

Guidelines for Tasmanian Government Businesses

Corporate Governance Principles

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Corporate Governance Principles

Introduction

Corporate governance describes the processes and structures for overseeing the direction and management of an enterprise so that it effectively achieves its objectives. Good corporate governance practices have the potential to enhance business performance, improve risk management and augment business integrity and reputation with shareholders and financial markets.

In the public sector, corporate governance is also about the interaction of Parliament, the Treasurer and Portfolio Minister (as Shareholder Ministers) and the board of directors in stewardship and accountability matters.

The duties of Government business boards are similar in many ways to their private sector counterparts, but there are significant differences in the legal, regulatory and operational environments that shape the responsibilities and expectations facing Government business boards. Government business boards need to understand and consider these differences when constructing their governance regimes.

The ASX Corporate Governance Council's (the Council's) eight corporate governance principles and recommendations¹, which were developed with listed companies in mind, form the basis of good corporate governance practices that may be adopted by Government businesses. The purpose of this document is to provide a general discussion of matters, in the context of each of the Council's eight principles, which Government businesses may take into consideration as a result of Government ownership. It should be noted that this discussion is not intended to be prescriptive, nor provide an exhaustive list of matters that should be taken into account by Government businesses.

It is recognised that there is no single model of corporate governance that is appropriate for all Government businesses given their varying size and scope of business activities. Accordingly, this is intended as a guide, to assist the board in its implementation of good corporate governance practices. Complementing this document are the Guidelines for Tasmanian Government Businesses (the Guidelines) which are published on the website of the Department of Treasury and Finance.

Consistent with the Council's approach to its recommendations, the Guidelines are not directions but are intended to assist boards in adopting good corporate governance practices. The Council notes that if a company considers that a recommendation is inappropriate to its particular circumstances, it has the flexibility not to adopt it – a flexibility tempered by the requirement to explain why – the “if not, why not” approach. Each Government business board is expected to undertake a similar approach in adopting the Guidelines, and disclose any departure in the businesses' Annual Report.

¹ *Corporate Governance Principles and Recommendations – 2nd Edition*, ASX Corporate Governance Council, August 2007.

PRINCIPLE 1 - LAY SOLID FOUNDATIONS FOR MANAGEMENT AND OVERSIGHT

Companies should recognise and publish the respective roles and responsibilities of board and management.

The company's framework should be designed to:

- enable the board to provide strategic guidance for the company and effective oversight of management;
- clarify the respective roles and responsibilities of board members and senior executives in order to facilitate board and senior executives' accountability to both the company and its shareholders; and
- ensure a balance of authority so that no single individual has unfettered powers.

GENERAL

In undertaking the management and oversight of a Government business, directors and senior management must be aware of their respective roles and responsibilities under the relevant Government Business Enterprise (GBE) and State-owned Company (SOC) governance framework, taking into consideration:

- legislative requirements laid out in Tasmanian and Commonwealth legislation, including the Portfolio Acts of Government businesses; *Government Business Enterprises Act 1995* (GBE Act) and *Corporations Act 2001* (Corporations Act);
- current policies of the Government; and
- expectations of the Shareholder Ministers detailed in constitutions, ministerial charters, shareholders' statements of expectations or otherwise specified in writing.

ACCOUNTABILITY

Due to the nature of ownership of the business, the relationship between the board and the Shareholder Ministers generally requires more frequent interaction than that required between boards and shareholders in public listed companies.

This is because the Shareholder Ministers, who represent the Government on behalf of the Tasmanian community, are accountable to Parliament for the performance and strategic direction of each Government business through the channels provided by the portfolio legislation, ministerial charter, corporate/business plan, and constitution.

On this basis, the roles and responsibilities of both the board and senior management must be clearly identified, which in-turn will provide for accountability to both the business and the Shareholder Ministers.

It is important for the board to recognise that, through Government ownership of the business, it will be subject to parliamentary and community scrutiny.

LEGISLATIVE REQUIREMENTS

The GBE Act prohibits a person holding the office of chief executive officer of the respective Government business in conjunction with the office of chair. This ensures clear separation of the respective role and responsibilities of the chair and chief executive officer.

The GBE Act requires the board to conduct an annual performance review of the chief executive officer and provide its findings to the Portfolio Minister.

BOARD CONSIDERATIONS

- The board should identify the respective roles of the board and management in the context of legislative requirements and the written expectations of the Shareholder Ministers.
- The respective roles of the board and management should be published in the Annual Report.
- The board should publicly disclose the process for performance evaluation of the board, its committees and individual directors, and performance evaluation of key executives.
- The chair and chief executive officer are required to formally attend and respond to questions at the Government Business Scrutiny Committees.

PRINCIPLE 2 - STRUCTURE THE BOARD TO ADD VALUE

Companies should have a board of an effective composition, size and commitment to adequately discharge its responsibilities and duties.

An effective board is one that facilitates the effective discharge of the duties imposed by law on the directors and adds value in a way that is appropriate to the particular company's circumstances. The board should be structured in such a way that it:

- has a proper understanding of, and competence to deal with, the current and emerging issues of the business;
- exercises independent judgement;
- encourages enhanced performance of the company; and
- can effectively review and challenge the performance of management.

Ultimately the directors are elected by the shareholders. However, the board and its delegates play an important role in the selection of candidates for shareholder vote.

GENERAL

Under provisions in the GBE Act, or the Portfolio Act, a director of a GBE (including the chair) is appointed by the Governor on the recommendation of the Shareholder Ministers.

The GBE Act also prescribes that the board may provide the Shareholder Ministers with its recommendations, in writing, in respect of the appointment of a chair or another director.

The constitution of each SOC requires directors to be appointed by the Members of the company.

To ensure there is a fair and transparent director appointment process, a director selection advisory panel will be established to consider all potential candidates and provide a shortlist to the Shareholder Ministers for their consideration.

The advisory panel consists of the Secretary of Treasury or the Secretary of the relevant Portfolio Department, the chair of the Government business or their representative (eg where appointment of the chair is being considered), and an independent member with either corporate governance/board appointment expertise or industry experience relevant to the business.

LEGISLATIVE REQUIREMENTS

The GBE Act, and in some cases GBE portfolio legislation, specifies the requirements in relation to the appointment (and removal) of the chair, directors and the chief executive officer of a GBE, including:

- the authority given to both appoint and remove directors, including circumstances under which directors may be removed;

- the level of input by the board in new director appointments;
- the minimum and maximum complement of the board, including the chair;
- the authority given to appoint the chief executive officer;
- that the person holding the position of chief executive officer cannot concurrently hold the position of chair of the GBE; and
- the level of input by the board in the appointment of the chief executive officer.

The constitution of each SOC and the Corporations Act specify the requirements relating to the appointment (and removal) of the chair, directors and the chief executive officer. The enabling legislation of each SOC may also stipulate requirements relating to directors, such as the process for appointment of directors.

COMMITTEES

The GBE Act requires the board of a GBE to establish an audit committee and prescribes special requirements in relation to the establishment of any GBE committee, eg the chief executive officer of a GBE may not be a member of its audit committee.

The board should consider establishing a board nomination committee responsible for considering the required skills of the board, reviewing succession plans, considering appointment of directors and board performance evaluation.

BOARD CONSIDERATIONS

- The board should regularly review how many positions it needs.
- All board positions should have a role statement or position description.
- For all upcoming director vacancies, the board should provide to the director selection advisory panel the names of up to three suitably qualified candidates (including any retiring director assessed as suitable for an upcoming position and seeking appointment for a further term), together with supporting information.
- The board should consider the skill set of the current board members and identify areas that need strengthening when making the recommendation.
- The board must be able to effectively review and challenge the recommendations of management and directors must ensure they have the required information to make a decision. This may mean that if the current board structure does not contain the relevant expertise to make an informed decision on a major issue the board should seek independent advice.
- The board should ensure that board performance reviews are undertaken at least annually.
- The board should publicly disclose the process for performance evaluation of the board, its committees and individual directors.
- The board needs to consider succession planning to manage future and unanticipated retirements of directors from office in conjunction with changing requirements of the business. The staggering of director appointments will assist in this regard.
- To ensure adequate board renewal, a director will generally be appointed for a maximum of two or three terms, (ie a maximum of six or nine years of continuous service). The Shareholder Ministers will consider increasing the number of terms on a case by case basis.

PRINCIPLE 3 - PROMOTE ETHICAL AND RESPONSIBLE DECISION-MAKING

Companies should actively promote ethical and responsible decision-making.

To make ethical and responsible decisions, companies should not only comply with their legal obligations, but should also consider the reasonable expectations of their stakeholders including: shareholders, employees, customers, suppliers, creditors, consumers and the broader community in which they operate. It is a matter for the board to consider and assess what is appropriate in each company's circumstances. It is important for companies to demonstrate their commitment to appropriate corporate practices and decisions making.

GENERAL

As Government businesses are accountable to the Parliament and ultimately the Tasmanian community, there is an expectation that those charged with the responsibility for the management and operations of a Government business will ensure that the business operates with the highest level of ethical behaviour.

LEGISLATIVE REQUIREMENTS AND MINISTERS' EXPECTATIONS

Part 5 of the GBE Act prescribes certain powers and duties of directors and staff of a GBE. Part 5 covers such matters as:

- the duties of officers and employees including a duty to act in the best interest of the GBE, for proper purpose and to prevent insolvent trading;
- false or misleading information; and
- the requirements for directors to disclose material personal interests.

The ministerial charter of a GBE specifies the Shareholder Ministers' expectations of the business, management and staff to be committed to the highest standards of practice and behaviour.

In the case of a SOC, the Corporations Act and the constitution prescribe the powers and duties of directors and officers.

The Shareholders' Statement of Expectations requires a board of a SOC to be ethical in its operations and dealings, and to act with the highest standards of probity.

A Director Induction Checklist has been provided to each Government business for the purpose of ensuring that new directors are provided with (amongst other things) information relating to expected standards of ethical behaviour, including but not limited to:

- a business specific code of conduct;
- board specific conflict of interest procedures and documentation; and
- a copy of the Duties and Responsibilities of Company Directors and Officers (published by the Australian Institute of Company Directors and updated annually).

BOARD CONSIDERATIONS

The board should maintain and make publicly available its code of conduct in relation to standards of ethical behaviour required of directors and senior management.

PRINCIPLE 4 - SAFEGUARD INTEGRITY IN FINANCIAL REPORTING

Companies should have a structure to independently verify and safeguard the integrity of the company's financial reporting.

This requires companies to put in place a structure of review and authorisation designed to ensure the truthful and factual presentation of the company's financial position. The structure would include, for example:

- review and consideration of the financial statements by the audit committee; and
- a process to ensure the independence and competence of the company's external auditors.

Such a structure does not diminish the ultimate responsibility of the board to ensure the integrity of the company's financial reporting.

GENERAL

The board of a Government business is charged with the responsibility of ensuring that financial reporting by the business meets a high level of integrity and that all applicable reporting requirements are met.

LEGISLATIVE REQUIREMENTS

The GBE Act prescribes that the board must establish an Audit Committee, and further prescribes particular functions that the Audit Committee must undertake. The GBE Act also prescribes requirements in relation to the provision of information to the Auditor-General.

The constitution of each SOC provides for the Members to appoint the auditor of the company from time to time, and the expectation is that this will be the Tasmanian Auditor-General. The appointment of the auditor is normally confirmed at the SOC's annual general meeting.

BOARD CONSIDERATIONS

The board should be mindful that the GBE Act and the enabling legislation of SOCs require that annual reports be tabled in each House of Parliament, and therefore will be subject to the scrutiny of all members of the Parliament and the community in general.

The Corporations Act for SOCs and the Treasurer's Instructions for GBEs define the declaration/certification that directors must make regarding the financial statements in the annual report.

The Treasurer's Instructions for GBEs require the financial statements be certified by the chief executive officer and chief financial officer prior to approval by the board. Although not mandatory for unlisted companies, SOC boards should implement formal sign-off procedures for the financial statements by the chief executive officer and chief financial officer prior to approval by the board.

PRINCIPLE 5 - MAKE TIMELY AND BALANCED DISCLOSURE

Companies should promote timely and balanced disclosure of all material matters concerning the company.

Companies should put in place mechanisms designed to ensure compliance with the ASX Listing Rule requirements such that:

- all investors have equal and timely access to material information concerning the company – including its financial position, performance, ownership and governance; and
- company announcements are factual and presented in a clear and balanced way. “Balance” requires disclosure of both positive and negative information.

GENERAL

Under the reporting frameworks for GBEs and SOCs, specific information (financial and non-financial) must be provided to the Shareholder Ministers on a regular basis. Specific information must also be provided where the business intends to undertake large projects. Treasury has a role to review information provided by Government businesses and provide advice to the Shareholder Ministers. Treasury may seek further information from businesses as required to fulfil this role.

The ASX Listing Rules require listed companies to continuously disclose share price sensitive information. As Government-owned businesses, it is vital that the Shareholder Ministers be kept informed of all matters that may have a material impact (financial or otherwise) on the business or potentially adverse implications for Government.

LEGISLATIVE REQUIREMENTS AND MINISTERS' EXPECTATIONS

The Government's policy objectives are specified in ministerial charters for GBEs and shareholders' statements of expectations for SOCs, or may be advised separately in writing.

An example of a key policy objective is the Government's Fiscal Strategy that is detailed in the State Government's Budget papers.

Issues the Government will need to be kept informed of may include material financial impacts (both positive and negative) in relation to debt/borrowings, tax equivalent payments, dividend policy and payments, and guarantee fees, as well as material non-financial impacts.

Section 13 of the GBE Act specifies the circumstance under which the board must notify the Shareholder Ministers of any development that, in the opinion of the board, may be significant. The ministerial charter requires the board to maintain written policies on information disclosure and a system to ensure the information is disclosed to the Shareholder Ministers.

The constitution of each SOC requires it to advise the Members of the company of certain significant developments and shareholders' statements of expectations include the expectation that the Shareholder Ministers are kept informed.

BOARD CONSIDERATIONS

GBEs and SOCs should have:

- written policies and procedures on information disclosure that focus on continuous disclosure and appropriate access to information by the Shareholder Ministers; and
- a system in place to ensure that information is disclosed in a timely fashion as soon as it becomes available.

PRINCIPLE 6 - RESPECT THE RIGHTS OF SHAREHOLDERS

Companies should respect the rights of shareholders and facilitate the effective exercise of those rights.

Companies should empower their shareholders by:

- communicating effectively with them;
- giving them ready access to balanced and understandable information about the company and corporate proposals; and
- making it easy for them to participate in general meetings.

GENERAL

An effective relationship between the shareholders and the board is enhanced if there is an agreed set of communication arrangements.

The relationship between the Shareholder Ministers and the board should enable:

- regular communication (both formal and informal) between the board and the Shareholder Ministers; and
- formal reporting by the board against the agreed performance objectives.

Formal communication channels include the annual report, quarterly and half yearly reporting and other specified reports, and written advice/requests. While annual general meetings have a formal agenda, other meetings provide an opportunity for less formal discussions.

The Shareholder Ministers also have a number of obligations and responsibilities under the GBE Act, portfolio legislation and constitutions. These include the tabling of annual reports in Parliament, approval for the establishment of subsidiaries, and the disposal of main undertaking. The Shareholder Ministers will generally seek advice from Treasury and/or the Portfolio Department on the policy impact of more complex issues.

BOARD CONSIDERATIONS

- The board should have a formal shareholder communication policy to ensure it meets legislative requirements and the expectations of the Shareholder Ministers. The requirements will be different for each business and may include, for example, monthly meetings between the chair, chief executive officer and Minister.
- The Shareholder Ministers will generally seek advice from Treasury and the Portfolio Department on information provided by the business and expect that the business will provide all necessary information for these Departments to provide appropriate advice to the Shareholder Ministers.
- The board should be aware of the importance of the senior management building an effective working relationship with Treasury and the Portfolio Department.
- The board needs to recognise the time required for the Shareholder Ministers and Parliamentary consideration when seeking approvals required under legislation.

PRINCIPLE 7 - RECOGNISE AND MANAGE RISK

Companies should establish a sound system of risk oversight and management and internal control.

Risk management is the culture, processes and structures that are directed towards taking advantage of potential opportunities while managing potential adverse effects.

Risk management should be designed to:

- identify, assess, monitor and manage risk; and
- inform investors of material changes to the company's risk profile.

Risk management can enhance the environment for identifying and capitalising on opportunities to create value and protect established value.

The company should address risks that could have a material impact on its business (material business risks), as identified by the company's risk management system. The board should regularly review and approve the risk management and oversight policies.

GENERAL

Given the nature and ownership of GBEs and the Government's desire to minimise risk, GBEs must ensure that they take all appropriate measures to recognise and manage risk.

Whilst SOC's operate under the Corporations Act they are still owned by the Government, and ultimately the Tasmanian community. Consequently, SOC's must also ensure that they take all appropriate measures to recognise and manage risk.

MINISTERS' EXPECTATIONS

Ministerial charters require GBEs to have in place a risk management plan, including strategies for managing operational and financial risks.

The shareholders' statement of expectations requires each SOC to describe in its business plan the key financial and operating risks of the business, and strategies approved by the board for managing those risks.

BOARD CONSIDERATIONS

- The board should ensure it has identified the risks that have the potential to adversely impact on the business, and have developed appropriate strategies to minimise or manage these risks.
- When assessing the level of risk, the board should consider the potential impacts on Government.
- The board should inform the Shareholder Ministers of the key financial and operating risks, board-approved management strategies, and highlight any residual risks that cannot be fully mitigated.

PRINCIPLE 8 - REMUNERATE FAIRLY AND RESPONSIBLY

Companies should ensure that the level and composition of remuneration is sufficient and reasonable and that its relationship to performance is clear.

The awarding of remuneration is a key area of focus for investors. When setting the level and structure of remuneration, a company needs to balance its desire to attract and retain senior executives and directors against its interest in not paying excessive remuneration, and that the policy underlying executive remuneration be understood by investors.

GENERAL

In the private sector, the board or a remuneration committee normally recommends the appropriate level of fees for directors and senior management of the company. Shareholder approval is required for changes to board remuneration.

In the case of Government businesses, fees for members of boards and committees are based on the Government Board and Committee Remuneration Framework (remuneration framework) administered by the Department of Premier and Cabinet.

The remuneration framework provides a board classification process and incorporates a scale of fees for board members. Fees for category A1 (fully competitive, critical to Government) Government businesses are the base category that is set by reference to the market and used for setting all other fee levels. Increases are linked to public sector wage outcomes.

The remuneration framework contains recommended maximum fees to be paid to members of government boards and guidelines for the maximum paid for the additional time commitment for members of board committees. The amount payable for committee members is jointly determined by the Treasurer and Portfolio Minister and may not exceed 15 per cent of the total fees payable to board members.

Once appointed a director enters into a contract detailing the conditions of the appointment including remuneration and the term of the appointment, which is not allowed to exceed three years.

LEGISLATIVE REQUIREMENTS

In the case of a GBE, the GBE Act prescribes that the Governor determines the remuneration and allowances that a director is entitled to be paid. The Portfolio Minister and Treasurer will jointly make a recommendation to the Governor in respect of a director's remuneration and allowances, which are determined within the limitations of the remuneration framework.

The constitution of each SOC states that directors shall be paid such remuneration as determined by the Members of the company in writing. Such remuneration will be specified in each director's instrument of appointment and will be determined within the limitations of the remuneration framework.

In addition, the constitution states that the directors may also be paid all travelling and other expenses properly incurred by them in participating in board and committee meetings or otherwise in connection with the business of the company.

REMUNERATION OF THE CHIEF EXECUTIVE OFFICER

The GBE Act provides for the Premier, on the recommendation of the Portfolio Minister, to appoint the chief executive officer of a GBE.² The GBE Act also provides that the board make a recommendation for the position of chief executive officer. A person must not be recommended to the Premier for appointment unless that person has been nominated for recommendation by the board. The chief executive officer's remuneration is specified in their instrument of appointment.

The board of a SOC appoints the chief executive officer and determines remuneration.

REMUNERATION AND PERFORMANCE

It is the responsibility of the board to determine the remuneration for senior management and the board should consider the link to performance when determining position descriptions and remuneration for senior management.

² Except Forestry Tasmania, under the *Forestry Act 1920* the board appoints the chief executive officer.



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