed under suspicious circumstances—let us be as polite as that—can the minister act as the board until there is a replacement new board or is the organisation hamstrung without a board?

Hon STEPHEN DAWSON: We are not aware of any examples when the total board of a GTE has been sacked before. However, I am told that if the minister were to sack the board, he would need to have a new board appointed at the same time. Separate to that, clause 29 also talks about a quorum being required for the board; it needs to have a certain number of directors. As far as my advisers tell me, the minister does not have the power to do what previous Prime Ministers might have done, for example in Whitlam’s day, by putting a certain amount in and taking responsibility for the board.

Hon Dr STEVE THOMAS: The examples I remember were not actually GTEs; they were separate. When Hon Bob Kucera became health minister, he sacked all the health boards in the state and appointed himself as the de facto board under that legislation. I suspect that it cannot happen to GTEs, but it might happen elsewhere.

Hon STEPHEN DAWSON: I am told there is nothing in this act that would allow that to happen.

Clause put and passed.

Clause 12: Board membership —

Hon Dr STEVE THOMAS: Can the minister give us an indication on the change of the size of the board from five to nine? What sort of thought process went into determining that size? The government is in the process of reducing the size of councils, for example. Is there a rationale or validation for the number of five to nine?

Hon STEPHEN DAWSON: I am told that the current GTEs span from the membership of five to nine.

Hon Dr Steve Thomas: Status quo, basically.

Hon STEPHEN DAWSON: It is, but some GTEs might have more complex issues to deal with. For example, the electricity corporations may well be more complex than some of the others, Aqwest for example. That window between five and nine allows for experience to be brought on, or for the board to stay a similar size to what it is now.

Clause put and passed.

The DEPUTY CHAIR (Hon Stephen Pratt): I draw members’ attention to supplementary notice paper 92, issue 1.

Clause 13: Appointment of board members —

Hon Dr STEVE THOMAS: Before we get to the substantive amendment, I have a couple of other questions about clause 13 that I would like to hash out. Perhaps with a good intent and good debating skills, the minister can dissuade me from moving the amendment standing in my name on the supplementary notice paper, but we will see how we go. It will depend on how much comfort the minister gives me.

Hon Stephen Dawson: I am happy for you to move it because then we can have a vote and then move on.

Hon Dr STEVE THOMAS: That is very true. Therefore, it will depend on how quick and eloquent the minister is in his debate as to which one is faster, but I will ask a couple of other questions first before we get to that one.

Clause 13 of the bill is about the appointment of board members. Before I get to the amendment for a new clause 3A, I will start with clause 13(1), which states —

The Portfolio Minister must, after consultation with the board, appoint the members of a GTE's board.

Effectively, the portfolio minister will consult with the board to appoint a member of the GTE's board. What concerns me is a jobs-for-the-boys situation in which a GTE board has a look and says, "John Smith over here is one of us." This is not just an issue on corporate boards and public boards; it happens everywhere. The existing board of a GTE will make a suggestion or nomination to the minister. What obligation does the minister have to accept that nomination? What capacity does the minister have to say, "No. I am going to appoint Jane Smith from a completely different direction to that board"?

Hon STEPHEN DAWSON: Currently, it depends whether the board suggests to the minister or the minister asks the board for recommendations. But, as it reads, the minister must consult with the board but the minister is under no obligation to take forward the nominee or nominees who have been suggested by the board.

Hon Dr STEVE THOMAS: Thank you, minister. Again, that is good to hear. The issue might be that we do not have representatives from 11 different existing boards to check this with, but my understanding is that the current practice is that many of the boards of GTEs self-nominate replacement board members. We will not finish the entire bill tonight. Maybe, if necessary, we will come back tomorrow, having had an opportunity to seek a bit more information because you are the representative minister. Do boards currently self-nominate? I presume ministers are obligated to review the nomination but not necessarily accept it—that exists under the establishing legislation. I presume, therefore, that at the very least this legislation will mean that the minister will not be required to accept that self-nominating, self-fulfilling position of the boards?

Hon STEPHEN DAWSON: Although a number of the GTEs can currently nominate or suggest members to the minister for new board members, there is currently no obligation, as I am advised, on the minister to accept those nominations. It is not always the case that the boards can provide names; the minister can also ask for names. In terms of what is before us now, names can be brought forward from the board, but, as I have indicated, a consultation needs to take place but the minister is under no obligation to accept those nominations. The minister can go with whomever he wants to bring forward to cabinet.

Hon Dr STEVE THOMAS: That is good. I think that is a good outcome. Perhaps this is a little rant of my own, but I am generally concerned when the self-fulfilling prophecies of boards come up. Therefore, I am pleased with the minister's answer because it also relies on ministers to resist—I nearly said the word enticements; that would be very wrong—the suggestive power of the existing members, I suspect. It will need a reasonably strong minister to make sure that that is not done, but I am pleased to see that, at least, the power exists. The tricky part will probably be when we get to clause 14 and we start to talk about the directors' skills matrix and whether it is a minister's requirement to use the directors' skills matrix to make a decision, particularly from an own nomination. But we might leave that to the clause 14 debate, which is another particularly interesting one.

Subclause (2) states —

The Portfolio Minister may, with the approval of the GTE Minister, appoint a GTE's chief executive officer to its board.

I would presume that we read that word "may" as "must". Do we read that as "must appoint"? If that is the case, what happens when the GTE minister says that they are not so sure? Can the portfolio minister still appoint that person to the chief executive officer?

Hon STEPHEN DAWSON: If the minister wants to appoint the CEO, they must have the approval of the GTE minister.

Hon Dr Steve Thomas: So we read it as "must".

Hon STEPHEN DAWSON: Yes. The CEO may be on the board but must be approved by the portfolio minister and GTE minister. This additional step in the approval process is an acknowledgement of the inherent conflict that

would exist with appointing the CEO onto the board. As such, the bill will allow the appointment to be contemplated, but the circumstances of the particular GTE would deem it appropriate.

Hon Dr STEVE THOMAS: Thank you. We now come to the pertinent part of the debate. I am sorry; it is all pertinent. These are all very good parts of the debate. Clause 13(3) states —

The Portfolio Minister cannot appoint a member of staff of a GTE to its board.

Obviously, apart from the CEO to some degree, because they are effectively part of the board, I presume that we then focus on every other staff member or any other GTE. The concern I have, of course, is that we end up with a range of public servants serving as directors on boards of GTEs. I think that there is a conflict of interest in having public servants who are there to advise the government also serving as decision-makers. I suspect that it is quite convenient to put people on boards who we can trust who are public servants who might have a vested interest, but it creates an interesting problem area.

First, I presume, given that the CEO effectively functions as a director, can a CEO of a different corporation serve as a director on any other government boards? If that is the case, is that not to some degree a conflict of interest as well?

Hon STEPHEN DAWSON: Yes, they can. I do not think it is a conflict of interest. Obviously, CEOs of that significance are senior public servants, executive directors and the like. They will have expertise in particular areas and so forth—a Treasury official, for example. An Under Treasurer or an executive director from Treasury might have experience in an area and it may well be appropriate for them to be on another board—to bring that experience to the board. They might have the same experience as somebody in the public sector or they may have come from the public sector and have been in Treasury for a period. That experience is valuable and would add to the make-up of the board. Therefore, I do not think it is a conflict. Certainly, a public servant who is appointed to a GTE board has the same duties as their fellow directors to act in the best interest of the GTE. It is unclear how a public servant who is prepared to ignore their obligation to act in the GTE's best interest could convince their fellow independent directors to act in the same way.

Hon Dr STEVE THOMAS: I take the minister's point that we are all held theoretically to high standards, it is just that sometimes we do not necessarily reach them. The other component is that I do not understand why a senior public servant, whether it is a director general or a CEO equivalent, would not be available to provide advice to a truly independent board. I think that is the key. That is not to say that truly independent boards do not get it wrong as well, because occasionally they do, but I think there is value in being an independent board as opposed to a board with public servants who effectively are both part of the organisational structure of government and theoretically also on a separate board. For example, when health boards were first formed, originally there were no medicos on them because they had a vested interest—they worked in hospitals et cetera. That changed so boards suddenly became available to them and now they are full of doctors. I must admit I remain somewhat unconvinced of the need to put senior public servants in board positions. Under those circumstances, I move the amendment standing in my name on supplementary notice paper 92, issue 1 —

Page 8, after line 22 — To insert —

(3A) The Portfolio Minister cannot appoint a member of the Public Service as defined by section 34 of the *Public Sector Management Act 1994* to a GTE's board.

I do so because I think we are chasing a truly independent board. I think that is the standard that the Corporations Act, for example, would have us lift to. In my view, it is reasonable to expect that arm's-length decision-making cannot occur. A senior public servant obviously answers to a minister who is a part of cabinet, so it is very difficult for a senior public servant to disagree with government policy even though it might be in the best interests of the corporation for them to do so. That makes it incredibly difficult to be genuinely independent and I therefore think that the motion I have moved to amend the bill should stand.

Hon STEPHEN DAWSON: I am not in a position to support this amendment this afternoon. I do not believe it is necessary. The board appointment provisions in the current establishing acts do not limit administrative discretion to appoint a candidate the minister deems appropriate for the GTE's board. It is considered appropriate for the minister and cabinet to retain discretion on who is appointed. We do not support the bill being amended to limit the appointment of public servants. The skills and experience required on the board should be a matter for discussion between the board, the chair and the portfolio minister as covered in the skills matrix provisions of the bill. It is appropriate that, from time to time, public servants be appointed to boards given that they bring to the board expertise in government processes, policies and decision-making. Of the 12 GTEs, I am told there are three public servants currently on their boards. They have been put on for a reason—because of their expertise—and we do not want to limit that moving forward. With that, as I said, I will not be supporting the Leader of the Opposition's amendment.

Hon Dr STEVE THOMAS: I am shocked! But I probably should not be. I do not want the minister to name those three individuals because I do not think that is appropriate in the debate.

Hon Stephen Dawson: By way of interjection, it is publicly available information because it is in the annual reports.

Hon Dr STEVE THOMAS: Okay. I do not really care to be honest, but that will suffice. There is no need to identify specific individuals as part of the debate. The question really is, in support of the amendment, why is the advice of those three senior public servants not available to those boards without them being board members?

Hon STEPHEN DAWSON: I am told there is a concept of shadow directors. A person providing advice to a board at that level opens themselves up to liabilities and issues if they are not formally appointed as a member of the board or as an official *ex officio* of the board. In those cases, people are there because of their experience and expertise, to be a decision-maker of the board, not to be an adviser of the board. They are a director like everybody else—a decision-maker to decide what is good for the organisation and how it is in the public interest. They are not there to give advice or come and brief the board.

Hon Dr STEVE THOMAS: Under that argument, basically anybody who provides advice to the board who is not a director would become a shadow director.

Hon Stephen Dawson: By interjection, if they are an employee of the agency it would be appropriate to give advice to the board. In this case, we are saying there are people from other agencies—public servants or public sector workers from other places with experience who are not staff members of the GTE who are on the board and they are on there by virtue of their experience.

Hon Dr STEVE THOMAS: Surely those boards would take advice from other public servants, other business leaders, other experts in fields who are not employees of their own GTE and would the same rule then apply? I am not convinced by the argument because the minister cannot convince me an electricity corporation board would not take advice from a consultant electricity engineering network, for example. In fact, they send out for them.

Hon Stephen Dawson: They pay for them.

Hon Dr STEVE THOMAS: They pay for them. Companies go out to seek advice. They are not shadow directors because their advice has been sought. I do not understand why a departmental person in a separate department might be a shadow director but everybody else is not. I am not convinced that there is a difference there.

Hon STEPHEN DAWSON: It is a question of extent. In the example the member gave, there would be contractual obligations. If somebody has been paid for their advice, they are providing a service and a payment has been provided by the GTE for that service. If somebody is coming to brief the board from outside the agency every week, it potentially opens them up to the shadow director issue. If it is a one-off thing and advice was given to the board, that is probably fine. In the case of the three individuals, government has decided that their expertise warrants them being members of the boards because they will add to the decision-making process and ensure that public benefit comes of the decisions of the board.

Hon Dr STEVE THOMAS: Minister, if it is three boards on which those three members function, they cannot function without the three members. If the members cannot be sought for advice occasionally—if they are required at every meeting—I think there is a structural problem on the board. That comes back to the overall intent of the bill and the act to try to improve the standard of boards because, effectively, we are allowing public servants on the board because it would appear that the boards cannot function without them. I am concerned about that.

Hon STEPHEN DAWSON: That is not what I am suggesting, honourable member. From time to time, there will be value in having people on boards who have experience in dealing with government, government processes, government policies and government decision-making. It is not always appropriate and boards do not always want that. As I alluded to earlier on, there will be a skills matrix by agreement between the board chair and the minister. From time to time, it may end up that a member of staff—a senior executive of another agency—is a member of the board. That is not always going to be the case but we want the legislation before us to retain that option. The member obviously has a different view. That is fine but I am not sure whether we are going to get anywhere with this, so I am happy for the member to vote on his amendment.

Hon Dr STEVE THOMAS: Let us conclude. It is the one substantive amendment that I propose to the entire bill. I am intent to test the waters but we know exactly how deep the waters are. I think it is worth making a statement on this. The government's proposal in the bill makes it easier for government but I think it will deliver a lesser outcome in terms of arms-length independent boards and, therefore, I am keeping the amendment on the train and I commend the amendment to the chamber.

Division

Amendment put and a division taken, the Deputy Chair (Hon Stephen Pratt) casting his vote with the noes, with the following result —

Ayes (9)

Hon Martin Aldridge	Hon Nick Goiran	Hon Tjorn Sibma
Hon Peter Collier	Hon Steve Martin	Hon Dr Steve Thomas
Hon Donna Faragher	Hon Sophia Moermond	Hon Colin de Grussa (<i>Teller</i>)

Noes (18)

Hon Klara Andric	Hon Lorna Harper	Hon Martin Pritchard	Hon Darren West
Hon Dan Caddy	Hon Jackie Jarvis	Hon Samantha Rowe	Hon Pierre Yang
Hon Sandra Carr	Hon Kyle McGinn	Hon Rosie Sahanna	Hon Peter Foster (<i>Teller</i>)
Hon Stephen Dawson	Hon Shelley Payne	Hon Matthew Swinbourn	
Hon Kate Doust	Hon Stephen Pratt	Hon Dr Sally Talbot	

Amendment thus negatived.

Clause put and passed.

Clause 14: Directors' skills matrix —

Hon Dr STEVE THOMAS: Obviously, the most interesting parts of the bill are at the start so the debate will speed up in the fullness of time. I am interested in the directors' skills matrix, which is an excellent idea, by the way. It will drag the GTE boards somewhere towards, I think, what the Corporations Act has effectively required of private corporations for some time. Obviously, I think it is good. I am looking for examples of what that might look like in practice. I presume that Treasury or Finance will provide a standard version of this. Are we anywhere down that path? Do we know when that might be delivered and what that might look like?

Hon STEPHEN DAWSON: Not yet, honourable member. We intend to issue guidance notes to GTEs, but it will not prescribe exactly what is needed. It is essentially guidance. We are not dictating that it is an absolute.

Hon Dr STEVE THOMAS: That is interesting. I think some sort of guidance on it is absolutely essential. Does the minister think that the matrix will be a fairly broad indicative document, rather than a more prescriptive tick-a-box document? Is that where we are going?

Hon STEPHEN DAWSON: That is correct, honourable member.

Hon Dr STEVE THOMAS: Is it likely it will be a public document when it comes along, and does the minister have any idea what time frame is required to put it together?

Hon STEPHEN DAWSON: Hopefully, honourable member, if the bill passes this week, the work can start very soon afterwards. No decision has been made about whether it will be made public. I cannot see why not, but at this stage I am not in a position to say it will be made public.

Hon Dr STEVE THOMAS: I am happy to take that as, hopefully, it will be. If it is a very broad indicative document, we think it would be. If it becomes much more prescriptive over time, it might not be. I accept the minister cannot tell us what it might end up like, I just note that it ultimately comes in under regulations. I think it comes in. Clause 14(5) states that the regulations may provide for the content, the processes et cetera. It may be under regulations. The government puts "may" into legislation and it means "must" and sometimes "must" means "may". It is not the easiest process. I would read clause 14(5) as meaning that the government might find itself having to table regulations on what is contained in the matrix. In theory, would it be a disallowable instrument and end up in the house for debate, because that would make it incredibly public if that were the case?

Hon STEPHEN DAWSON: It is not our intention to use the regulations to prescribe a particular skills matrix. Therefore, because we are not using the regs, it would not be a disallowable instrument.

Progress reported and leave granted to sit again, pursuant to standing orders.