



Government Boards and Committees

GUIDELINES FOR AGENCIES
AND BOARD MEMBERS



**FOREWORD FROM
THE PREMIER**

The first edition of this booklet was printed in September 1995 and was welcomed as a significant milestone in the process of continual improvement in the performance and accountability of boards and committees which is a key element in the Government's commitment to improve the efficiency and effectiveness of the public sector.

The Guidelines have now been revised to take into account new policy developments and our continued commitment to good government. Government boards and committees are established to meet a number of key requirements for government. Some boards and committees are established to ensure adequate community involvement in sensitive policy-making issues. Many boards and committees are established to ensure specialised skills are available for the management of areas of significant change. The role of commercial boards is to bring commercial expertise and strategic focus to the enterprise, enabling Government to focus upon policy issues, leaving the board and management to focus on operational matters. All boards and committees must ensure that accountability and performance mechanisms are in place and fully utilised.

This Government is dedicated to ensuring that the best candidates are recruited and selected for its boards and committees, and that the right balance of skills and experience, cultural diversity and gender is available to meet the challenges that government has set for the public sector.

This handbook is part of this Government's commitment to continual improvement in this area, and is an integral component of its program.

PREMIER

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Further information on this publication can be obtained from:

Boards and Committees Unit
Corporate Operations and Governance Division
Department of the Premier and Cabinet
GPO Box 2343
ADELAIDE SA 5001

Phone: 8226 5557 or 8226 2763

Email: boardsandcommittees@dpc.sa.gov.au

Website: <http://www.dpc.sa.gov.au/boards-and-committees>

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Introduction

These guidelines have been produced by the Department of the Premier and Cabinet (DPC) to assist agencies and statutory authorities to establish and operate boards and committees, and to provide guidance to members or members of government boards and committees to perform their duties efficiently. The purpose of the guidelines is to set out the respective duties and responsibilities of boards and members and the relationship between boards, Ministers and the organisation of which the board is the governing body, for the information of both the agencies and the members of such boards.

Section 1, *Guidelines for agencies*, deals generally with the role of boards, the selection of members, skill requirements and balance. Section 2, *Guidelines for board members*, deals specifically with the role and accountabilities of members of government boards. Section 3, Information for members appointed to Boards Incorporated under the Public Corporations Act, deals specifically with information for members of boards to which the *Public Corporations Act 1993* applies.

In these guidelines, the term 'board' is used to mean boards of statutory authorities and in so far as it is relevant, committees of such boards. In addition, for the purposes of this document the term 'board' also means non statutory boards and committees of a commercial or entrepreneurial nature. The term 'member' is used to mean members, trustees or directors of boards of management of statutory authorities. In the event of any inconsistency, legislation overrides these guidelines.

Note that these guidelines do not apply to directors of companies which are government owned and established under Corporations Law. Guidelines for such directors are available from the Australian Institute of Company Directors and other such institutions.

These guidelines have been developed for Ministers, agencies and board members as a guide to best practice. However, specific legislation and Government need will always prevail.

The guidelines have been developed to cover many boards set up for differing purposes, so certain boards will need to use only those parts of the guidelines which are relevant to them. For example, boards which do not manage their own funds and do not have financial obligations under their Acts, need not be concerned with the sections relating to financial management. Some boards, for example health boards, may encounter specific issues not covered in the guidelines.

All non statutory government boards and committees should use this booklet as a guide to efficient and effective performance.

1. Guidelines for agencies

1.1. The role of a board

The role of a board and its members is to give direction to an organisation and to accept initial responsibility for its management.

Boards of major business-oriented government agencies, public trading enterprises (PTEs) and corporatised entities (which all fall within the definition of statutory authority used in this document) look at the organisation from a higher level and are concerned with policy development and strategic matters. The key functions of these boards are to adopt a strategic plan and annual budget, ensure that internal control systems are in place, and monitor the progress and results associated with these functions.

The board may also have a key role of advising the Minister during the selection process for a chief executive (CE) and for new members. It has a responsibility to ensure that the highest standards of financial and ethical behaviour are maintained in the organisation. Some boards may have a community, environmental or regulatory role rather than being business focused. In all cases members are responsible for putting in place systems to monitor the meeting by management of performance targets and compliance with corporate policies, regulations and ethical standards.

The model below, adapted for boards of public-sector organisations from *The Director's Manual* (Tricker, 1990), identifies a board's key areas of responsibility as:

- accountability
- strategic thinking
- monitoring
- corporate policy development.

EXTERNAL	
Accountability <ul style="list-style-type: none"> • Report to Minister and Government • Ensure compliance with legislation • Review audit reports 	Strategic Thinking <ul style="list-style-type: none"> • Review and initiate strategic analysis • Formulate strategy • Set corporate direction • Recommend and work with CE

Recommend and work with Chief Executive

INTERNAL	
Monitoring <ul style="list-style-type: none"> • Review key executive performance • Review business results • Monitor budgetary control and corrective actions 	Corporate Policy Development <ul style="list-style-type: none"> • Approve budgets • Determine broad policy • Create corporate culture

ACCOUNTABILITY

While boards are ultimately accountable to Parliament (and might, for example, be called before a Parliamentary Committee) in our system of Government, this accountability is usually exercised by the Minister.

For boards subject to the *Public Corporations Act 1993* there is a clear chain of accountability from the CE to the governing board, to the Government through the Minister, and thence to Parliament.

In concept, a public corporation may therefore be viewed as being more like a subsidiary (with the Government standing in place of a holding company), than to a publicly listed company in which the board is directly accountable to a wide community of shareholders.

Members of boards are appointed for their personal skills and knowledge and are required to exercise these for the benefit of the organisation as a whole. Members are not appointed to represent the views of any particular stakeholder or interest group, even though they may have been nominated by a specific group as specified by legislation. As members of a board, they are responsible to the government through the Minister and ultimately to the community for the manner in which they exercise their functions. There is a consistent line of authority to the effect that no matter how and why a person is appointed to a statutory body, that person is not the representative of the sectional interests from which he or she was appointed, but the person's duty is owed to the body as a whole (Walter, 1997).

Members of boards that exercise statutory functions have significant responsibilities which may be subject to high levels of public scrutiny. Members must ensure that their actions are effective, lawful and justifiable by having a good understanding of the objects of the relevant legislation and a good working knowledge of the requirements of the Act that established their role.

However, in the case of statutory authorities, there is sometimes a difficult relationship between the community service obligations imposed by legislation, and the financial requirements of operating an efficient business. This challenge cannot be ignored by a member because he or she is appointed for his or her commercial or other skills. Members should be aware of Government priority policy areas.

STRATEGIC THINKING

A key responsibility for members of boards is considering the long-term external environment and developing strategies for the organisation to:

- adapt to external changes
- adopt 'best practice' internal policies and procedures.

The board sets the broad strategies that move the organisation towards its long-term goals and objectives but this should be done in the light of the Government's strategies and policies.

MONITORING

Annually, the Minister should review the board's performance with the chairperson or the board as a whole (for board performance assessment guidelines see section 2.2). Board members are required to develop long-term strategic plans and clear performance criteria and monitoring processes to ensure the achievement of objectives set well into the future.

Each Board should regularly review and assess its own performance and that of its members, and ensure that its own composition, committee structures and support are appropriate to its tasks. (Hilmer, 1993)

The board's monitoring of the internal operations of the organisation should not take over the role of management, which is concerned with the day-to-day operations of the organisation.

Members need to be sure they are regularly receiving adequate and logical information. They need to use management reports to examine whether the organisation's current direction is consistent with its strategic goals.

Members also need to ensure independent audit reports of the financial information presented by management to the board are available when requested. Submissions to the board that seek financial approval, are to be based on the quantifiable, measurable benefits of the expenditure of the approved funds.

A board, particularly one of a large PTE, may appoint an audit committee mostly made up of non-executive members, to help with finance matters. An audit committee is generally mandatory for boards subject to the Public Corporations Act. The board should clearly define the role of the audit committee and ensure that it has easy access to the CE, the senior finance person in the organisation, the board and the auditors.

CORPORATE POLICY DEVELOPMENT

The board creates a corporate policy for the organisation so that it meets its long-term strategic aims. The corporate policy includes broad policies, values, practices and procedures of 'the way we do things around here', and what is held to be important and valued by the organisation determined within the Government policy framework.

1.2. Recruiting and selecting members

This section covers selection, composition and skills requirements for members. Responsibility for selection and appointment of members for boards lies with the Minister or Cabinet, and the Governor. However, legislation will often specify the necessary skills, experience and attributes of board members, and legislation prevails over these guidelines and/or Government policy.

The apparent short supply of effective board members may come from the perception that few capable people are able and willing to commit the time required to be an effective board member, time which is considerably more than that required for attendance at monthly meetings. When selecting members for a board, carefully consider the time commitment required. Advise potential candidates of that requirement and ask them if they are willing and capable of making that commitment.

Consider the composition of the board as a whole when selecting new members. Each board should include people with superior knowledge of the particular industry and applied knowledge of management disciplines. Bodies which are required to establish an audit committee need to ensure that members have the skills and willingness to serve on these committees. It may be necessary and desirable to recruit some board members who have superior knowledge of the industry but are sufficiently distant to avoid conflict of interest. For a monopoly supplier or for statutory authorities in competition with the private enterprise sector, it may be necessary to recruit from interstate to find board members who have the required industry knowledge without a conflict of interest.

BALANCE OF SKILLS ON BOARDS

Representation of a full range of skills and experience on boards is a prerequisite for ensuring the board can discharge its overall obligations to improve performance and protect the long-term viability of the organisation and the Crown's financial interest in the organisation.

SELECTION OF A CHAIRPERSON

In the special case of recruiting and selecting a chairperson, the selection criteria could refer to the ability of the potential chairperson to:

- concentrate people's energies
- ensure that decisions are properly recorded
- make available the time for board matters and access by the Minister and CE.

SELECTION OF A MEMBER

Each minister's office receives a monthly report of upcoming board member vacancies occurring within the forthcoming six-month period from the date of the report. This process encourages early preparation for appointments and reappointments, which can take some time if non-government entities must provide nominations for membership and/or if the Governor is required to make the appointments.

Members are selected from suitable candidates nominated by relevant Ministers, or by other means as specified in the appropriate legislation or terms of reference.

Consider the following criteria relating to potential candidates when appointing a member to a board:

- integrity
- high levels of performance in significant fields
- a demonstrated understanding of the objectives, roles, duties and obligations of members
- experience in, or knowledge of, general management or a relevant specialist field
- an understanding of accountability relationships
- relevant commercial and business experience
- capacity to think and act strategically
- number of other current memberships (eg. time available for the board)
- any possible conflicts

Also consider:

- gender mix based on merit
- any legislative requirements.

The Minister should consult with the chairperson of the board, when a vacancy occurs, and consider the overall composition of the board and gaps in experience, ability and knowledge, so that a suitable replacement can be identified to fill these gaps. Issues relating to incompatible public offices should be taken into account (see section 1.4).

BOARD MEMBER SPECIFICATION

The board member specification is to be provided to potential candidates.

The responsibility for preparing and maintaining the board member specification rests with the Minister. The specification outlines:

- the duties and responsibilities of each board position
- the skills required for the position
- the essential and desirable selection criteria
- terms and conditions of appointments.

These specifications could be developed with the assistance of the board.

RECRUITMENT METHODS

Potential board candidates can be identified through a number of methods:

- networking
- direct mail targeting particular individuals, industries or bodies
- advertising
- registers
- executive search
- general publicity.

Generally, use a mix of these methods to generate a list of potentially suitable candidates.

It is recommended that selection panels for board members of statutory authorities include at least one man and one woman (see gender balance section below).

POTENTIAL SOURCES OF NOMINEES – USE OF EXECUTIVE SEARCH CONSULTANTS, ADVERTISING AND NETWORKING

Some executive search consultants are now tending to advertise for expressions of interest for positions on boards, especially for public-sector bodies. The shortlist of candidates produced from advertisement is supplemented by a list produced from the executive search by the consultants.

The Government also has its own sources for executive search:

- Past and present chairs of boards, not only of major statutory authorities but also of many minor bodies with responsibilities established by or under statute, may identify from members of their boards suitable candidates for membership of key boards of management.
- Past and present members of these boards may be able to identify suitable candidates from their personal contacts in industry and the community.
- CEs of these bodies, CEs of administrative units and other senior public servants may be able to identify suitable candidates from their personal contacts in industry and the community. CEs must not be involved in the identification process of members for their own boards. Agencies could develop a register of potential members who may be able to serve on a government board.
- Heads of industry, employee and professional bodies, such as Business SA, the Australian Institute of Management, PRO:NED Board Consultants and the Institution of Engineers, may identify suitable candidates.
- Particular group registers or information sources may yield candidates: the 'Premier's Women's Directory' (Office for Women) for women; Multicultural SA for people of diverse cultural and linguistic backgrounds; and the Aboriginal Affairs and Reconciliation Division of DPC for Aboriginal people. The Office for Youth can provide assistance in locating young people as candidates.

Website for Premier's Women's Directory:

<http://www.premierswomensdirectory.sa.gov.au/>

- Executive search consultants are useful, particularly for appointments to the boards of larger statutory bodies. The Office for Women uses executive searches to identify women with relevant skills for appointment to government boards.

The best performing local firms in private enterprise can be directly canvassed. Consultants can provide high level nominees to major boards, and help establish a candidate register.

COMPOSITION AND STRUCTURE OF THE BOARD

The composition of the board is paramount. The composition of the board is reviewed if the functions or terms of reference are altered. Where appropriate, the chairperson of a statutory authority will be consulted on the composition of a board and any review which may be required. However, legislation will always prevail over the guidelines and/or government policy.

Non-executive members are usually expected to contribute the broader view to the board, as individuals not intimately involved in the organisation's daily operation. They may be experienced executives or professional persons such as lawyers, financiers and accountants who have distinguished themselves in relevant industries and positions.

An independent member is one who is genuinely independent of management by not having either of the following:

- a contractual relationship with the organisation and therefore not being subject to control or influence; or
- any other relationship with the organisation that might affect his/her independent judgment.

The objectivity of independent members is vital, particularly if viewed in the context of accountability and as a safeguard for the board.

If the Government is to rely on the decisions made by boards, it is critical that people with 'appropriate' skills are appointed. In general terms, this means a mix of skills, with the balance probably favouring executives with highly developed skills in the relevant industry. Perhaps the most significant decisions to be made by the Government affecting the success of boards will be in appointing members to them. Accordingly, the primary objective should be to get the best people on these boards. A gender balance brings to boards a variety of points of view.

The selection process should be merit based and begin with a board member specification.

GENDER BALANCE

With the increasing globalisation of the world's economies, the pace of technological development and the major social and political changes in many countries, the contribution of women is critical to the future well-being of South Australia (Office for the Status of Women, 1997).

The Government has a two Strategic Plan targets to increase representation of women on government boards and committees to fifty percent. The two targets are:

*Target 30. Boards and committees:
Increase the number of women on all State Government boards and committees to 50% on average by 2014, and maintain thereafter by ensuring that 50% of women are appointed, on average, each quarter*

And

*Target 31. Chairs of boards and committees:
Increase the number of women chairing State Government boards and committees to 50% by 2014*

Advise any executive search consultants used of the Government's objectives and specifically brief them to nominate women who are qualified to sit as members. In addition, Ministers, departments and statutory authorities should consult with the Premier's Women's Directory to identify suitable women, before making appointments to boards.

Website for Premier's Women's Directory:
<http://www.premierswomensdirectory.sa.gov.au/>

Section 36A of the *Acts Interpretation Act 1915*, titled "Gender balance in nomination of persons for appointment to statutory bodies" was inserted into the Act in July 2005. In essence, section 36A provides:

- Where an Act provides for a non-government entity to nominate a panel of persons for appointment, the Act will be taken to provide that the panel must include at least 1 woman and 1 man
- Where an Act **does not** provide for a non-government entity to nominate a panel of persons for appointment, the Act will be taken to provide that the non-government entity **must nominate a panel of persons** comprised of not less than twice the number of members to be nominated by the entity plus one, and the Panel must include at least 1 woman and 1 man

Where a non-government organisation is invited to nominate a person to a government board, but is not required by law to do so, government policy is that the organisation supply a panel of three nominees, one of whom must be a man and one a woman, for each position. This policy is contained in section 5 of DPC Circular 22, which is available at <http://www.dpc.sa.gov.au/boards-and-committees>.

The aim of these initiatives is to ensure the appointment of suitable qualified women who can contribute to the board's operations and accept accountability for results.

PEOPLE OF DIVERSE CULTURAL AND LINGUISTIC BACKGROUNDS

The Government of South Australia is committed to ensuring that all government activities are inclusive of and value cultural diversity. This means encouraging all South Australians to contribute to, and participate in, all levels of public life and decision making.

Where appropriate, Ministers and their agencies should include people from diverse linguistic and cultural backgrounds on decision-making and advisory bodies so that a breadth of views reflecting the general society is available. Particular consideration should be given to the inclusion of indigenous people. Multicultural SA can identify people from diverse linguistic and cultural backgrounds and the Aboriginal Affairs and Reconciliation Division of DPC can identify indigenous people for appointment to these bodies.

Website for Aboriginal Affairs: <http://www.aboriginalaffairs.sa.gov.au/>

Website for Multicultural SA: <http://www.multicultural.sa.gov.au/>

Also consider seeking nominations of individuals with an appropriate range of skills and experience from peak bodies.

YOUTH PARTICIPATION

The Government of South Australia formally recognises that young people are the State's future, and a key part of our present. The Government values young people as important community members and welcomes what they have to say in making decisions which affect young South Australians and their community.

Where appropriate, Ministers and their agencies should include young people on decision-making and advisory bodies where the outcomes of those bodies' operations ultimately affect or influence young people directly or indirectly.

Where young people are appointed to decision-making and advisory bodies, members should be offered training in encouraging and using their input. Youth members should be provided with:

- agency-specific induction including information on that agency's decision-making processes and the role of the body, interagency links and a glossary of relevant terminology incorporating industry jargon and acronyms
- regular opportunities to meet with other young people in similar roles
- opportunities for further training they identify as being necessary to fulfil their role as a member.

Consideration should also be given to convening youth representative meetings before or after formal meetings.

Contact the Office for Youth on 8413 9002 or visit the website at <http://www.officeforyouth.sa.gov.au/>.

CONSULTATION PROCESS AND ROLE OF CHAIRPERSON IN ASSISTING OR RECOMMENDING

Consult the chairperson of the board on which the vacancy is appearing regarding the:

- contribution of members whose period of appointment is expiring
- completeness of the skills range on the board
- balance of the board's composition
- selection criteria for vacant positions
- time commitment required of board members.

Consider including the chairperson on a selection panel if this is the approach to be used.

PROTOCOL FOR APPROACHING POTENTIAL MEMBERS

For many government boards, the power to appoint members is vested in the Governor in Executive Council. As the agenda of Executive Council is determined by Cabinet, it is also necessary that Cabinet approve the recommendation of the responsible Minister. Therefore, any approach to a prospective board member must not compromise the decision-making authority of the Minister, the Cabinet or the Governor. The usual practice is for the Minister to take to Cabinet a Cabinet Note for consideration of a potential nominee before the nominee is approached.

It is appropriate that the background of nominated candidates be thoroughly scrutinised during the selection process. It is appropriate that their potential contribution (strengths and weaknesses) is well understood and documented for the benefit of decision-making bodies. This will require referee checks, not only with nominated referees. It is both appropriate and necessary that permission for referee checks be obtained from potential candidates. Obtain such permission in writing, together with an acknowledgment that the comments of referees will be subject to qualified privilege. Similarly, advise referees that their comments will be subject to qualified privilege and will be used only for the declared purpose.

It is suggested that all written comments of referees and notes on their remarks be destroyed on appointment of the member (subject to State Records requirements).

A significant factor affecting a person's potential to contribute is the time the individual will make available to their duty as a board member. Ascertain the time requirement and advise potential candidates. Before candidates are shortlisted, examine their capability and willingness to devote the necessary time should they be appointed. Also discuss the remuneration for board membership (after consultation with the Chief Executive of DPC, see below) and determine the willingness of the candidate to accept appointment early in the process, when an approach is made concerning referee checks.

The Chief Executive of DPC has been delegated authority of Cabinet to make recommendations on the level of remuneration payable to board members in accordance with Cabinet-approved guidelines. For newly formed boards, make an early approach to the Chief Executive of DPC for a recommendation on board fees so that negotiations with prospective board members can take place.

Advise a candidate under consideration for shortlisting of the obligations he/she would assume on becoming a member. This could include declaring financial interests and signing an agreement to abide by a code of ethics.

APPOINTMENT OF MEMBERS

Government board members are appointed by either the Minister or the Governor. As a general rule, all non-statutory boards will be appointed by the Minister. In the case of statutory boards, the relevant legislation will specify who makes appointments.

In both cases, a Cabinet note will be required and, in the case of boards appointed by the Governor, a Cabinet submission will also be required.

Guidance on preparing and lodging Cabinet Submissions or Cabinet Notes should be directed to Cabinet Office on:

Cabinet Clerk (Cabinet)	8226 3525
Cabinet Clerk (Executive Council)	8226 3602

Alternatively, policies and templates are available online at <http://intra.sa.gov.au/site/cabinet/> (**internal government access only**).

Board members should be advised in writing of their appointment by the responsible Minister. Such advice should specify the position, term of the appointment and any applicable terms and conditions.

1.3. Information to be provided to members of boards

Newly appointed board member should be provided with:

- a copy of relevant legislation (such as the Act under which the board was established) or the *Public Corporations Act 1993* (if applicable)
- the board's terms of reference
- the board's most recent annual report
- a copy of the honesty and accountability paper (see section 2.5)
- a copy of these guidelines
- an outline of the organisational structure
- a statement on board membership and the role of the board
- relevant statements of government policy (eg. DPC Circulars 16 and 22)

This is not intended to be an exhaustive list, however, and Ministers, chairpersons and CEs are encouraged to develop their own induction process and information package. The Office for Women has developed an induction package on the rights and responsibilities of women on boards.

1.4. Information for State Government employee board members

State Government employee board members should make themselves aware of the Government's policy on remuneration, detailed in section 2 of DPC Circular 16, which is available at http://dpc.sa.gov.au/sites/default/files/pubimages/Circulars/PC016_Remuneration_1.pdf.

State Government employee board members should also be aware of the following information relating to incompatible public offices.

INCOMPATIBLE PUBLIC OFFICES

The common law recognised that where a person held two public offices, a functional incompatibility might arise between those two office holdings. Whether incompatibility arose in any particular case depended on the character of the offices and their relation to each other. The test was whether the two offices could be faithfully and impartially discharged by the same person. The doctrine operated at common law such that upon occupation of the second (incompatible) office the first office was deemed to be vacated. In some later authorities, it was suggested that rather than vacating the first office, the person was deemed ineligible to take the second office.

Section 67 of the *Public Sector Act 2009* has largely abolished the doctrine of incompatible public offices. However, it is arguable that it has not eliminated the operation of the doctrine in circumstances where the two offices are inherently incompatible. An example of an inherently incompatible public office holding is where an officer, in one office, has duties to supervise his or her own activities in another.

Section 67 is titled "Multiple Appointments etc" and subsections (2)-(4) provide:

- ...
- (2) If a person holding an office is or has been appointed to a further office, he or she is not to be taken to have vacated the first mentioned office or to have been invalidly appointed to the further office because—
 - (a) the potential exists or has existed for the duties of the offices to be in conflict; or
 - (b) the duties of either 1 or more of the offices require, by implication, the person's full time attention.
 - (3) The Minister may give directions in relation to an actual or potential conflict of duty between offices held concurrently, or in relation to some other incompatibility between offices held concurrently, and, if the office holder concerned complies with those directions, he or she is excused from any breach that would otherwise have occurred.
 - (4) In this section—

office means—

 - (a) a public office; or
 - (b) any employment in the public sector.

Despite section 67, care needs to be taken when public sector employees are appointed to government boards to ensure their ordinary job functions do not involve activities incompatible with the role of board member. Should a functional incompatibility arise, normally the ordinary job function can be revised for the duration of the board appointment to avoid that incompatibility. This is possible because usually, but not always, public sector employees' roles are not specifically defined by statute beyond general principles. Of course, in the small number of cases where the ordinary job functions are defined in detail by statute, individual consideration will need to be given.

PRINCIPLES

The following principles apply only in the case of proposals to appoint public sector employees as Board **members**. These principles do not apply to public sector employees who are **Ministerial representatives** attending Board meetings in that capacity rather than as Board members.

- Always consider whether a relevant functional incompatibility may arise before a public sector employee is appointed to any board or committee
- When making an appointment to a statutory board, always bear in mind that a board member of a statutory corporation holds a public office under the Crown. That office is one of trust and confidence to perform the duties of overseeing the management of the statutory corporation. In participating in the business of the board of a statutory corporation, board members are legally required to prefer only the interests of the statutory corporation.
- As a general rule, and except where permitted or required by statute, public sector employees should not be appointed to the board of a statutory corporation, while retaining a position in a public sector department or agency within any portfolio of the Minister responsible for that body.
- When a public sector employee, employed within the portfolio of the responsible Minister, is appointed to the board of a statutory corporation, the Minister making the appointment should consider whether or not there is merit in making public the reasons for the appointment to address any perceptions of conflict that might arise.
- A public sector employee appointed to a government board while retaining a position in a public sector department or agency within any portfolio of the Minister responsible for that body should not:
 - Be given responsibilities in the department directly in relation to the board's affairs or actions. If such responsibilities already attach to the departmental position held by the public sector employee, then those responsibilities should be revised for the duration of the board appointment.
 - In their role as board member, be required to behave in a different fashion in relation to the Minister and the department, from that required of other board members.
 - Act as an informal vehicle of communication by the Minister to the board in matters in which the board is required to act independently or for which a formal procedure for the communication of the Minister's view is prescribed.

- A public sector employee facing circumstances in which there is reasonable likelihood that the two offices cannot be faithfully and impartially discharged by them may seek directions from the Minister. The submission to the Minister seeking directions should set out in detail the relevant functional incompatibility and the directions necessary to avoid it.

1.5. Information for State Government employees involved in the administration of part-time boards and committees

State Government employees involved in the administration of part-time boards and committees should be aware of the following government policy documents and sources of information:

DPC CIRCULAR 16 – REMUNERATION FOR GOVERNMENT APPOINTED PART-TIME BOARDS AND COMMITTEES

Circular 16 deals primarily with remuneration issues for boards and committees and covers the following:

- remuneration for government employee board members
- seeking a remuneration determination or review of existing remuneration
- annual fees and sessional fees
- methods of payment
- salary sacrifice and superannuation
- reimbursement of travel and other expenses
- personal accident insurance
- the Boards and Committees Information System (BCIS)

Circular 16 is available at:

http://dpc.sa.gov.au/sites/default/files/pubimages/Circulars/PC016_Remuneration_1.pdf

DPC CIRCULAR 22 – IMPROVING THE EFFECTIVENESS OF GOVERNMENT BOARDS AND COMMITTEES

Circular 22 imposes measures to improve the effectiveness of government boards and committees. In particular, the policy requires that boards and committees:

- have a terms of reference
- regularly report on their performance against objectives
- have a sunset clause or, in certain circumstances, a review date.

Circular 22 is available at:

http://www.dpc.sa.gov.au/sites/default/files/pubimages/Circulars/PC022_Effectiveness.pdf

DPC CIRCULAR 13 – ANNUAL REPORTING REQUIREMENTS

With a few minor exceptions, all boards and committees are required to provide an annual report either as a result of the board's enabling legislation or as a result of DPC Circular 22 (see above). DPC Circular 13 provides guidance on the information that should be included in an annual report.

Circular 13 is available at:

http://dpc.sa.gov.au/sites/default/files/pubimages/Circulars/PC013_AnnRep-Requirements.pdf

CABINET NOTE AND SUBMISSIONS – BOARD APPOINTMENT TEMPLATES

- Refer to 'Appointment of members' of section 1.2

OTHER DOCUMENTS AND SOURCES OF INFORMATION

- Honesty and accountability for members of boards and committees (see section 2.5)
- Agency-specific payroll and HR forms for board members (should be sourced from HR area or section of agency intranet)
- The Boards and Committees Information System section of IntraSA, available at <http://intra.sa.gov.au/Policies/boards/> (**internal government access only**)

The Boards and Committees Unit of DPC carries responsibility for a number of functions related to the management and policy development of the Government's board and committee program. For further information or advice, contact the Unit on 8226 5557 or email boardsandcommittees@dpc.sa.gov.au.

Or visit the Boards and Committees Unit website at:

<http://www.dpc.sa.gov.au/boards-and-committees>

2. Guidelines for board members

2.1. Best practice and boards

Effective boards of members usually have some features in common; yet, depending on the nature of the organisation and the mix of members, each board will work quite differently. Some of these features in common are covered in the following sections.

ROLE OF STATUTORY AUTHORITY BOARDS

Michael Terlet AO, former Chairman of WorkCover Corporation, had this to say about statutory authorities (Terlet, 1994):

A statutory authority established by Parliament and subject by statute to ministerial direction differs in nature and function from a company established under Corporations Law. Like companies, statutory authorities have the power to enter contracts, sue and be sued, hold land and property and spend money from their own accounts. However, the differences are significant. Statutory authorities generally have a public service element which requires them to pursue social benefits to the community which may be in conflict with financial objectives.

In legal terms, the main difference is that they do not have consensual shareholders; instead Parliament is responsible for creating the authority.

Members of government boards must have a clear understanding of the differences between members' responsibilities on a board of a company established under Corporations Law and their responsibilities as members on a statutory authority board.

GOVERNANCE

A key principle of effective public sector governance is that boards should retain full and effective control, and monitor executive management and leadership (Chartered Institute of Public Finance and Accountancy, 1995).

This requires:

- a clear and appropriate definition of the role and functions of the board
- a consistent approach to governance in terms of the roles of the board, Government and Parliament regardless of the nature, size, assets or income of the organisation being governed
- a clear separation of the roles of the Minister and the board
- a definition in legislation of the roles, powers, responsibilities and accountabilities of the Government, its Ministers and boards
- legislation to provide boards with the authority to carry out their governance responsibilities
- a process to ensure reporting of board achievements and governance practices, including appointments.

If boards are to have powers that match the responsibility of their statutory duties, then the public will rightly expect them to be fully and publicly accountable. Elected governments will clearly have an interest in what boards are doing and will expect them to account to the Government for board actions and achievements. This is a direct and unavoidable consequence of a board being part of the State's public sector machinery. This practical reality can be accommodated without excessively undermining the principle of statutory independence of boards. To achieve this, Government needs to play a key role in the system of accountability for public sector boards and to ensure that the following five conditions are met for boards with a governance role:

- there are defined roles and functions of each board, preferably in legislation
- there are defined expectations as to what boards report upon
- there is a performance agreement between the board and the Minister/Government
- boards report achievements against this performance agreement to Parliament through the Minister
- the government regularly reviews the need for and the performance of boards (Audit Office of NSW, 1997).

ROLE OF THE MINISTER

A Minister of the Crown is a position of trust bestowed by the people of South Australia. A Minister has a great deal of discretionary power, being responsible for decisions which can markedly affect an individual, groups of individuals, organisations, companies, local communities or all South Australians. Ministerial responsibility not only includes the collective responsibility of Cabinet to Parliament for the whole conduct of government administration, but also the individual responsibility of Ministers to Parliament for the administration of their departments and agencies.

It is a cornerstone of the Westminster system of government that full and true disclosure and accountability to Parliament are the basis for government in South Australia today. The Westminster system requires the Executive Government of the State to be answerable to Parliament, and through Parliament to the people (Department of the Premier and Cabinet, 1997). For this reason it is imperative that the Minister have clear understanding of the functions and responsibilities of each statutory board under his/her control and also that clear and regular reporting mechanisms are in place and agreed with the chairperson.

In addition, the Minister should establish a performance agreement with the chairperson and the board that contains agreed measurable outcomes, as well as a process for monitoring and assessing progress in achieving them.

ROLE OF THE CHAIRPERSON

Although the chairperson has no greater responsibility as a member of the board than other members, in practical terms the chairperson usually has a great influence over the success of the board and the success of the organisation.

A chairperson must be prepared to contribute much more time overseeing the organisation than an ordinary member.

The chairperson should not identify too closely with management, dominate the board or allow coalitions to form that exclude other members from the decision-making process.

CHAIRPERSON AND THE MINISTER

The chairperson and the Minister must agree on the long term objectives of the Government in relation to the statutory authority. The chairperson must also help to translate those objectives into a strategic plan, and have the Minister 'sign off' that plan as the Government's expectation of performance. The chairperson must also ensure that appropriate reporting arrangements are in place to advise the Minister and that the necessary internal policies, procedures, controls and audits are operating effectively to provide early warning of problems and mechanisms for developing solutions. Appropriate reporting arrangements must be established with the Minister to report progress against this plan on a regular basis (Terlet, 1994).

It is important that in cases of a Minister giving a direction to the board of a statutory authority (not incorporated under the *Public Corporations Act 1993*) such direction should be in writing. If a direction is given verbally, it would be prudent for the board to ensure it clearly understood the Minister's intention regarding the discharge of its responsibilities, to confirm in writing with the Minister the board's understanding (McPherson, 1997). It would be appropriate in these circumstances for the direction to be reported in the next annual report of the statutory authority, to enable transparent accountability for the matter.

The chairperson has a special responsibility to guide the Minister and advisers to an appropriate level of understanding and confidence for the sake of a realistic operating and reporting arrangement without undue interference. To achieve this, the Minister and the chairperson should arrange sufficient time to fully discuss issues and concerns. The chairperson must also help the Minister ensure that the board members selected by the Minister have the appropriate mix of skills to assist the business of the statutory authority (Terlet, 1994).

THE CHAIRPERSON AND THE BOARD

The chairperson must, on behalf of the Government and the public, identify the issues of significance to the board, provide the right environment for consideration of those issues, and ensure that all members have the opportunity to put their views and have them considered. He/she will do this through the structuring of the board agenda and the chairing of the meeting discussion. A carefully structured board meeting deals with routine matters quickly and efficiently, allowing time for attention to the key areas of responsibility (accountability, strategic thinking, monitoring and corporate policy).

The chairperson must be thoroughly familiar with the business of the organisation and would usually be expected to be spokesperson for the board where necessary. The chairperson should guide the other members of the board to understand their individual and collective roles and responsibilities, and encourage them to familiarise themselves with the operations of, and to make real contributions to, the organisation. The chair's responsibility is also to ensure that each member fully contributes his/her skills and experience towards the effective operation of the board and that an effective forum exists to enable the board to examine its own performance.

The chairperson may be involved in establishing criteria for board membership and the recruitment/selection/nomination process for new board members. However, prime responsibility for establishing such criteria rests with the Minister, Cabinet and Parliament.

Specific legislation may override these general principles and board members should be thoroughly conversant with any legislation that applies to their board.

THE CHAIRPERSON AND THE CHIEF EXECUTIVE

The chairperson (depending on the wording of the legislation relating to the board) also establishes the most critical link to the organisation through his/her relationship with the chief executive (CE). The chairperson must be able to strike the right balance in supporting and trusting the CE while retaining an objective view of the management of the organisation. A CE needs a strong board — one that is both demanding and supportive.

Some principles underpinning the relationship between the chairperson and the CE are as follows:

- The CE of a statutory authority should be selected by the Minister in agreement with the board. The board has to hold the CE accountable, and itself be accountable for his/her selection; if it has no say in the selection, it cannot be held responsible for the CE's performance.
- There is a presumption that the CE is not normally a member of the board of a statutory authority, unless a case is made in the particular circumstances of the board. The CE in a statutory authority holds considerable power and has ready access to the Minister. Difficulties could arise if the CE is on the board, when it is the board to which the CE is accountable for the organisation's performance (Terlet, 1994).
- The chairperson and CE should coordinate their involvement with the Minister and ensure that the two channels of communication are consistent and complement each other. They need to agree on the reporting arrangements to the Minister and clarify these with the board and the Minister.
- The engagement of the CE should be the subject of a formal contractual agreement. The chairperson should establish a performance agreement with the CE consistent with the program agreed with the Minister to meet the Government's objectives. Feedback to the CE on performance against agreed objectives should be provided on at least an annual basis (Terlet, 1994).

ROLE OF MEMBERS

Without the control of the budget process, Parliament relies upon the Board of the statutory authority to exercise necessary control and diligence over its activities. A consideration of the duties and responsibilities of Board members of statutory authorities must be considered against this background. The assumption that a statutory authority is a company and that the Government is the shareholder fails to comprehend that the issues are not ones of company law but constitutional and public law: it is from these latter areas that the duties and responsibilities of Board members derive.

A Board member holds a public office under the Crown: it is an office of trust and confidence to perform the duties of overseeing the management of the statutory authority. A Board member's role is to ensure the authority meets its social/political objectives without compromising its financial and legal responsibilities (Terlet, 1994).

The members are required to familiarise themselves with the organisation and with their legal responsibilities as members. If appointed because of special skills (for example financial, legal), members are expected to contribute those skills to the board and the organisation.

Members are expected to prepare for meetings and actively participate in them. Board effectiveness is greatly diminished by members who do not prepare or who do not participate actively in an informed way.

The board needs to actively seek quality information from the CE and assess it critically. An agreed format of board papers, an established proper routine and process, and the opportunity to become familiar with board papers through their early distribution, all contribute to the quality of the information.

Information can be of two important types:

- routine data, such as financial performance figures, which show how the organisation is performing relative to plan and to last year's performance
- specific information that relates to the main agenda items for the meeting.

For proposals put to the board, the members should require that management provide information that clearly defines the issue, presents the alternative solutions and analyses the financial and intangible benefits and costs of pursuing each one. In addition, members should ensure that their agency is properly consulting and listening to its stakeholders.

If formal meetings do not allow members to develop a sense of cohesiveness, they can arrange for other meetings to discuss issues in a less formal setting, perhaps without management present (for example setting up subcommittees that do not include executive members if executive members are on the board).

Defining the long-term strategy for an organisation is an important part of participating in setting the organisation's agenda. It allows members to measure performance against determined key objectives.

In some circumstances, a member's initial high level of enthusiasm diminishes through poor meeting management. Members must weigh seriously the benefits and costs of being a member of a board and accept the position only on the basis of actively seeking an improvement in the performance of the organisation. Members must make their presence felt from the start, ask the obvious or tough questions, and feel free to express 'active dissatisfaction' or 'loyal opposition' to company officers.

ROLE OF THE CHIEF EXECUTIVE

The CE may participate on the board as an executive member or may attend meetings in the capacity of CE. The benefits or disadvantages of the CE's participation as an executive member should be carefully evaluated beforehand. Once again, the legislation under which a board is established will always prevail over these general principles. However, as stated previously under the heading of the Chairperson and the Chief Executive, there is a presumption that the CE is not normally a member of a board of a statutory authority.

The advantages of the CE's participation on the board include a greater commitment and 'ownership' of board outcomes, flow of information, and accountability for implementing decisions and directions. Disadvantages include problems associated with a strong CE dominating a board, and the need for the board to be able to discuss the performance of the CE and the organisation openly and frankly.

The appointment of the CE is one of the most important decisions for a board. If a board has an incumbent CE, it must develop a relationship that supports, but also assesses, the CE's performance. Trust between the board and the CE is very important. The main board relationship is between the CE and the chairperson.

Therefore, the board must exhibit sound judgement and not become too closely identified with the CE nor too oppositional.

2.2. Board performance

Annually, the Minister should review the board's performance with the chairperson or the board as a whole, against the agreed outcomes in the performance agreement.

In preparation for this review, the board could evaluate its own performance through the members:

- discussing their performance as a board
- completing a questionnaire on the board's performance
- having a review meeting facilitated by an outside expert.

The performance of a board can be assessed in the following areas (Owens and Larkin, 1997):

- the board owns and understands the statutory authority's vision, values, mission, strategic plan and business plan, and reflects this understanding on key issues throughout the year
- the board has and follows procedures for effective meetings
- board meetings are conducted in a manner that ensures open communication, meaningful participation and timely resolution of issues
- members receive timely and accurate minutes, advance written agendas and meeting notices, and clear and concise background material before meetings
- members evaluate their individual and overall board performance on a periodic basis
- the board reviews and adopts annual capital and operating budgets which are regularly monitored throughout the year
- the board monitors cash flow, net revenue, expenses, productivity and other financially driven indicators to ensure the statutory authority performs in accordance with performance indicators
- the board regularly monitors performance against corporate plan targets and other benchmarks
- members comprehend and respect the difference between the board's policy-making role and the CE's management role
- the board reviews each year the charter of its committees and their performance
- the board reviews whether its committee structure is adequate and functioning properly
- the board reviews its own size and composition every few years, and whether the authority structure remains effective
- the board reviews whether policies or controls are in place in major areas where the discretion of management should be limited
- the board reviews and monitors its own compliance against its code of conduct (see section 2.5)
- the board regularly reviews its delegations of authority and monitors reports of compliance and use

- skills and competency statements (or job and person specifications) exist for members and are used for performance review and selection
- members are encouraged and supported to undertake relevant training.

2.3. Board member performance

Annually, the chairperson should review each member's performance.

The chairperson can meet with each member to discuss how the member is meeting the board's goals/objectives or other agreed performance targets. Issues which could be covered as part of this review include the following (Owens and Larkin, 1997):

- Does the member attend meetings regularly?
- Does the member participate in site visits and social functions?
- Does the member accept a fair share of committee work?
- Are the member's contributions to committee work of value?
- Does the member make appropriate contact with executives and the chairperson between board meetings?
- Does the member appear to have an understanding of the role of a non-executive member?
- Does the member seem to understand the business sufficiently?
- Does the member seem to read the board papers thoroughly?
- Does the member appear well informed on relevant aspects of the external environment?
- Does the member bring relevant experience to the board table and use it effectively?
- Do the member's contributions carry weight with his/her colleagues?
- Are the member's contributions creative and pick up matters which may have been overlooked by others?
- Are the member's contributions succinct and to the point?
- Does the member maintain good personal relations with colleagues and management?
- Is the member cooperative and helpful?
- Has the member an actual or potential conflict of interest that could be embarrassing?
- Is there any other aspect of the member's performance that could be commented on positively or negatively?

The member should also be given the opportunity to provide feedback to the chairperson on his/her performance.

When a vacancy occurs on a board, the Minister should evaluate the contribution of a member if he/she is being considered for reappointment, and seek a full assessment from the chairperson before offering reappointment to a board member.

Board member performance should be reviewed by the chair annually, prior to the board performance review by the Minister.

2.4. Matters of principle in public administration

CONTRACTUAL ARRANGEMENTS

The Auditor-General (Auditor-General's Department, 1995) raised the following issues/concerns:

Where the tendency inherent in procedures adopted by a Government agency in discharging a public responsibility can fairly and objectively give rise to public concern or a perception of the possibility of a lack of fairness and/or integrity regarding those procedures, such a tendency can itself undermine public confidence in the processes of public institutions. Such tendency can be injurious to the public interest and against the public good [...].

Public concern can be avoided by ensuring that there are publicly known rules of engagement/regulatory arrangements that have been authoritatively endorsed through a public and/or other due process and that there has been compliance with these rules and/or regulations.

The existence of clearly established standards (does) not impose a deterrent to activity by Government agencies to pursue objectives in the public interest. Such standards do however, provide a framework within which dealings with the Government are seen to be objectively reviewable for fairness/integrity and thus maintain the confidence of the community in the processes of public institutions [...].

In all commercial relationships between government and public sector entities, the conduct of the Government and its agencies must be such that the perception of its actions does not allow for the erosion of confidence in the integrity and fairness of the processes of public sector institutions [...].

This issue is important if for no other reason (than) such perceptions may damage the capacity of Government and/or its agencies to enter into future transactions on this basis [...].

External parties have a right to expect fairness in governmental processes.

GOVERNMENT OWNED COMPANIES: THE IMPLIED GUARANTEE

Although a publicly owned entity may have a responsibility under its 'charter' to operate commercially, its resources are owned by the public and it has an obligation to account and conduct its affairs accordingly. The taxpayer, as the ultimate underwriter of the activities of government, is entitled to expect appropriate accountability to the Parliament (Auditor-General's Department, 1996).

The Government's obligations regarding companies has been well documented by the South Australian Solicitor General, B M Selway, QC, in an article in the *Australian Journal of Public Administration* of 3 September 1995 under the title 'Managerialism and the Implied Guarantee' (Auditor-General's Department, 1996):

Can it (the Government) for example, carry on an activity using a limited liability company with the effect that the Government's exposure is limited to the extent of its shareholdings? It is my contention that this sort of risk management is not available within the Australian public sectors by reason of the Government's implied guarantee of such bodies and that the potential operation of such implied guarantee has significant consequences in the consideration of the management of such a body.

He explained the far reaching nature of the implied guarantee as follows:

It should be noted the implied guarantee does not rest on any particular principle or criterion. The implied guarantee may arise irrespective of whether there is government ownership or even government financial involvement. On the other hand, political, financial and other factors may well play a part in determining whether government is subject to some obligation, as will the view of the government, the electorate and others as to what is morally correct. The implied guarantee arises, it would seem from the nature of government itself within the Westminster system as a continuing, perpetual and accountable constitutional entity.

It must be understood that in this context it is not strictly legal criteria which determine the responsibilities and actions expected of government when conducting an operation/activity through an incorporated company, or for that matter in any of its commercial and/or external relationships.

In essence, this means that the board, and indeed the executive management of government-owned companies and public authorities, must, in performing their duties, accord with the highest concepts of public duty. This requires conduct that encompasses standards of honesty, due care and diligence consistent with the responsibility and stewardship of public resources (Auditor-General's Department, 1996).

REQUESTS FOR ADVICE FROM RESPONSIBLE MINISTERS TO BOARDS OF GOVERNMENT-OWNED COMPANIES

During the 1995-96 financial year the Auditor-General (Auditor-General's Department, 1996) was advised of circumstances in which conditions were imposed by a government-owned company on access to information by the responsible Minister, on the basis that the information was 'commercially sensitive'. It must be emphasised that whilst information was not denied, unnecessarily restrictive conditions were sought to be imposed, in the opinion of the Auditor-General, on the Minister's access to the information.

The Articles of Association of a government-owned company should, in the Auditor-General's opinion, provide for the responsible Minister to be entitled to request information from the board from time to time as the Minister sees fit.

To be able to 'request' information would not constitute the Minister a 'director de son tort'. Should the Minister be in a position under the Articles to have the right to 'direct the company board' and for the company board to consider that it had an obligation to comply with the Minister's direction this would constitute the Minister 'a director de son tort' for the purposes of the law. As such, the Minister would be responsible 'as a director' of the company. Where a company has been incorporated, and a board of members appointed, it is clearly not the intention, other than in exceptional circumstances, that the Minister himself/herself assume the responsibilities of a member.

As the person responsible to the Parliament for the operations of a government-owned company, the Minister must be in a position to answer questions in the Parliament on a fully informed basis. As already emphasised, government-owned companies attract the operation of the implied guarantee.

AUDITOR-GENERAL'S SUGGESTION TO ENSURE ACCOUNTABILITY

To ensure that there is no avoidance of proper accountability to the Parliament, in the opinion of the Auditor-General, the responsible Minister should be empowered pursuant to the Articles of Association of all government-owned companies to be able to request and obtain on a timely basis, advice or information from the board regarding the operations or affairs of the company so as to be in a position to be able to answer questions in Parliament on a fully informed basis (Auditor-General's Department, 1996).

2.5. Honesty and accountability for members of government boards

Appointment to a government board places the individual in a unique position of trust. The community expects a high standard of ethical behaviour from the public sector, and to ensure that this expectation is met, public sector appointees operate under a framework of rules dealing with honesty and accountability.

An information paper detailing appointees' legal duties (eg. dealing with conflict of interest), criminal offences and immunity from civil liability, are detailed in the publication 'Honesty and accountability for members of government boards', which is available at: http://www.dpc.sa.gov.au/sites/default/files/pubimages/documents/boards-committees/BC_honesty-accountability.pdf.

ATTENDANCE AT MEETINGS

Members should strive to attend most, if not all, meetings of the board and spend a reasonable amount of time in preparation to ensure that they meet the obligations identified in the terms of reference of the board, its legislative requirements and the member specification. They need to have a significant awareness of the environment and an understanding of the resources available to the board and the organisation to ensure high standards of ethical behaviour within the organisation.

CONFIDENTIALITY OF INFORMATION

Subject to any applicable legislation or terms of reference approved by the responsible minister, all matters discussed or considered by a government board or committee (including papers prepared for and/or considered by the board) should be considered confidential unless instructed otherwise by the responsible Minister.

Board members may not discuss, distribute or release confidential information received in their capacity as a member to a person outside of the board or committee (except to disclose to legal advisers to the extent necessary for the purpose of obtaining legal advice).

2.6. Insurance risk and management arrangements

INDEMNITIES AGAINST CIVIL LIABILITY

Section 74 of the *Public Sector Act 2009* provides that individuals undertaking certain Public Sector roles are protected from civil liability when exercising their official duties. This indemnity extends to most government board and committee members.

Civil liability for board members is discussed at greater length in the publication 'Honesty and accountability for members of government boards', which is available at http://www.dpc.sa.gov.au/sites/default/files/pubimages/documents/boards-committees/BC_honesty-accountability.pdf.

PERSONAL ACCIDENT COVER

Board members are provided with personal accident insurance during their official duties (including travel to and from) under the government's insurance and risk management framework. Full details of the policy are described in section 12 of DPC Circular 16, available at <http://www.dpc.sa.gov.au/boards-and-committees>.

2.7. Travel expenses

Board members are entitled to reimbursement of certain travel and accommodation expenses in accordance with section 11 of DPC Circular 16, which is available at <http://www.dpc.sa.gov.au/boards-and-committees>.

3. Information for members appointed to Boards subject to the Public Corporations Act 1993

3.1. Public Corporations Act 1993

Members of boards which are brought under the *Public Corporations Act 1993* (the Act) and regulations, need to be aware of their particular responsibilities under that legislation. The following information applies specifically to those boards.

Section 5(1) of the Act provides as follows:

- A provision of this Act applies to a statutory corporation to which the provision is declared to apply
- (a) by the corporation's incorporating Act; or
 - (b) by regulation.

The Act is designed to overarch the legislation that incorporates some public trading enterprises (PTEs). PTEs play an important role in delivering services to the State, and continued microeconomic reform will be an important component of successful economic development.

However, many of the organisations the Department of Treasury and Finance lists as public trading (or financial) enterprises, have not been brought under the provisions of the Act. Accountability is more clear cut for PTEs than for some other statutory authorities but there can still be some difficulty in determining which PTEs are suitable to be brought under the legislation.

While this legislation has been developed primarily to advance accountability and performance of PTEs in support of the Government's commercialisation policy, it need not be limited to PTEs. One view is that the Government may consider that other major statutory authorities are suited to come under this legislation.

With the enactment of the public corporations legislation, boards affected by it are subject to significant new responsibilities and duties, and can be held more accountable for results. The legislation also requires the formation of audit committees. These factors are expected to increase both the responsibility and time commitment associated with membership of these boards.

The legislation and supporting policy on commercialisation emphasise the importance of attracting the best mix of managerial and commercial knowledge and skills for the boards to be able to fulfil these responsibilities. This has often proved difficult in the past for a number of reasons, including:

- the limited number of private-sector boards in this State from which suitable candidates can be drawn
- the complexities associated with Parliamentary accountability which may be unfamiliar to those from a commercial background
- the complexities associated with Ministers' power to direct boards
- remuneration scales.

The legislation attempts to address the accountability and power of direction issues by putting in place more 'transparent' arrangements between boards, Ministers and Parliament. However, more commercially acceptable remuneration practices may be required to ensure that suitably qualified persons are willing to serve.

The legislation also requires the development of an annual performance statement for each corporation stipulating, in quantified terms, the targets to be achieved by the public corporation. Measures stipulated in the statement should focus on performance (economic, financial and non-financial) and, where appropriate, risk. This statement forms the basis for regular monitoring effort and focuses on outputs and outcomes.

Members of statutory corporations subject to the Act are required to comply with the legislation.

3.2. Duties and liabilities of members²

Other sources of legal responsibility for members of statutory corporations include:

- the incorporating Act of each corporation
- the common law, especially as regards the fiduciary nature of the relationship between the member and the corporation
- specific statutory enactments for example anti-discrimination and environment protection legislation.

The biggest impact of the Act is in the area of the common law duties. Members of public corporations still need to be familiar with any special requirements of the legislation incorporating their corporations and are obliged to comply with specific statutory enactments. The Act codifies many of the common law duties and imports into the public sphere many of the obligations placed on members of private companies via the Corporations Law.

The following outline is intended to provide a brief overview of the duties and obligations that members of public corporations owe to the corporation. It is not intended to be a comprehensive study, and all appointees to boards of statutory corporations should be familiar with the provisions of the Act.

The duties and liabilities imposed by the Act are found for the most part in Part 4 of the Act. The duties can be divided into three distinct areas:

- general management obligations of the board
- statutory elaboration of common law duties
- other provisions.

The following paraphrasing of sections of the Act in no way diminishes a member's responsibility to obtain his/her own copy of the Act and to comply with its requirements. See Appendix D for a copy of these sections of the Act.

3.3. Governance

The requirements imposed on members in relation to the general management of a public corporation are contained in section 14 of the Act.

Section 14(1) The Board of a public corporation is responsible to its Minister for overseeing the operations of the corporation and its subsidiaries with the goal of:

(a) securing continuing improvements of performance; and

² The Public Corporations Act distinguishes between statutory corporations to which the Act is declared to apply, and subsidiaries of such statutory corporations. The treatment of subsidiaries differs in some respects from the treatment of the statutory corporations themselves.

(b) protecting the long term viability of the corporation and the Crown's financial interests in the corporation.

The remainder of section 14 contains a list of the functions that the board has a responsibility (as far as practicable) to ensure are undertaken. These include:

- establishment of strategic and business plans
- establishment of management structures for monitoring the corporation's performance
- establishment of systems for management and financial planning and control and the maintenance of accurate records
- regular review and revision of plans, targets, systems and practices
- compliance with the corporation's incorporating Act and charter and with the law generally
- observance of high standards of corporate and business ethics
- regular reporting to the Minister
- immediate notification to the Minister of any material development affecting the financial or operating capacity of the corporation
- provision of accurate and comprehensive information to the Minister.

3.4. Statutory elaboration of common law duties

MEMBERS' DUTIES OF CARE

Members of public corporations are required (section 15 of the Act) to exercise a reasonable degree of care and diligence in the performance of their functions. They must:

- take reasonable steps to keep informed about the business of the corporation and its subsidiaries
- take reasonable steps to have sufficient background information on matters to be decided by the board to enable them to make conscientious and informed decisions
- exercise an active discretion in all decisions to be made by the board.

It is an offence to be culpably negligent in the performance of a member's functions. The penalty is a fine of up to \$15,000.

MEMBERS' DUTY OF HONESTY

Section 16 requires members of public corporations to act honestly at all times in the performance of their functions as members.

Members and former members of public corporations must not make improper use of information acquired by virtue of their position to gain any advantage for themselves or others or to cause detriment to the corporation or its subsidiaries.

Nor may members make improper use of their position to gain either a direct or indirect advantage for themselves or for someone else or cause detriment to the corporation or its subsidiaries.

Breach of either of these requirements attracts a fine of up to \$15,000 or imprisonment for up to four years or both.

Transactions (section 17 of the Act) between members and the corporation are generally prohibited. Neither members nor their associates³ can be directly or indirectly involved in transactions with the corporation. Members or their associates may not hold an interest in the corporation (eg shares or debentures).

An interest in the corporation or a subsidiary may be held by a member or an associate of the member only if the Minister has given prior approval.

Again, breaches of these provisions attract penalties of up to \$15,000 or up to four years imprisonment.

3.5. Other provisions

CONFLICT OF INTEREST

Section 19 requires disclosure of a conflict of interest to the board as soon as reasonably practicable. If a member has a direct or indirect personal or pecuniary interest in a matter to be decided by the board, the member must:

- as soon as reasonably practicable disclose to the board full and accurate details of the interest
- not take any part in board discussions concerning the matter
- not vote in relation to the matter
- be absent from the meeting room when any discussion or voting is taking place.

Non-compliance with these requirements attracts a fine of up to \$15,000.

A member must disclose potential conflicts as soon as he/she becomes aware that it is reasonably foreseeable that the possibility of conflict has arisen.

Where a conflict of interest is declared, the declaration has to be recorded in the minutes and reported to the Minister. If the conflict is so significant that, in the Minister's view, the holding of the interest or office is not consistent with the proper discharge of the member's duties, the Minister may require the member either to divest himself/herself of the interest or office, or resign from the board.

See Appendix A for a suggested 'Declaration of Pecuniary Interests' form.

CIVIL LIABILITY

The Act also imposes civil liability (section 21 of the Act) if a member or former member has contravened the duties of care and honesty imposed by Part 4 of the Act.

A person who is or has been a member can be ordered by the court which convicts a person charged with breach of the Act, to pay to the corporation an amount equal to any profit made by the person as a result of the contravention. It can also order that compensation for loss or damage suffered by the corporation as a result of the contravention be paid to the corporation. Subject to those limitations, members have the benefit of complete immunity for their honest acts.

³ 'Associates' is a widely defined term, and includes relatives, relatives of spouses, trustees of a trust of which directors and their associates are beneficiaries, and bodies corporate where a director and/or an associate holds a relevant interest in shares of 10% or more of the body corporate.

In addition, the corporation or its Minister can issue civil proceedings for recovery of profit, and for compensation for loss or damage suffered by the corporation, even in the absence of a criminal conviction.

Public officer offences are also addressed in the *Criminal Law Consolidation Act 1935* (sections 237 and 238).

MEMBERS' IMMUNITY

Members of public corporations incur no civil liability (section 22) for honest acts or omissions in the performance or discharge of their functions as a member except as otherwise provided in the Act (see also section 2.6 on Insurance and risk management arrangements).

4. References

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Walter, MD. 1997. *Crown Solicitor's Advice on Guidelines for Agencies and Board Members of 10 June, 1997*.

5. Suggested reading

Commissioner for Public Sector Employment, South Australia, 1994. *Code of Ethics - SA Public Sector* (20 pages).

This booklet provides a guide for the proper behaviour of public employees in South Australia. It gives details of the ethical conduct required of public employees and indicates types of unacceptable behaviour. Members are encouraged to obtain a copy of the code and read it in conjunction with section 2.5 of these Guidelines: Code of Conduct for Directors of Boards. The code is available at <http://files.oper.sa.gov.au/files/CodeOfEthics.pdf>.

Business Council of Australia. 1995. *Corporate Practices and Conduct, 3rd edition*, Pitman Publishing (58 pages).

A working group chaired by Henry Bosch AO, produced this booklet for the Australian Institute of Company Directors, the Australian Society of Certified Practising Accountants, the Business Council of Australia, the Law Council of Australia (Business Law Section), the Institute of Chartered Accountants in Australia, and the Securities Institute of Australia. The booklet is available from the Australian Institute of Company Directors.

Price Waterhouse. 1991. *Directors' Responsibilities — A Working Guide for Australia* (26 pages).

Baxt, R. 1998. *Duties and Responsibilities of Directors and Officers, 14th edition* Australian Institute of Company Directors (124 pages).

Written by Professor Bob Baxt, BA, LLB, LLM, this book is available from the Australian Institute of Company Directors.

Bosch, H. 1995. *The Director at Risk, Accountability in the Boardroom*, Pitman Publishing (249 pages).

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Public Corporations Act 1993.

All members of boards brought under the provisions of the Public Corporations Act must have their own copy of the Act. Copies of the Act are available from <http://www.legislation.sa.gov.au>

Statutory Authorities Review Committee. 1997. *(Thirteenth Report) Boards of Statutory Authorities: Recruitment, Gender Composition, Remuneration and Performance* (98 pages).

Copies are available from the Statutory Authorities Review Committee, Parliament House, North Terrace, Adelaide 5000, Tel 8237 9417.

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Presented to the members of the Legislative Assembly, Sydney, June 1997. Available on the Internet at <http://www.audit.nsw.gov.au>, or e-mail: mail@audit.nsw.gov.au, or Tel (02) 9285 0155 (Audit Office of New South Wales).

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Available from the Public Sector Management Office, Ministry of the Premier and Cabinet, Western Australia and on the Internet at <http://www.wa.gov.au/psmo/pubs/directory/guides/hrpp/train/boards>

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This report is available from the Office of Public Employment of Victoria.

6. Appendices

APPENDIX A - Declaration of Pecuniary Interests

Confidential

DECLARATION OF PECUNIARY INTERESTS

SURNAME:

OTHER NAMES:.....

DATE OF BIRTH:.....

ADDRESS:.....

Registrable Interests	Details
1. The income Source ¹ of any financial benefit ² which you received or were entitled to receive during any part of the previous twelve months.	
2. The name of any company or other body in which you held office as director or otherwise during the previous twelve months.	
3. The name or description of any company or other body in which you hold a beneficial interest.	
4. The name of any association or trade or professional organisations of which you are or have been a member during the past twelve months.	
5. A concise description of any trust in which you hold a beneficial interest or a potential beneficial interest.	
6. A concise description of any trust or other body in which a member of your family ³ holds a beneficial interest or a potential beneficial interest.	

¹ "Income source" means: a) any person or body of persons with whom you entered into a contract of service or held any paid office; or b) any trade, vocation or profession engaged in by you.

² "Financial benefit" means: a) the remuneration fee, salary or other pecuniary sum received by you in respect of any contract of service entered into or paid office held by you; and b) the total of all remuneration fees or other pecuniary sums received by you in respect of any trade, profession or vocation engaged in by you.

³ "Family" to include de facto spouse, dependant children and other members of the household or family with closely connected interest.

7. The address or description of any property ⁴ in which you hold a beneficial interest (other than by way of security for a debt).	
8. The source of any significant contribution in cash or in kind for travel beyond South Australia undertaken by you during the previous twelve months (but not including contributions from public funds).	
9. Any gift exceeding \$500 received by you from a person other than a relative by blood or marriage.	
10. Any other substantial interest (whether of a pecuniary nature or not) held by you or a member of your family of which you are aware and which you consider might appear to raise a material potential conflict with your public duty.	
11. Any criminal conviction, financial or taxation dealing and any other matter that might render or be seen to render you unfit for this office.	

I will undertake to declare any change in circumstances that might be seen to cause a potential conflict of interests.

Signature:..... Signature of Witness:

Date:

⁴ "Property" to include private residence, land and other real estate.

Appendix B - Public Corporations Act duties and liabilities of board and director

GENERAL MANAGEMENT DUTIES OF BOARD

- 14.(1) The board of a public corporation is responsible to its Minister for overseeing the operations of the corporation and its subsidiaries with the goal of -
- (a) securing continuing improvements of performance;
- and
- (b) protecting the long term viability of the corporation and the Crown's financial interests in the corporation.
- (2) Without limiting the effect of subsection (1), the board must for that purpose ensure as far as practicable -
- (a) that appropriate strategic and business plans and targets are established that are consistent with the corporation's charter and performance statement;
 - (b) that the corporation and its subsidiaries have appropriate management structures and systems for monitoring management performance against plans and targets and that corrective action is taken when necessary;
 - (c) that appropriate systems and practices are established for management and financial planning and control, including systems and practices for the maintenance of accurate and comprehensive records of all transactions, assets and liabilities and physical and human resources of the corporation and its subsidiaries;
 - (d) that all such plans, targets, structures, systems and practices are regularly reviewed and revised as necessary to address changing circumstances and reflect best current commercial practices;
 - (e) that the corporation and its subsidiaries operate within the limits imposed by the corporation's incorporating Act and charter and comply with the requirements imposed by or under this or any other Act or law;
 - (f) that the corporation and its subsidiaries observe high standards of corporate and business ethics;
 - (g) that the corporation's Minister receives regular reports on the performance of the corporation and its subsidiaries and on the initiatives of the board;
 - (h) that the corporation's Minister is advised, as soon as practicable, of any material development that affects the financial or operating capacity of the corporation or any of its subsidiaries or gives rise to an expectation that the corporation or any of its subsidiaries may not be able to meet its debts as and when they fall due;
- and
- (i) that all information furnished to the corporation's Minister by the corporation or any of its subsidiaries is accurate and comprehensive.

DIRECTORS' DUTIES OF CARE, ETC.

- 15.(1)** A director of a public corporation must at all times exercise a reasonable degree of care and diligence in the performance of his or her functions, and (without limiting the effect of the foregoing) for that purpose -
- (a) must take reasonable steps to inform himself or herself about the corporation and its subsidiaries, their businesses and activities and the circumstances in which they operate;
 - (b) must take reasonable steps through the processes of the board to obtain sufficient information and advice about all matters to be decided by the board or pursuant to a delegation to enable him or her to make conscientious and informed decisions;
- and
- (c) must exercise an active discretion with respect to all matters to be decided by the board or pursuant to a delegation.
- (2) A director is not bound to give continuous attention to the affairs of the corporation but is required to exercise reasonable diligence in attendance at and preparation for board meetings.
- (3) In determining the degree of care and diligence required to be exercised by a director, regard must be had to the skills, knowledge or acumen possessed by the director and to the degree of risk involved in any particular circumstances.
- (4) If a director of a public corporation is culpably negligent in the performance of his or her functions, the director is guilty of an offence.

Penalty: Division 4 fine.

- (5) A director is not culpably negligent for the purposes of subsection (4) unless the court is satisfied the director's conduct fell sufficiently short of the standards required under this Act of the director to warrant the imposition of a criminal sanction.
- (6) A director of a public corporation does not commit any breach of duty under this section by acting in accordance with a direction or requirement of the Minister or the Treasurer under this Act.

DIRECTORS' DUTIES OF HONESTY

- 16.(1)** A director of a public corporation must at all times act honestly in the performance of the functions of his or her office, whether within or outside the State.

Penalty: Division 4 fine or division 4 imprisonment, or both.

- (2) A director or former director of a public corporation must not, whether within or outside the State, make improper use of information acquired by virtue of his or her position as such a director to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation or any of its subsidiaries.

Penalty: Division 4 fine or division 4 imprisonment, or both.

- (3) A director of a public corporation must not, whether within or outside the State, make improper use of his or her position as a director to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation or any of its subsidiaries.

Penalty: Division 4 fine or division 4 imprisonment, or both.

TRANSACTIONS WITH DIRECTORS OR ASSOCIATES OF DIRECTORS

- 17.(1)** Neither a director of a public corporation nor an associate of a director of a public corporation may, without the approval of the corporation's Minister, be directly or indirectly involved in a transaction with the corporation or a subsidiary of the corporation.

- (2) A person will be treated as being indirectly involved in a transaction for the purposes of subsection (1) -

- (a) if the person initiates, promotes or takes any part in negotiations or steps leading to the making of the transaction with a view to that person or an associate of that person gaining some financial or other benefit (whether immediately or at a time after the making of the transaction);

and

- (b) despite the fact that neither that person nor an agent, nominee or trustee of that person becomes a party to the transaction.

- (3) Subsection (1) does not apply -

- (a) to -

- (i) the receipt by the corporation or a subsidiary of the corporation of deposits of money or investments;
- (ii) the provision of loans or other financial accommodation by the corporation or a subsidiary of the corporation for domestic or non-commercial purposes;
- (iii) the provision of accident, health, life, property damage or income protection insurance or insurance against other risks (excluding credit or financial risks) by the corporation or a subsidiary of the corporation;
- (iv) the provision of services (other than financial or insurance services) by the corporation or a subsidiary of the corporation, in the ordinary course of its ordinary business and on ordinary commercial terms;

or

- (b) to transactions of a prescribed class.

- (4) If a transaction is made with a public corporation or a subsidiary of a public corporation in contravention of sub section (1), the transaction is liable to be avoided by the corporation or by the corporation's Minister.

- (5) A transaction may not be avoided under subsection (4) if a person has acquired an interest in property the subject of the transaction in good faith for valuable consideration and without notice of the contravention.
- (6) A director of a public corporation must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subsection (1).

Penalty: If an intention to deceive or defraud is proved - Division 4 fine or division 4 imprisonment, or both.

In any other case - Division 6 fine.

DIRECTORS' AND ASSOCIATES' INTERESTS IN CORPORATION OR SUBSIDIARY

- 18. (1)** Neither a director of a public corporation nor an associate of a director of a public corporation may, without the approval of the corporation's Minister -
- (a) have or acquire a beneficial interest in shares in, debentures of or prescribed interests made available by the corporation or any subsidiary of the corporation;
 - (b) have or hold or acquire (whether alone or with another person or persons) a right or option in respect of the acquisition or disposal of shares in, debentures of or prescribed interests made available by the corporation or any of its subsidiaries;
- or
- (c) be a party to, or entitled to a benefit under, a contract under which a person has a right to call for or make delivery of shares in, debentures of or prescribed interests made available by the corporation or any of its subsidiaries.
- (2) A director of a public corporation must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subsection (1).

Penalty: If an intention to deceive or defraud is proved - Division 4 fine or division 4 imprisonment, or both.

In any other case - Division 6 fine.

CONFLICT OF INTEREST

- 19. (1)** A director of a public corporation who has a direct or indirect personal or pecuniary interest in a matter decided or under consideration by the board -
- (a) must, as soon as reasonably practicable, disclose to the board full and accurate details of the interest;
 - (b) must not take part in any discussion by the board relating to that matter;
 - (c) must not vote in relation to that matter;

and

- (d) must be absent from the meeting room when any such discussion or voting is taking place.

Penalty: Division 4 fine.

- (2) If a director makes a disclosure of interest and complies with the other requirements of subsection (1) in respect of a proposed contract -
 - (a) the contract is not liable to be avoided by the corporation;and
 - (b) the director is not liable to account to the corporation for profits derived from the contract.
- (3) If a director fails to make a disclosure of interest or fails to comply with any other requirement of subsection (1) in respect of a proposed contract, the contract is liable to be avoided by the corporation or by the corporation's Minister.
- (4) A contract may not be avoided under subsection (3) if a person has acquired an interest in property the subject of the contract in good faith for valuable consideration and without notice of the contravention.
- (5) Where a director of a public corporation has or acquires a personal or pecuniary interest, or is or becomes the holder of an office, such that it is reasonably foreseeable that a conflict might arise with his or her duties as a director of the corporation, the director must, as soon as reasonably practicable, disclose full and accurate details of the interest or office to the board of the corporation.

Penalty: Division 4 fine.

- (6) A disclosure under this section must be recorded in the minutes of the board and reported to the corporation's Minister.
- (7) If, in the opinion of the corporation's Minister, a particular interest or office of a director is of such significance that the holding of the interest or office is not consistent with the proper discharge of the duties of the director, the Minister may require the director either to divest himself or herself of the interest or office or to resign from the board (and non-compliance with the requirement constitutes misconduct and hence a ground for removal of the director from the board).
- (8) Without limiting the effect of this section, a director will be taken to have an interest in a matter for the purposes of this section if an associate of the director has an interest in the matter.
- (9) This section does not apply in relation to a matter in which a director has an interest while the director remains unaware that he or she has an interest in the matter, but in any proceedings against the director the burden will lie on the director to prove that he or she was not, at the material time, aware of his or her interest.

REMOVAL OF DIRECTOR

- 20.** Non-compliance by a director of a public corporation with a duty imposed by this Act constitutes a ground for removal of the director from office in accordance with the provisions of the corporation's incorporating Act.

CIVIL LIABILITY IF DIRECTOR OR FORMER DIRECTOR CONTRAVENES THIS PART

- 21. (1)** If a person who is a director or former director of a public corporation is convicted of an offence for a contravention of this Part (other than an offence consisting of culpable negligence), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the corporation -
- (a) if the court is satisfied that the person or any other person made a profit as a result of the contravention - an amount equal to the profit;
- and
- (b) if the court is satisfied that the corporation or a subsidiary of the corporation suffered loss or damage as a result of the contravention - compensation for the loss or damage.
- (2)** If a person who is a director or former director of a public corporation is guilty of a contravention of this Part for which a criminal penalty is fixed (other than a contravention consisting of culpable negligence), the corporation or the corporation's Minister may (whether or not proceedings have been brought for the offence) recover from the person by action in a court of competent jurisdiction -
- (a) if the person or any other person made a profit as a result of the contravention - an amount equal to the profit;
- and
- (b) if the corporation or a subsidiary of the corporation suffered loss or damage as a result of the contravention - compensation for the loss or damage.

IMMUNITY FOR DIRECTORS

- 22. (1)** Except as otherwise provided by this Act, a director of a public corporation incurs no civil liability for an honest act or omission in the performance or discharge, or purported performance or discharge, of functions or duties as such a director.
- (2)** A liability that would, but for subsection (1), lie against a director of a public corporation lies instead against the corporation.