Public Sector Governance
Volume 1

Better Practice Guide

Framework, Processes and Practices
Auditor-General’s Foreword

Corporate governance has received extensive attention in recent times, with much interest presently focused on regulatory and other responses to improving corporate governance in the private sector. The public sector has often been considered to lead the private sector in the adequacy and conduct of its governance. However, Australian National Audit Office (ANAO) audits have continued to clearly show that considerable scope still exists for Commonwealth organisations to improve many aspects of their governance.

The ANAO has produced this guide, therefore, to assist public sector organisations to improve their governance framework, processes and practices. Good public sector governance is important to provide adequate accountability to its many stakeholders, including taxpayers, and to encourage performance improvement while satisfying control and compliance requirements.

The intention of the guide is to provide governance options for public sector organisations to consider. It is not a prescriptive guide, and has no legislative status. Governance arrangements must be tailored to individual agency circumstances, based on a risk management approach that considers potential benefits and costs associated with activities that contribute to meeting specified objectives.


Guidance Papers in Volume 2 of the guide may be updated in the future as other governance issues gain prominence and would benefit from ANAO guidance, and as governance arrangements change. On the latter point, this guide has been released at a time of considerable ‘action’, and has taken into account recent corporate governance releases, such as the Australian Stock Exchange Principles of good corporate governance and best practice recommendations and the suite of Australian standards on corporate governance from Standards Australia International. However, the forthcoming release of the Uhrig Committee Review of corporate governance of Statutory Authorities and Office Holders and the Commonwealth Government’s Corporate Law and Economic Reform Program (CLERP 9) draft legislation are likely to generate further developments in corporate governance, that may require the ANAO to update and extend its governance Guidance Papers.

The ANAO appreciates the assistance provided by individuals and agencies in preparing the guide. In particular, I would like to thank the National Institute for Governance at the University of Canberra, and Blake Dawson Waldron Lawyers who provided invaluable inputs to this guide.

P J Barrett
Auditor-General

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What the guide is about

The purpose of this guide is to assist Commonwealth organisations to achieve better public sector governance by discussing the overarching public sector governance framework and proposing processes and practices to address commonly encountered governance problems.

While the guide focuses on Commonwealth organisations, many of the governance issues it examines affect public sector entities outside the Commonwealth sector. It should, therefore, also assist such entities, especially those in Australia’s state and local government sectors.

The issues canvassed in the guide are as follows:

- what are the principles and objectives of public sector governance?
- what is the Commonwealth’s legal and policy framework?
- what structures and processes best support good public sector governance?
- what are the behaviours, values and standards—both organisational and individual—that support good public sector governance?
- what are the main issues in public sector governance and what guidance is available?
- where can further information, guidance and updates be obtained?

Given the breadth and complexity of the subject, this guide cannot be exhaustive. However, it does cover a wide range of issues that affect every organisation in the Commonwealth. It therefore highlights the major issues of public sector governance. Many of these were identified in a series of interviews conducted in 2002 with senior managers and board members in a selection of Commonwealth organisations.

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This guide aims to assist personnel at all levels to implement better public sector governance.

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2 The term ‘public sector governance’ is explained on page 4. For the sake of brevity, the word ‘governance’ is used to refer to public sector governance, except where otherwise indicated.
Who will benefit from using the guide?

The guide is aimed at the following groups:

- chief executives and board members to ensure the organisation establishes an effective governance framework, processes and practices;
- corporate governance practitioners to provide detailed and practical guidance in implementing better practice; and
- other management and staff to ensure they understand their legislative and other responsibilities in discharging their duties.

Benefits from using the guide

- Greater understanding of governance framework and related better practices
- Increased capacity to manage specific governance issues
- Knowledge of ANAO audit expectations about public sector governance

Structure of the guide

The guide is published in two separate volumes.

- Volume 1: Better Practice Public Sector Governance: Framework, Processes and Practices. This volume outlines the context and overarching framework for public sector governance and then discusses processes and practices (including behaviours) that can provide good governance across the wide range of public sector organisations.

- Volume 2: Governance Guidance Papers. Summarises specific, separate modules of guidance on current governance issues in the Commonwealth, frequently cited as being of concern to senior Australian Public Service (APS) managers and board members interviewed during research for this guide. These will be updated from time to time as warranted by developments in public sector governance and as better approaches are developed.

The guide has been structured to allow the reader, and especially governance practitioners in the APS, to quickly access different types of guidance on public sector governance.

Using Volume 1 of the guide

This volume can be read as a stand-alone outline of the key requirements for better practice governance in the public sector. However, it also cross-references the Guidance Papers in Volume 2, which provide more specific guidance on selected issues. As indicated above, additional Guidance Papers may be published in the future, as other governance issues gain prominence.
This volume of the guide is divided into five parts:

**Part 1: Overview of Public Sector Governance** introduces the topic, placing it in the current context of public sector management in the Commonwealth and defining the term ‘public sector governance’. The objectives and principles of public sector governance are also discussed.

**Part 2: Legal and Policy Framework** outlines the key elements of the Commonwealth’s legal and policy arrangements relating to the governance of its various organisations.

**Part 3: Framework, Processes and Practices for Good Public Sector Governance** canvasses the key governance issues to be addressed by Commonwealth organisations, including: leadership, ethics and culture; stakeholder relationships; risk management; external conformance and accountability; internal conformance and accountability; planning and performance monitoring; information and decision support; and review and evaluation of governance arrangements.

**Part 4: Overview of Guidance Papers** lists specific, separate modules of guidance on current governance issues in the Commonwealth that are currently contained in Volume 2 of the guide.

**Part 5: Further Information** provides information on further sources of information and guidance, including key publications.
In recent years there has been growing worldwide interest in, and concern about, corporate governance in both the private and the public sectors. Shortcomings in corporate governance have been exposed in major company failures in Australia and internationally. In response, there have been a number of recent reviews, programs and better practice guidelines aimed at improving corporate governance in Australia.³

Since early 1997 there have been:

- major changes in the legal and regulatory framework for the governance and management of Commonwealth organisations—including the passage of several major pieces of relevant legislation (discussed in Part 2 of this volume);
- significant developments in the Commonwealth’s management and financial arrangements—especially the introduction of an accrual-based outcomes and outputs resource management framework in 1999; and
- widespread developments in general managerial practice—such as the application of systematic approaches to risk management and significant outsourcing or privatisation of program delivery and support functions.

This guide is, therefore, being published at a time when there has already been considerable change in the public sector. It is highly likely that further changes affecting governance arrangements and practices in the Commonwealth will continue to be implemented. Accordingly, it is important that organisations seek current information on these matters, as they affect individual organisations and as they apply across groups of organisations.

Definitions

While there are many definitions of corporate governance, the definition provided in the previous ANAO Discussion Paper remains valid. This definition has been adopted by the Department of the Prime Minister and Cabinet in its Requirements for Annual Reports.

Broadly speaking, ‘corporate governance’ refers to the processes by which organisations are directed, controlled and held to account. It encompasses authority, accountability, stewardship, leadership, direction and control exercised in the organisation.

The term ‘public sector governance’ has been chosen to focus this guide on the governance arrangements for public sector organisations at the Commonwealth level in Australia, as outlined in the definition below.

Public sector governance has a very broad coverage, including how an organisation is managed, its corporate and other structures, its culture, its policies and strategies and the way it deals with its various stakeholders. The concept encompasses the manner in which public sector organisations acquit their responsibilities of stewardship by being open, accountable and prudent in decision-making, in providing policy advice, and in managing and delivering programs.

Objectives of public sector governance

Public sector governance aims to ensure that an organisation achieves its overall outcomes in such a way as to enhance confidence in the organisation, its decisions and its actions. Good governance therefore means that the organisation’s leadership, its staff, the Government, the Parliament and the population can rely on the organisation to do its work well and with full probity and accountability.

Good governance generally focuses on two main requirements of organisations:

- **performance**, whereby the organisation uses its governance arrangements to contribute to its overall performance and the delivery of its goods, services or programs; and
- **conformance**, whereby the organisation uses its governance arrangements to ensure it meets the requirements of the law, regulations, published standards and community expectations of probity, accountability and openness.

Risk management should underpin the organisation’s approaches to achieving both performance and conformance objectives. An integrated risk management system develops the control environment, which provides reasonable assurance that the organisation will achieve its objectives with an acceptable degree of residual risk. Figure 1 illustrates elements of governance that contribute to conformance and performance.

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5 For a discussion of these issues, see Dahms, T, ‘Systems and commitment in corporate governance’, in Keeping Good Companies, October 2002.
Ian Dunlop, a former CEO of the Australian Institute of Company Directors (AICD) has observed that the compliance or conformance responsibilities that have dominated boards’ thinking remain critically important and must be discharged to impeccable standards, but in essence they are ‘hygiene’ issues. The real added value for boards, or equivalently chief executives of FMA agencies, is at the strategy level. This requires them to be forward looking, proactive, innovative, and not risk-averse.6

**Principles of public sector governance**

Most Commonwealth organisations apply many of the structures and processes associated with good governance (such as those described in Part 3). However, better practice requires that these structures be supported by the application of core governance principles7, as outlined in Box 1.

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7 Such as those articulated in the International Federation of Accountants, *Governance in the public sector: a governing body perspective*, August 2001, which forms the basis for Box 1.
Box 1:

**Principles of Public Sector Governance**

**Accountability** is the process whereby public sector organisations, and the individuals within them, are responsible for their decisions and actions ... and submit themselves to appropriate external scrutiny. It is achieved by all parties having a clear understanding of those responsibilities, and having clearly defined roles through a robust structure. In effect, accountability is the obligation to answer for a responsibility conferred. This responsibility extends across a range of concerns, including probity and ethics as well as the effective and efficient implementation of programs and encompasses a range of processes.8

**Transparency/Openness** is required to ensure that stakeholders can have confidence in the decision-making processes and actions of public sector organisations, in the management of their activities, and in the individuals within them. Being open, through meaningful consultation with stakeholders and communication of full, accurate and clear information, leads to effective and timely action and stands up to necessary scrutiny.

**Integrity** comprises both straightforward dealing and completeness. It is based upon honesty and objectivity, and high standards of propriety and probity in the stewardship of public funds and resources, and management of an entity’s affairs. It is dependent on the effectiveness of the control framework, influenced by relevant legislation (such as the APS Values and Code of Conduct) and ultimately determined by the personal standards and professionalism of the individuals within the entity. It is reflected both in the entity’s decision-making procedures and in the quality of its financial and performance reporting.

**Stewardship.** Public officials exercise their powers on behalf of the nation. The resources they use are held in trust and are not privately owned. Officials are therefore stewards of those powers and resources. It is important to govern public sector organisations so that their capacity to serve Government and the public interest is maintained or improved over time. This includes financial sustainability and the efficient and effective management of resources, as well as less tangible factors, such as maintaining the trust placed in the organisation and/or the Government as a whole.

**Leadership** sets the ‘tone at the top’, and is absolutely critical to achieving an organisation-wide commitment to good governance.

To these could be added **efficiency**, that is the best use of resources to further the aims of the organisation with a commitment to evidence-based strategies for improvement. Efficiency thus requires objectivity and the application of the merit principle. For example, in carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.9

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9 Nolan Committee (UK), *First report of the Committee on Standards in Public Life*, 1995.
Introduction

This part provides an overview of the current legal framework and policy settings for governance in Commonwealth organisations. Specific guidance on matters such as the impact of legislation on APS staff and handling conflicts of interest is provided in the relevant Guidance Papers (in Volume 2 of this guide).

Legal and regulatory framework

This section provides an overview of the governance aspects of the main pieces of Commonwealth legislation. It is not an exhaustive review of the legislation.

Given that the legal framework is subject to change, organisations should ensure that their understanding and application of it is fully up to date. This includes maintaining regular communication with the departments and agencies responsible for developing the legislation. Many Commonwealth organisations also have specific legislation that regulates aspects of their governance (for example, the appointment of directors). This organisation-specific legislation should also be regularly consulted.

Where there are any doubts about the legislation or regulations (for example, apparent inconsistencies between agency-specific legislation and general legislation such as the Commonwealth Authorities and Corporations Act 1997 (CAC Act), professional legal advice should be sought.

The major pieces of legislation and other aspects of the legal framework affecting public sector governance in the Commonwealth are shown in Figure 2.
Altogether, this suite of legislation and accountability arrangements constitutes a complex and interconnected framework that regulates the management, governance and scrutiny of all Commonwealth Government organisations.

The major related legislation—the Auditor-General Act 1997, the Public Service Act 1999 (PS Act), the Financial Management and Accountability Act 1997 (FMA Act), the CAC Act and the Corporations Act 2001 — is outlined in Appendix 1.

Other laws that may affect specific aspects of governance in the Commonwealth include the Remuneration Tribunal Act 1973 (concerning remuneration of office holders, including board members), the Trade Practices Act 1974 (which applies to the Commonwealth insofar as it may be carrying on a business), various parts of the administrative law regime (including freedom of information and administrative appeals) and the Privacy Act 1988. The Archives Act 1983 also affects governance matters through the obligations it places on Commonwealth organisations to meet specific standards of record-keeping and data management. The Workplace Relations Act 1996 takes precedence where it covers issues in common with the PS Act.

Running across the system is the Auditor-General Act 1997, which subjects all Commonwealth organisations to audit scrutiny by the Auditor-General, who is an independent officer of the Parliament.

All laws and actions of the Commonwealth must be in accord with the relevant provisions of the Constitution.
Policies

Other than for Government Business Enterprises (GBEs), there is no express policy statement relating to governance arrangements in Commonwealth organisations. For the most part, such policy is revealed through legislation, regulations and actions rather than through comprehensive policy and operational statements.

The package of legislative reforms outlined above was designed and implemented against the background of a set of particular reform objectives concerned, among other things, with:

- sharpening accountabilities for chief executives (in the case of organisations subject to the PS and FMA Acts) and boards (in the case of bodies under the CAC Act);
- devolving responsibility to individual agency heads or boards of directors;
- highlighting standards of ethical behaviour and probity (particularly in relation to the PS Act); and
- aligning, as far as possible, financial and accountability arrangements for GBEs with those pertaining to the private sector.

At the same time, the shift to an outcomes and outputs accrual-based management and reporting regime in 1999 has focused attention on organisational performance and delivery of cost effective outputs to meet specified outcomes. Under this broad umbrella of reform, there has also been a growing emphasis on: risk management; stakeholder engagement; outsourced program delivery; knowledge management; corporate and information technology support; and the need for effective coordination of Whole-of-Government and inter-agency issues.

Main governance structures in the Commonwealth public sector

Figure 3 indicates the main governance structures in the Commonwealth public sector. For FMA agencies, the emphasis is on accountability residing with the chief executive. While the chief executive may choose to appoint an advisory board to help with the management of his or her agency, formal accountability for the performance of that agency resides with the chief executive. The formation of an executive board is likely to assist in ensuring good governance of the agency.

In contrast, GBEs and Commonwealth corporations to which the CAC Act applies, have structures that generally mirror the broad-based arrangements pertaining to the Corporations Act 2001. In this setting, directors share responsibility for decision-making and the overall performance of the body.

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The CAC Act applies to Commonwealth companies. A Commonwealth company is defined under the CAC Act as ‘a Corporations Act company in which the Commonwealth has a controlling interest’ (s. 34). However, where the Commonwealth has a non-controlling interest in a company, the CAC Act does not apply. These companies are typically subject to the Corporations Act 2001. The Australian Securities and Investments Commission has primary responsibility for regulating the corporate governance of such companies.

Many such companies (and other private entities) obtain Commonwealth funding, through various means, including direct budget funding and tied levies. The Commonwealth’s main control over these entities is via funding agreements, and especially performance criteria that are included in associated contracts. However, as Ministers may be held partly accountable for such entities if they fail, especially in the political arena, a question arises as to whether the Commonwealth should have a governance role beyond the specified contractual agreements.

The ANAO understands that, beyond specific contracted funding arrangements, the Commonwealth generally does not have a legally-based governance role. However, given Parliamentary concerns about organisations involving public moneys, portfolio agencies and such entities should consider the possible extent of ministerial responsibility and, where appropriate, mutually agree protocols that would allow the Commonwealth to monitor governance arrangements in these entities and to suggest steps to remedy identified limitations.

Located between the two extremes of FMA agencies and Commonwealth companies are a large number of statutory bodies, mostly but not entirely subject to the CAC Act, that also operate under specific legislation. In many cases, this specific legislation dictates the structure, make-up, appointment arrangements, planning and reporting for the body, its board and/or its chief executive.

This categorisation of Commonwealth organisations is not mutually exclusive. For example, some Commonwealth bodies subject to the CAC Act are also subject to provisions of the FMA Act relating to public money that they hold (as is the case with the Australian Securities and Investments Commission).
Introduction

This part of the guide outlines the elements Commonwealth organisations should have in place in order to support good governance. These elements are important and useful in themselves, but the relationships established between the various elements of good governance are crucial to successful performance.

Differences in the legislative and regulatory arrangements discussed in Part 2 have a significant effect on the structures and processes of good governance. Each of the components, therefore, is discussed with reference to the different implications of the FMA and CAC Acts in particular. The PS Act also has specific implications for those organisations that are subject to it. Similar distinctions arise for GBEs and incorporated bodies subject to the Corporations Act 2001.

Illustrating the governance framework: the house of governance

Figure 4 (The House of Public Sector Governance) shows clearly the key organisational and process elements of good public sector governance.
On the basis of effective consultation with stakeholders—both external and internal—and good information and decision support, an organisation can establish arrangements that enable it to plan and deliver the organisation’s required outcomes and outputs as well as meeting the demands for external and internal conformance and accountability. These elements are, however, dynamic factors and can be greatly affected by the human dimensions of behaviour and values.

Implementing, maintaining and enhancing these elements maximises the chances that the organisation will enjoy the confidence of its stakeholders, clients, staff and management and that it will be recognised as making sound, well informed and accountable decisions that lead to appropriate and effective actions. Applying better practice governance arrangements is not a guarantee of an organisation’s performance and conformance, but it is a crucial element and increases the probability of success in both areas. Conversely, it is highly likely that an organisation that pays scant regard to governance issues will eventually face serious failures in terms of meeting minimum statutory requirements or performance expectations, or both.

The relationships established between the various elements of good governance are crucial. Leadership, ethical conduct and a performance culture support and sustain the framework as a whole. Without them, there would be no foundation to build on.

In the ‘House of Public Sector Governance’, stakeholder relationships influence the effectiveness of all three central components of the structure, that is, the ‘windows’ of internal conformance and accountability, external conformance and accountability, and planning and performance monitoring.
These ‘windows’ represent the core activities of governance for Commonwealth organisations. They are the elements on which governance boards and committees are focused.

Each ‘window’ exerts an influence on the other two as the following indicates:

- planning and performance monitoring set the management framework within which external and internal conformance and accountability processes take place—accountability is integral to the performance of public organisations;
- internal conformance and accountability needs to be aligned with, and generate the information required for, external conformance and accountability; and
- external conformance and accountability establishes the base line for internal processes, as information required for external purposes should generally form a subset of what is required internally.

The usefulness of the three ‘windows’ (for internal and external stakeholders) depends on:

- information and decision support, which ensure the right information gets to the right people at the right time to support their decision-making, and which also generates the information needed to account for decisions and performance achieved;
- ongoing review and evaluation of governance arrangements, which ensures the organisation learns from its experience, including any problems, and adapts to changing circumstances affecting its governance structures or practices; and
- a structured, detailed and integrated approach to risk management, which ensures that risks are identified and managed in both operational arenas and policy development.

The following sections discuss each of the elements in Figure 4. It is important to keep in mind, however, that the elements form part of a unified whole, with overall success being largely determined by how well the various elements are integrated and related to the strategic objectives of the organisation.

Leadership, ethics and performance culture

Overview and importance

Leaders have dual responsibilities for governance:

- to ensure implementation, evaluation and improvement of good governance structures and processes; and
- to enact good governance through their own performance and behaviours.

While rules, systems and structures are certainly important, they are primarily the vehicles by which crucial values and behaviours are applied. Good governance is, therefore, primarily a function of the behaviours and values of the organisation’s leaders and of the overall culture of the organisation.

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In particular, it is important that leaders demonstrate an active commitment to the principles of good public sector governance outlined in Part 1 earlier (including accountability, openness, integrity, stewardship and efficiency). It is also vital that staff adopt good governance practices through their own behaviour and performance.

The recent Inquiry into the HIH collapse emphasises the importance of leadership, ethics and performance culture in determining good corporate governance, as outlined below. 13

A danger with an overly prescriptive approach to systems and structures is that it may unwittingly encourage a superficial or ‘tick the box’ approach to the achievement of governance objectives.

Systems and structures can provide an environment conducive to good corporate governance practices, but at the end of the day it is the acts or omissions of the people charged with relevant responsibilities that will determine whether governance objectives are in fact achieved.

Critical success factors for governance leadership

According to the Australian Public Service Commission’s Senior Executive Leadership Capability Framework14, effective leaders:

- shape strategic thinking;
- achieve results;
- cultivate productive working relationships;
- exemplify personal drive and integrity; and
- communicate with influence.

Effective communication—both internally and externally—is therefore a primary function of leadership. It is through clear and consistent communication of the values and objectives of the organisation to staff, management and external stakeholders that an agency’s leadership most effectively supports good governance outcomes and contributes to stakeholder confidence in the organisation. Top-down and bottom-up communication must focus strongly on risk management, to ensure a risk management culture prevails in the organisation.

It is also through consistent communication and actions that leaders support ethical behaviour in the organisation, and influence the culture necessary to support the objectives of the organisation and achieve the required results.

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**Indicators of success**

It is difficult to objectively measure factors such as leadership, ethics and organisational culture, or to identify problems before they become manifest in organisational performance. It is often only through significant failures (for example, corrupt behaviour, staff or management acting contrary to the interests and objectives of the organisation, or high staff turnover in critical work units) that problems in these areas are detected.

Nevertheless, it is possible to use tools such as staff surveys, performance appraisals and leadership self-assessment techniques to determine the degree to which these factors match expectations articulated in, for example, the APS Values and Code of Conduct, the organisation’s corporate plan and key statements made by the chief executive and other leaders. Publications, such as the Public Service Commissioner’s *Annual State of the Service Report*, can provide a guide to key issues to be monitored.

External board members (in bodies subject to the CAC Act) or advisory groups (such as audit committees or consultative forums) can provide feedback on governance performance. If there is trust and goodwill between the external board members and management, it may be possible for the organisation to benefit from the availability of external insights into the organisation’s leadership, values and culture that may not necessarily be obvious to internal management or staff. Such feedback would normally be provided in confidence to the chief executive, and perhaps the senior management team.

Guidance Papers No. 3 and No. 4 in Volume 2 of this guide discuss better practices of CAC and FMA boards, respectively.

**Stakeholder relationships**

Most public sector organisations have a wide range of stakeholders with an interest in their operations. The interests represented by these stakeholders can be disparate, to the point where they can be in conflict with one another. As such, stakeholder management is a key aspect of risk management for public organisations. It is relevant, for example, to reputation risk. As a consequence, governance arrangements should ensure that the legitimate interests of stakeholders are properly and appropriately considered.

**Key governance mechanisms to represent external stakeholder interests**

External stakeholders may often be represented through the formation of a consultative forum with membership from across the spectrum of stakeholders. They may also be represented in other consultative processes that allow their views and needs to be heard by the organisation, without their sitting on any boards or committees.

The *Review of GBE Governance Arrangements* report by Mr Richard Humphry AO states that:

> Boards should not be appointed on the basis of representation… Appointments to boards should be made on the basis of the person to contribute to the operations of the board, based on experience achieving a mix of skills that will provide for the firm to be managed in a way that produces the best outcomes for the shareholders.

The ANAO supports this view. However, the ANAO notes that, as a matter of law or policy, some Commonwealth organisations may be required to have client representatives on their boards or committees.
Managing conflicts of interest

In seeking stakeholder representation, it is important to consider carefully the potential conflicts of interest (that is, where the individual may have a personal, financial or other interest in the work of the organisation) or conflicts of duty (that is, where the individual may hold one or more official positions that could come into conflict with one another). It is often not possible to avoid all potential conflicts absolutely. After all, stakeholders with the most to offer the organisation are often those who have the greatest interest in its outcomes. It is, however, important to consider the degree, nature and extent of such potential conflicts; make these known to the parties involved (including other members of the board or committee); and put protocols in place to minimise the likelihood of such conflicts. Guidance Paper No. 6 discusses better practices for managing conflicts of interest.

Stakeholder representatives should be particularly encouraged to avoid potential or actual conflict of interests in relation to:

- supply of goods or services to the organisation; and
- purchase of goods or services from the organisation.

There is a considerable risk that competitors will perceive such representation as unfair, denoting favoured access even where arrangements are put in place to ensure such representatives are not present when relevant contracts are being considered. Such circumstances should be avoided where possible. Accordingly, Commonwealth organisations should review policies and legislation that require supplier or client representatives on boards, with a view to advising reconsideration of the requirement if potential or perceived conflicts of interest are evident.

One way to reduce problems with conflicts of interest or conflicts of role is to consult relevant stakeholders without giving them privileged access to decision-making. It is important that such consultations are (and are seen to be) genuine and not merely going through the motions of consultation with little or no scope for actual influence on the outcome.

Internal stakeholders

Internal stakeholders include staff and managers as well as the units, divisions and branches that make up the organisation. High level boards and committees risk becoming distant from staff and middle level management unless there are mechanisms in place to encourage feedback and suggestions from these groups. Such mechanisms range from regular formal staff surveys through to occasional meetings with groups of staff and managers, as well as taking opportunities during normal business activities to ask the views of staff and managers that come in contact with the organisation’s boards and committees from time to time.

Appendix 2 illustrates overarching agency governance relationships, including interaction with internal and external stakeholders. Guidance Paper No. 2 discusses potential conflicts in the governance of CAC bodies, which can involve the treatment of internal and external stakeholders.

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However, where Commonwealth entities continue to have supplier and/or client representatives on their boards or committees, it is important to make the selection process, and the rules for participation, as transparent as possible, to gain the confidence of those who might otherwise feel excluded from the privileges of representation.
Risk management

Risk management establishes a process of identifying, analysing, treating, monitoring and communicating risks. These risks could either prevent the organisation from achieving its business objectives or provide the opportunity for extra benefits to be realised. Risk management therefore provides organisational flexibility as well as control.

Risk management often encourages a more outward looking examination of the role of the organisation, thereby increasing customer/client focus, including a greater emphasis on outcomes, as well as concentrating on resource priorities and performance assessment as part of management decision-making.

Key components of effective risk management

Risk management is ultimately the responsibility of the chief executive in FMA agencies and directors of CAC agencies. However, all managers and staff have a responsibility to manage risk. The chief executive in FMA agencies and directors of CAC agencies are personally liable for decisions and thus for risk management. It is their responsibility to ensure that there is a focus on managing risk and to supervise the management of risk. Accordingly, they must have robust systems in place to protect themselves as well as the organisation. This requires:

- governing bodies such as boards, executive committees and audit committees to include in their deliberations detailed consideration of the risks facing the organisation as a whole as well as major policy developments and/or operational tasks or projects;
- the establishment by management of appropriate processes and practices to manage all risks associated with the organisation’s operations;
- analysis and review of risk management approaches; and
- the active involvement in risk management of everyone in the organisation.

To be effective, the risk management process needs to be rigorous, structured and systematic. However, it is important that the emphasis is on real actions and outcomes so that it does not become essentially a procedures-based exercise. Effective risk management requires an organisation to have a risk-assessment culture whereby all major decisions are considered in terms of risk management principles.

This is particularly important as the nature and significance of risks change in the public sector as the role of the public sector itself changes.

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16 Risk management processes are generally well known and understood in the public sector, based on these key steps.
18 Department of Finance and Administration, Submission to the JCPAA Inquiry into Corporate Governance and Accountability Arrangements for Commonwealth GBEs. Submission No. 4, Canberra, 2 July 2002.
Developing a risk management culture

Figure 5 below outlines the key elements required to establish a risk management culture. A risk management culture supports a holistic approach to the identification and management of risk throughout an organisation. This requires a strong alignment between identification of strategic risks and their treatment, in conjunction with the treatment of management, operational and financial risks. It also requires risk management to guide the control environment, for example in order to determine and prioritise the agency functions and activities that need to be controlled.

Risk management should be part of the strategy and planning processes, rather than a back-end control. For example, risk management activities, including the design of treatments, should be undertaken at the same time as an initiative is designed. Risk treatments, therefore, should be resourced at the same time that the resourcing decision is made for the initiatives they are designed to support.

Figure 5: Key elements to foster a risk management culture

Executive commitment

Policy/procedures accountabilities

Operational framework
roles and responsibilities, approach, methodology, structure

Training and education

Monitor and review

Source: O’Callaghan, P, ‘Avoiding Corporate Governance Failures by Establishing a Risk Culture’, Presentation to IIR Conference on Corporate Governance in the Public Sector, Canberra, 13 August 2002.

External conformance and accountability

Commonwealth agencies that perform well in acquitting their external accountability responsibilities typically seek to incorporate these requirements in the earliest stages of their planning, policy development, decision-making and program design work. External scrutiny should not be regarded as something that happens “to” the organisation but as a factor integral to the organisation performing its role as part of Government.

Meeting public sector conformance and accountability obligations is one of the measures of success for Commonwealth agencies, rather than an after-thought addressed only when an external agency initiates scrutiny of the organisation. In practical terms, this means that well governed organisations in the Commonwealth seek to ensure that Parliamentary scrutiny, for example, is aided by the way programs
are designed, managed and monitored. Such scrutiny requires good record-keeping and documentation of decisions and actions.

**Key external accountability institutions**

There are often several external bodies to which Commonwealth organisations are accountable or to which they are required to provide information on their performance and/or conformance with regulatory requirements. It is through effective governance arrangements that Commonwealth organisations acquit their responsibilities to these bodies.

Key external accountability institutions include:

- the Parliament, especially relevant committees such as the Joint Committee of Public Accounts and Audit (JCPAA), the various Senate and House of Representatives Standing Committees and Senate Legislation and Reference Committees;
- the Auditor-General, who is responsible to the Parliament for conducting both financial and performance audits in the Commonwealth and with whom organisations’ often liaise on such matters as internal audit arrangements and practice;
- the Commonwealth Ombudsman, who has the power to investigate complaints about Commonwealth organisations’ actions to see if they are unlawful, wrong, unjust or discriminatory;
- the Privacy Commissioner, who has responsibilities under the *Privacy Act 1988* and who assists citizens who have privacy complaints relating to Commonwealth or Australian Capital Territory Government agencies, consumer credit reporting activities, tax file numbers and spent convictions;
- the Administrative Appeals Tribunal, which provides independent review of a wide range of administrative decisions made by the Commonwealth Government and some non-Government bodies;
- the Australian Securities and Investments Commission (ASIC), which enforces company and financial services laws to protect consumers, investors and creditors. GBEs are subject to the *Corporations Act 2001* and thus ASIC; and
- the Courts, which may be called upon to scrutinise the actions or decisions of Commonwealth bodies, for example, in reviewing a tender process on the action of an unsuccessful tenderer.

In addition, Commonwealth organisations respond to a number of central agencies that have a coordination and oversight role. Included in this group are the Australian Public Service Commission (APSC), the Department of Finance and Administration (Finance), the Treasury, the Department of Employment Workplace Relations (DEWR) and the Department of the Prime Minister and Cabinet (PM&C). Each of these central agencies has a key role in Commonwealth public sector governance arrangements.

The APSC is responsible for the PS Act and advises on strategic people management issues. Finance is responsible for the FMA and CAC Acts and provides guidance on procurement and annual reporting requirements for bodies subject to the CAC Act. DEWR oversees the application of the *Workplace Relations Act 1996* within the Commonwealth public sector. PM&C provides advice on Cabinet and accountability processes, including publishing the annual report requirements for FMA agencies, as approved by the JCPAA.
Key processes for acquitting external accountability requirements

There are several processes through which external accountability requirements are acquitted. These include the following:

- annual reporting to the Parliament in accordance with specific guidelines issued by Finance for CAC authorities and PM&C for FMA agencies. Both CAC authorities and FMA agencies are required to include in their annual report financial statements prepared in accordance with Finance Minister’s Orders. Specific agency legislation may also stipulate reporting obligations to the Parliament;
- communicating with stakeholders via electronic methods, such as an up-to-date, comprehensive and user friendly website and by providing up-dated information on request via e-mail;
- providing detailed budgetary information through the Portfolio Budget Statements tabled in the Parliament as part of the Federal Budget each year. These documents, which are produced in accordance with guidelines issued by Finance, are scrutinised particularly by Senate Legislation Committees;
- the examination of each organisation’s accounts by the Auditor-General, with the results published in the annual reports tabled in the Parliament;
- occasional performance audits carried out by ANAO in accordance with its audit work program;
- the Ombudsman’s Office Own Motion Investigations of Systemic Issues; and
- specific parliamentary inquiries into matters of public interest, which generally involve the establishment of a Senate Select Committee on the particular matter.

Under the Finance Minister’s Orders, authorities subject to the CAC Act are required to include in their report of operations a ‘Statement on Governance’. The annual report requirements for FMA Act agencies also specify corporate governance as a topic required for reporting to the Parliament. Both sets of requirements refer to the Australian Stock Exchange listing rules.

A key aspect of reporting to the Parliament is the need to ensure that the agency informs the Parliament about what it is planning to do (that is, usually through the Portfolio Budget Statement) and subsequently reports in similar terms on what it actually did (that is, in the annual report tabled in the Parliament). Where circumstances have changed in the intervening period (for example, new performance indicators have been developed), these changes must be clearly articulated and the implications for reporting addressed. The objective is to be clear and consistent in external reporting, directly addressing the interests and concerns of the scrutinising body.

Internal conformance and accountability

Internal accountability arrangements should be closely aligned with external requirements. This is both efficient—by reducing reworking of similar material—and effective—by establishing internal arrangements on the basis of broader standards and expectations. A well governed organisation will, for example, ensure that its internal audit plans and activities are coordinated with the requirements and plans of the external auditor, including through inviting a representative of the ANAO to participate in the Audit Committee.20, often mainly in an observer role.

20 See the ANAO’s Better Practice Guide: Audit Committees (June 1997), and Controlling Performance and Outcomes: Better Practice Guide to Effective Control (December 1997) for more information.
Where an organisation finds itself having to carry out a great deal of additional work to meet external accountability requirements, it may be necessary to review internal structures and processes to more closely align them with those requirements.

**Key elements of internal conformance and accountability**

The primary function of internal accountability arrangements is to ensure clarity of roles and clarity of communications about decisions and actions. The fact that such arrangements are internal does not mean they are necessarily confidential or not transparent to persons and organisations outside the organisation. Key elements of internal conformance and accountability include:

- documentation of the objectives, roles and powers of the board (for CAC Act bodies governed by boards) or executive committee (for other bodies, including some of those subject to the FMA Act);
- internal audit and review processes and functions;
- documentation of objectives, roles and powers of other corporate committees (for example, the finance committee, remuneration committee and consultative forums);
- corporate and business planning arrangements that aim to make conformance and accountability integral to the way the organisation meets its business objectives;
- performance planning and monitoring arrangements;
- fraud control plans and processes;
- up to date and consistent rules relating to financial and other delegations (for example, through the Chief Executive’s Instructions for FMA Act agencies and similar documentation for other bodies); and
- clear and widely communicated policies on handling conflicts of interest, and standards of professional and ethical behaviour.

As a general indicator, an organisation with effective internal conformance and accountability arrangements will have staff and management who know, understand and communicate clearly their own roles, powers and responsibilities and how these relate to others in the organisation.

At times, the public sector operating environment provides unavoidable ambiguities or uncertainties (for example, through the organisation having an express obligation to reconcile competing or discordant community or business interests, such as the need for safety regulation and the need to minimise regulatory costs on industry). These points of complexity will ideally be articulated and identified in the way the organisation does business, especially in the way its peak board or executive committee discusses and resolves policy and planning issues.

External stakeholders who work closely with the organisation (for example, related Commonwealth bodies, state and territory departments operating in the same policy area, peak community and business organisations) will also often have valuable perspectives on how well the organisation deals with complex or ambiguous objectives.

**Planning and performance monitoring**

Governance is not only about conformance and meeting formal accountability requirements. It is above all concerned with ensuring the organisation performs as well as possible in meeting its policy and operational objectives. It is therefore important to ensure that governance arrangements and practices do not focus unduly on conformance at the expense of performance.
Key governance structures and processes

A well governed organisation will include the following in its governance structures and processes.

- **Effective corporate and business planning.** It is particularly important to ensure such plans—down to, and including, individuals’ performance plans and agreements—are aligned and mutually supportive. This reduces scope for confused objectives or gaps in performance planning and monitoring. Effective corporate planning and business planning cascade from the Commissioning Letter, or equivalent, sent to each secretary/chief executive by the relevant Minister.

- **A clear and robust budgeting and financial planning system,** overseen by an appropriately constituted and resourced finance committee or equivalent, or by the peak board or executive committee itself. In the current Commonwealth environment, this will include addressing the financial and non-financial aspects of the organisation’s specified outcomes and outputs.

- **Chief executive officer** (or equivalent) and **chief financial officer** (or equivalent) **sign-off** to the board that the financial reports: present a true and fair view, in all material respects, of the organisation’s financial position and operational results; and accord with relevant accounting standards and the Finance Minister’s Orders.21

- **A structured and regular system of performance monitoring.** This system should be aligned with the organisation’s outcomes and outputs structure and generate information that is appropriate for both internal performance management needs and external reporting requirements.

- **Consideration of Whole-of-Government and cross-agency issues in policy development and program delivery.** Increasingly, Commonwealth organisations are working in an environment characterised by work that cuts across agency boundaries. This raises issues of joint or shared accountability, risks and responsibilities that can affect governance arrangements, especially where major initiatives (for example, Australians Working Together) are concerned. Guidance Paper No.7 in Volume 2 of this guide discusses these governance arrangements in detail.

- **A structured, detailed and integrated approach to risk management.** It is good practice for governing bodies such as boards, executive committees and audit committees to include in their deliberations detailed consideration of the risks facing the organisation as a whole and major policy development and/or operational tasks or projects.

Boards and committees that regularly and systematically address these performance-related factors are more likely to be seen by staff, management and stakeholders as: providing real leadership; being credible and relevant; and actively contributing to the success of the organisation.

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21 Based on ASX Corporate Governance Council – Principles of Good Corporate Governance and Best Practice Recommendations, (Recommendation 4.1).
The role of performance information in the governance framework

Figure 6 highlights the key role performance information plays in the governance framework.

Information and decision support

In an increasingly complex and multi-faceted operating environment, public sector organisations have to manage their information in more sophisticated ways. This involves ensuring the basics of good record-keeping, such as file maintenance, minuting of meetings and decisions are all observed while at the same time taking advantage of the new information and communication technologies to create, store and retrieve knowledge, information and data in a timely fashion. The objective is to ensure that the right people (that is, decision-makers) have the right information at the right time in order to allow them to make the right decisions.

Requirements of information and decision support

For most Commonwealth organisations, standards for the creation and retention of public records are established under the Archives Act 1983. It is important that those responsible for such records—especially board and committee secretariats—are aware of those standards and have procedures in place to meet them.

Beyond the Archives Act 1983 requirements, however, it is also better practice to ensure that good records are kept of decisions by governance boards and committees, including the information on which those decisions were based and the main points considered or discussed in reaching those decisions. It is possible that decisions taken by a board or committee may be challenged in a court or made the...
subject of a request under the Freedom of Information Act 1982. This, therefore, becomes the standard by which such records should be assessed: would they stand up to public scrutiny as a complete and accurate record of the decisions and the processes that lead to them?

Data, information and analysis are also needed to ensure decisions are based on as much of the available evidence as possible. Time constraints can mean that boards and committees must take decisions on the basis of incomplete information. Where this is unavoidable it may be possible to take an interim decision pending receipt of further information or to make the decision contingent on emerging data. It is important, however, to minimise the need for such a process. Secretariat staff and those submitting matters to boards and committees for consideration have an obligation to make all reasonable efforts to provide sufficient information on which to base a decision.

Providing information has resourcing implications. Boards and committee members need, from time to time, to consider the adequacy of resources when making business decisions about their secretariat support. While short-term savings in such areas can be tempting, the long-term risks of poorly informed or recorded decisions could be extremely costly. The impact could come in the form of a crisis—such as a failure to meet a legal requirement to consider certain matters, a failure that subsequently results in high costs or political embarrassment—or through a gradual decline in the effectiveness of the organisation as a whole.

**Emerging trends in information and decision support**

The nature of what constitutes data to support decisions is changing as a consequence of the new information and communication technologies. E-government initiatives, the use of the internet to gather information and stakeholder opinions, and the development of sophisticated intranets to disseminate information within the organisation and to gather views and information from staff and management all mean that there is an increasing amount of information. As well, that information is increasingly qualitative as well as quantitative.

Government decision-making is therefore now taking into account information and views from a wider range of groups, organisations and individuals. This also has implications for the resourcing and constitution of secretariats and other areas of Commonwealth organisations responsible for supporting governance boards and their committees.

**Review and evaluation of governance arrangements**

Review and evaluation of the performance of the organisation and its operations is an important part of what governing boards and their committees do. From time to time, it is also important for governing boards and their committees to invest in evaluation of overall governance arrangements, including of their own roles and performance. This can aid the learning process, leading to improvements and adjustments to changed circumstances that allow the organisation and its boards or committees to meet new challenges successfully.

**Types of evaluations of governance arrangements**

Reviews or evaluations of governance arrangements can take various forms. The following factors need to be borne in mind.

- **Timing**: As a general rule, governance arrangements should be reviewed on an on-going basis and in detail every year or two. Governance arrangements should also be reviewed whenever there is a significant event affecting the organisation’s accountability or management arrangements (for example, major changes in legislation or relevant recommendations from an external body such as a Parliamentary committee or the Auditor-General).

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22 See the National Office for the Information Economy’s web site for more information: www.noie.gov.au.
Internal versus external review: It may be sufficient to carry out an internal review, whereby senior executives and/or the board of directors conduct an assessment of the organisation’s governance structures and their performance. A more formal, externally facilitated review can be carried out less frequently, and it can provide benchmark information for comparisons over time.

Scope: A governance review can extend across the full range of the organisation’s committees, consultative forums and their interconnections, or it may simply be limited to a regular performance assessment of the board of directors or governing committee. It is important, in either instance, to cover both conformance aspects (such as adherence to legal requirements, and general standards of structure and form) and performance issues (such as the quality of decision-making, conduct of meetings and effectiveness of communications of decisions).

Smaller and/or less complex organisations will generally not need to review their governance arrangements as frequently, or in as much depth, as larger or more complex organisations. Organisations operating in high-risk areas (that is, where there are significant policy or operational risks that might flow from failures in governance) will generally need to review their governance practices more frequently and/or more thoroughly.

Using results from governance reviews

It is important that whatever results come from reviews of governance arrangements and performance are acted upon. Staff and management—as well as board or committee members—can become cynical if areas for improvement are identified but not subsequently addressed within a reasonable timeframe.

Guidance Paper No. 5 discusses better practices for monitoring and evaluating board performance.

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23 However, sustained integrity of governance arrangements is not necessarily related to organisational complexity. Governance arrangements can degrade for example, when a key officer leaves a position. This can have a pronounced effect in a small organisation where one person may have responsibility for many elements of governance.
Part 4:
Overview of Guidance Papers

This part lists the topics on which the ANAO has prepared specific, detailed guidance within the overall framework of this guide. Although they can be used as stand alone documents, the Guidance Papers are best read in conjunction with this volume of the guide. The ANAO’s web site (www.anao.gov.au) should be consulted for up-to-date Guidance Papers.

Guidance Papers generally follow a standard structure:

- **Introduction** (introduces the topic and the purpose of the Guidance Paper);
- **Legal & Policy Framework** (discusses the issues involved, explaining why the topic is important to governance outcomes);
- **Elements of Better Practice** (points for organisations to check that they have in place to support better practice);
- **Examples** (examples of better practice, including outlines of relevant documents); and
- **References and Further Information** (key references on the topic, and organisations that can provide further information, guidance or support).

The series of Guidance Papers include:

1. Public Sector Governance and the Individual Officer;
2. Potential Conflicts in the Governance of CAC bodies;
3. CAC Boards;
4. Executive Boards in FMA agencies;
5. Monitoring Board Performance;
6. Conflicts of Personal Interest and Conflicts of Role;
7. Cross-Agency Governance; and
8. Summary of Current Legal Requirements that may be Applicable to CAC and FMA Bodies.
Aside from the ANAO, there are various organisations within the Commonwealth and elsewhere that can provide advice and assistance on aspects of public sector governance. These include:

- Department of Finance and Administration (responsible for the FMA and CAC Acts)—finance.gov.au
- Australian Public Service Commission (responsible for the PS Act)—apsc.gov.au
- Australian Institute of Company Directors (provides advice and training for directors)—companydirectors.com.au
- Certified Practicing Accountants Australia (advice on accounting and financial accountability issues)—cpaaustralia.com.au
- The Institute of Chartered Accountants in Australia (advice on accounting and financial accountability issues)—icaa.org.au
- National Institute for Governance (advice, research and training in governance issues)—governance.canberra.edu.au

Part 5:
Further Information
Appendix 1

Relevant Legislation

There are several pieces of legislation that affect governance in the Commonwealth public sector. The following sections outline the key acts.

**Auditor-General Act 1997**

All Commonwealth organisations are subject to the *Auditor-General Act 1997*. It is the main vehicle for external scrutiny of financial and other aspects of their performance.

The *Auditor-General Act 1997* provides for the appointment, powers and independence of the Commonwealth Auditor-General. In particular, it stipulates that the Auditor-General is ‘an independent officer of the Parliament’ (s. 8(1)). The Auditor-General has audit powers relating to Commonwealth agencies, authorities (including statutory agencies) and companies. The office is subject to oversight by the Joint Committee of Public Accounts and Audit, and takes into account the Committee’s audit priorities (s. 10).

The Auditor-General’s role is significant in corporate governance terms because it is a major element in the system of external scrutiny and accountability, which reviews the efficiency and effectiveness of departments’ and agencies’ governance arrangements. As such, examination of corporate governance issues constitute a significant component of the ANAO’s audit program.

The ANAO can be consulted should specific information be required on the application of the *Auditor-General Act 1997*.

**Public Service Act 1999 (PS Act)**

Most, but not all, civilian Commonwealth employees are employed under the PS Act. That Act establishes the ground rules for APS values and behaviours, giving explicit legislative force to the Parliament’s expectations in relation to the performance and accountability of public servants in general, and of agency heads in particular.
Under section 3, the main objects of the PS Act are:

- to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public;
- to provide a legal framework for the effective and fair employment, management and leadership of APS employees;
- to define the powers, functions and responsibilities of agency heads, the Public Service Commissioner and the Merit Protection Commissioner; and
- to establish rights and obligations of APS employees.

The PS Act details the APS Values (s. 10) and Code of Conduct (s. 13), the rights and responsibilities of APS employees (including whistleblowers—s. 16), the senior executive service (Part 4, Division 2) and agency heads (including secretaries of departments—Part 7). It also defines the role and powers of the Public Service Commissioner (Part 5) and other relevant office holders.

In relation to parliamentary departments, the PS Act is complemented by the Parliamentary Service Act 1999.

The PS Act has effect subject to the provisions of the Workplace Relations Act 1996 (s. 8). In considering the PS Act’s application to corporate governance issues, however, there are few circumstances where the Workplace Relations Act 1996 is likely to apply.

The Australian Public Service Commission can be consulted should specific information be required on the application of the PS Act.

**Financial Management and Accountability Act 1997 (FMA Act)**

The principal matters covered by the FMA Act are:

- the responsibilities and powers of the Minister for Finance and Administration (called the ‘Finance Minister’ in the Act);
- the collection and custody of public money and the control and management of public property;
- the accounting framework, Parliamentary appropriations and certain payments matters;
- borrowing and investment powers of the Finance Minister and the Treasurer;
- special responsibilities of chief executives of Agencies for the control and management of public money and public property;
- audit of the financial statements of the Commonwealth as a whole and of individual Commonwealth agencies by the Auditor-General; and
- delegation of powers or functions of the Finance Minister, the Treasurer and chief executives of agencies.

In contrast to the CAC Act, the FMA Act places specific and sole responsibility on the chief executives of FMA agencies to promote the ‘efficient, effective and ethical use of Commonwealth resources’ (s. 44). This complements the provision in the PS Act stipulating that a secretary of a department (the main FMA Act agencies) ‘is responsible for managing the department’ (s. 57 (1)).

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The Department of Finance and Administration can be consulted should specific information be required on the application of the FMA Act.

**Commonwealth Authorities and Companies Act 1997 (CAC Act)**

The CAC Act regulates:

- the corporate governance, financial management and reporting of Commonwealth authorities (including statutory agencies), which are in addition to the requirements of their enabling legislation;
- the corporate governance and reporting of Commonwealth companies which are in addition to the requirements of the *Corporations Act 2001*; and
- the duties and liabilities of directors and other officers of Commonwealth authorities and companies.

The principal matters covered by the CAC Act are:

- reporting by an authority or a company to a Minister or, through a Minister, to the Parliament;
- contents of the annual report of operations of an authority;
- audit of financial statements of an authority or a company by the Auditor-General;
- banking and investments powers of authorities;
- submission to the responsible Minister of budget estimates each financial year by authorities and companies other than GBEs and partly-owned companies;
- compliance of authorities and wholly-owned companies with general policies of the Government; and
- conduct of directors and officers of authorities, including the civil consequences of the directors and officers contravening civil penalty provisions.

The broad objective of the CAC Act is to bring governance and reporting arrangements for Commonwealth companies and authorities into line with those pertaining to other bodies corporate. To this end, relevant sections of the CAC Act have been amended to reflect the provisions of the *Corporations Act 2001*. In particular, the duties and responsibilities of directors are essentially the same under the CAC Act as they are under *Corporations Act 2001*, with suitable modifications to reflect the public sector environment. In contrast to the FMA Act (discussed above), the CAC Act places responsibility for meeting the requirements of the Act on directors of CAC bodies.

The Department of Finance and Administration can be consulted should specific information be required on the application of the CAC Act.

**Corporations Act 2001**

The *Corporations Act 2001* applies to Commonwealth companies limited by shares or by guarantee. This means that these organisations are subject to the same legal requirements as their private sector counterparts. Part 2D.1 of the *Corporations Act 2001* details some of the most significant duties of directors, secretaries, other officers and employees of corporations.

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Appendix 2

Governance Maps

CAC Agency governance

Legend

Accountability
Direction
Scrutiny

Reporting
Limited Direction
Consultative

Statutory and Common Law Duties

Parliament
Executive Government
Responsible Minister/s
Finance Minister

Board
CEO

Public

Stakeholders

eg. ANAO, Privacy Commissioner, Ombudsman.
Note that relationships with central agencies such as the Department of Finance and Administration and the Department of Prime Minister and Cabinet have been omitted.
No. 1: Public Sector Governance and the Individual Officer
No. 2: Potential Conflicts in the Governance of CAC Bodies
No. 3: CAC Boards
No. 4: Executive Boards in FMA Agencies
No. 5: Monitoring Board Performance
No. 6: Conflicts of Personal Interest and Conflicts of Role
No. 7: Cross-Agency Governance
No. 8: Summary of Current Legal Requirements that may be Applicable to CAC and FMA Bodies

The Australian National Audit Office (ANAO) publishes Better Practice Guides (BPGs) on a variety of issues relevant to the ANAO’s audit practice.

This BPG on public sector governance has been prepared as an update of two earlier publications (ANAO, Applying Principles and Practice of Corporate Governance in Budget Funded Agencies, July 1997; and ANAO, Corporate Governance in Commonwealth Authorities and Companies, May 1999). All ANAO BPGs can be found at www.anao.gov.au.

This BPG has been prepared with the substantial assistance of the National Institute for Governance at the University of Canberra and Blake Dawson Waldron Lawyers.
Introduction and Overview

The following Guidance Papers represent Volume 2 of a two-volume Better Practice Guide that provides guidance on public sector governance to assist various Commonwealth organisations.

- **Volume 1: Better Practice Public Sector Governance: Framework, Processes and Practices** outlines the context and overarching framework for public sector governance and then discusses processes and practices (including behaviours) that can provide good governance across the wide range of public sector agencies.

- **Volume 2: Governance Guidance Papers.** This volume summarises specific, separate modules of guidance on current governance issues in the Commonwealth. Most of these issues were cited as being of concern to senior Australian Public Sector managers and board members interviewed during research for this guide. These papers will be updated from time to time as warranted by developments in public sector governance and as new approaches are developed.

This volume can be read as a stand-alone set of documents for guidance about better practice approaches to specific governance issues in the public sector. However, it would be useful to read them in conjunction with Volume 1 of the guide, to better understand how each guidance topic fits into the broader governance framework, and relates to broader better practices and good governance principles.

The series of Guidance Papers contained in this volume are listed on the previous page. The ANAO’s web site (www.anao.gov.au) should be consulted for up-to-date Guidance Papers.
Structure of Guidance Papers

Guidance Papers generally follow a standard structure:

- **Introduction** introduces the topic and the purpose of the Guidance Paper;
- **Legal and Policy Framework** discusses the issues involved, explaining why the topic is important to governance outcomes;
- **Elements of Better Practice** highlights points for organisations to check they have in place to support better practice. It is stressed that these are provided as a guide only and are not intended to be prescriptive or exhaustive;
- **Examples** provides examples and cases of better practice, including outlines of relevant documents; and
- **References and Further Information** lists key references on the topic and organisations that can provide further information, guidance or support.
Introduction

This paper provides Commonwealth organisations with guidance on how governance issues affect the responsibility of the individual officer.

Good governance is enacted through the behaviours and actions of staff at all levels as they contribute to the efficient, effective and ethical delivery of their organisation’s goals. The leadership provided by agency heads and other senior officers plays a critical role in determining how effective an agency will be in encouraging the behaviours that support good governance throughout the organisation.

This paper should be read in conjunction with Guidance Papers Nos. 6 and 8.

Legal and policy framework

Every public official is the custodian of a certain measure of public power and resources, which are entrusted to him or her under the Australian system of government, as articulated through the Constitution, relevant legislation, regulations, conventions and practices that both provide and constrain the exercise of public power and the utilisation of public resources. The nature of the organisation in which an official works, as well as the position that he or she occupies, determine the applicable legislative and policy regime. The major classes of organisation are:

- Departments of State – these are part of the Crown and all subject to the Financial Management and Accountability Act 1997 (FMA Act) and the Public Service Act 1999 (PS Act);
- Statutory Agencies – these are established by an enabling Act, are subject to the PS Act and may or may not be subject to the FMA Act;
- Commonwealth Authorities – these are established by an enabling Act, are subject to the Commonwealth Authorities and Companies Act 1997 (CAC Act) and may also be subject to the PS Act;
- Commonwealth companies – are subject to the Corporations Act 2001 but generally not subject to the PS Act; and
- Government Business Enterprises (GBEs) – these are generally established under the Corporations Act 2001 and are subject to the CAC Act.
The degree to which the different classes of organisation are responsible for giving effect to government policy and the mechanism for communicating the Government’s policy priorities vary widely. In departments, the Minister may communicate requirements personally to the Secretary or other senior officers. However, in some other FMA agencies, there is no power of ministerial direction. In CAC bodies, the Minister may only be able to communicate policy directions to the managing board, and then only in writing and only after consultation with the board. In GBEs, the Minister’s power to provide policy direction may be even further reduced.

The officer’s duties and responsibilities, as set out in a position statement or performance contract, or powers, included in statute or delegations, need to be interpreted within the legal and policy regime that applies to the employing organisation. Guidance Paper No. 8 provides guidance on over 25 current legal requirements that may be applicable to a range of CAC and FMA bodies. This guide indicates who may be subject to the legal requirements, for example, employee, officer, director or CEO.

Officers employed under the PS Act are subject to the Australian Public Service (APS) Values (s. 10) and Code of Conduct (s. 13) requiring them, among other things, to be apolitical, ethical, honest, diligent, accountable and responsive in their public life. Underpinning all directives and guidance on official behaviour is the expectation that Commonwealth public servants will contribute to the good governance of their organisation.

Similar expectations are placed on Commonwealth officials not employed under the PS Act (for example, employees of Statutory Agencies which have their own employment provisions and which are not subject to the PS Act). They are bound by codes of conduct established by their employing body.

Officials who belong to professional bodies (for example, Certified Practising Accountants or Social Workers) may also be bound by the relevant professional code of conduct.

**Elements of better practice**

The elements of better practice include operating procedures and practices to direct, guide or monitor the ethical enhancement of performance and conformance with legal obligations. These elements are based on, and embody, principles of public sector governance.

**Principles**

Generally accepted principles of public sector governance include:

- **accountability** – being answerable for decisions and having meaningful mechanisms to ensure adherence to all applicable standards;
- **transparency** – clear roles and responsibilities and clear procedures for decision-making and the exercise of power;
- **integrity** – acting impartially, ethically and in the interests of the organisation, and not misusing information acquired through a position of trust;
- **stewardship** – using every opportunity to enhance the value of the public assets and institutions that have been entrusted to care;

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1 The enabling Act of a CAC authority may provide for Ministerial direction beyond the powers in the CAC Act related to general policies of the Commonwealth.
efficiency – the best use of resources to further the aims of the organisation with a commitment to evidence-based strategies for improvement; and

leadership – leadership from the top is critical to achieving an organisation-wide commitment to good governance.

Suggested procedures and mechanisms

Each and every officer needs to understand the legislation and performance standards relevant to the exercise of his or her duties. Each needs to understand how his or her personal contribution promotes good governance and, ultimately, the achievement of corporate goals.

Organisations should engage their staff and managers in the development, evaluation, monitoring and receipt of the following key documents, and their effective implementation:

- a clear statement of the values, practices and behaviours expected of the organisation’s employees. For APS employees, this statement should be consistent with the APS Values and Code of Conduct in the PS Act and with any guidance issued by the Australian Public Service Commission;

- a clear statement of the organisation’s human resource policy, including the rights and obligations it places upon supervisors and subordinates;

- concise, up-to-date and consistent information on the organisation’s governance arrangements, including the applicable legislative and policy framework, boards and committees, their charters, membership and relationships with other governance bodies, audit and fraud control arrangements, and whistleblower protection;

- a clear statement of the organisation’s corporate goals, key performance indicators and business plans; and

- the organisation’s risk management approach, including methodology, scope and review parameters.

Agency leaders should provide to their staff and managers:

- a clear set of personal duties, delegations and performance targets related to the organisation’s corporate strategies and business plans;

- regular information on the deliberations and decisions of the key board(s) or committee(s) governing the organisation. This will generally take the form of summary minutes and notices of agenda items for forthcoming meetings (subject, of course, to confidentiality requirements of the board/committee and its deliberations);

- regular reports on the organisation’s performance against its key indicators and/or targets, with analysis that will assist the organisation to learn from experience;

- encouragement at all levels to contribute to good governance, including exemplary leadership from senior management. Governance responsibilities need to be written into individual performance contracts and should be appropriately resourced and recognised, particularly where they involve undertaking tasks and activities outside individual line responsibilities for the wider good of the organisation. Relevant activities might include working on specific projects, such as corporate or business planning, participating in committees or task forces, or simply being helpful to colleagues across the organisation or elsewhere in the APS; and
Chief Executive Instructions, that provide guidance on matters necessary, or convenient, for carrying out or giving effect to the FMA Act or the FMA Regulations, for example: relating to handling, spending and accounting for public money; and acquiring, using, or disposing of, public property.

Example of a governance compendium

**Department of Transport and Regional Services (DOTARS)**

The DOTARS Governance Compendium reflects many of the elements of better practice discussed above. It stresses the importance of good governance systems, structures and procedures to the overall performance and reputation of the organisation and its people.

It provides an overview of the Department’s corporate planning, management arrangements, organisational structure, committee structure (including membership, roles and responsibilities, frequency of meetings and the linkages between the committees), information technology governance, performance framework and key governance documents. It also stresses the implications of good governance for DOTARS staff as a key element in facilitating leadership at all levels and supporting staff-management communications, feedback and action.

Selected references and further information

The primary sources for information on governance matters relating to individual officers are the Australian Public Service Commission (where the PS Act applies) and the Department of Finance and Administration (for matters relating to either the FMA or CAC Acts, in particular). Further reference material of interest includes:

POTENTIAL CONFLICTS IN THE GOVERNANCE OF CAC BODIES

Guidance Paper No. 2

Better Practice Guide

Public Sector Governance

JULY 2003
Introduction

The purpose of this paper is to assist authorities and corporations subject to the Commonwealth Authorities and Corporations Act 1997 (CAC Act) understand possible conflicts inherent in the governance framework and to suggest ways in which such conflicts might be managed.

The advice is aimed particularly at directors, that is, board or council members, or members of authorities and organisations subject to the CAC Act. Directors are most likely to experience tensions between conflicting legal obligations or between their differing roles in and outside of the CAC body.

This paper should be read in conjunction with Guidance Papers Nos. 1, 3 and 6.

Legal and policy framework

The duties of directors can be found in the enabling Act for the body, the CAC Act itself and for Commonwealth companies, in the Corporations Act 2001. Some duties need to be understood in terms of the common law. Many authorities are subject to the Public Service Act 1999 (PS Act). Where authorities are not legally bound by that Act, the code of conduct adopted by the board and endorsed by the Minister should be based on the APS Values and Code of Conduct, which are included in the PS Act (s. 10 and s. 13, respectively). Directors should also be aware that the operations and activities of a CAC body might be subject to State/Territory legislation.

Elements of better practice

The elements of better practice public sector governance include structures, procedures and mechanisms to direct, guide or monitor ethical standards and their conformance to legal obligations. These elements are based on, and embody, principles of public sector governance, including accountability, transparency, integrity, stewardship and efficiency. These elements and principles can be applied to recognise and manage conflicts in the CAC governance framework.

1 Except in limited circumstances, for example in supervising public service officers, such as secretariat staff.
Suggested procedures or protocols

Research conducted by the National Institute for Governance at the University of Canberra found that some board members, organisation heads and chairs experienced tensions between different aspects of their duties as board members or between their roles on and off the board. Members of some boards did not seem to understand the individual nature of their responsibility for board decisions. Some board members felt that board performance would be enhanced by enabling the board to select its chair or have a say in the appointment of new members and/or the organisation head. These sources of tension and uncertainty are discussed below with some suggestions as to how they might be managed.

Collective versus individual responsibility of directors

The CAC Act (like the Corporations Act 2001) makes no reference to a governing body such as a board or council, but only to the responsibilities of individual directors. This is consistent with the common law responsibility of directors, whose fiduciary duty is to the company as a whole, and not to any individual or group. It also highlights the inability of directors to shelter behind collective responsibility in order to diminish personal accountability for acts of the board, whether of omission or commission.

Board Charters need to include a clear statement of roles, responsibilities and accountabilities and to establish a modus operandi that promotes harmonious relationships between members, while respecting their right and duty to discharge their individual responsibilities. The chair plays a major role in setting the tone of interactions through his or her own conduct and, through skilful chairing, ensuring that each member has the opportunity to play an active role in board deliberations.

The autonomous board versus the board as an agent of the Minister

The research mentioned above indicated that some board members are confused about whom they are serving – the Government, the CAC body, or even the constituency they might represent on the board.

The general duties of directors under the Corporations Act 2001 and the CAC Act include the duty to act with care and diligence, in good faith, in the best interests of the corporation, and for a proper purpose. On the other hand, individual directors also have certain statutory obligations to their Minister. Under the CAC Act, they must comply with the ‘general policies of the Government’ that are to apply to the authority/company or its subsidiaries as notified by the Minister to the authority or company. The responsible Minister must consult with the directors before notifying them of the policies. The responsible Minister may also give formal directions to the board of an authority under its enabling Act.

Directors may find that they can reconcile their duty to exercise independent judgment, whilst giving effect to general government policy, by choosing to exercise that judgment within the area defined by that policy. If a board determines that giving effect to a particular general policy of the Government would present serious risks to the interests of the organisation, it could approach the Minister through the chair to seek exemption from that policy.

Effective management of tensions between board members and Ministers requires clear delineation of respective powers and restraints. The need for a working relationship based on trust, openness and

mutual respect needs to be acknowledged from the outset, and a procedure to follow in the event that the relationship begins to break down should be added to the agreed protocol for monitoring board performance.

Two governance lessons from the Hughes Aircraft Case relate to the interaction between board members and Ministers.

■ **Political interference:** Board members should not be influenced in their decisions by improper political interference. However, where provision is made in the enabling legislation of a CAC body, the relevant Minister will be able to direct the board as to the performance of its functions and exercise of its powers. Board members can properly act in accordance with such a direction. It may not always be clear whether a communication from the responsible Minister is such a ‘direction’, or an improper communication.

■ **Confidentiality and communications with responsible Ministers:** While a responsible Minister will be entitled to obtain information from a public body in light of public accountability requirements, where the body possesses confidential information, it should only be voluntarily disclosed where the board has made an informed decision to do so, having regard to the interests of the body.

**Tensions between the enabling Act and CAC legislation**

There may be tensions between the provisions of the enabling Act for a Commonwealth authority or corporation and provisions in the CAC Act. These tensions may be most marked in relation to the powers and responsibilities of directors vis-à-vis the Minister.

The board charter needs to set out the legal and policy framework, noting, where relevant, which enactments have precedence and conveying as clearly as possible the duties of board members in that framework.

**Tensions between organisation head and chair**

In a CAC body headed by a governing board, it is usual for the chair to have the major role in liaising with key stakeholders, including the Minister. In such bodies, the Minister usually has no role in day-to-day management, and thus has little reason to deal with the organisation head. However, if in the case where the relationship between the Minister and the organisation head is closer than that between the Minister and the chair, this may lead to tension and prejudice the effective functioning of the board. Privileged access to Ministerial information, on the part of a member of the management team who is not a member of the board, will not promote the building of trust.

Here again, it is important to clarify the way the Minister, the board and the organisation head should interact and to articulate their respective powers, responsibilities and limitations. Goodwill, openness and trust are essential ingredients in achieving effective governance. Courtesies, such as keeping the chair informed if the Minister meets with the organisation head, can help maintain a good relationship.

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3 (1997) 76 FCR 151. The case primarily focused on probity issues related to a contract awarded by the Civil Aviation Authority CAA.

4 The Hughes Aircraft Case was decided before the CAC Act came into force. Sections 16 and 41 of the CAC Act require that CAC authorities and wholly-owned companies must give the responsible Minister and the Finance Minister such ‘reports, documents and information’ they require.
‘Representative’ board members

Many directors on the boards of CAC bodies also represent the interests of a major stakeholder group – for example, pharmacists on the board of the Health Insurance Commission. While directors should be appointed on the basis of the skills and other personal capacities they can contribute to the board, as a matter of law or policy, some Commonwealth organisations may be required to have stakeholder representatives on their boards or committees.

Directors in this latter position are generally referred to as ‘nominee directors’ or ‘representative directors’. Directors in this situation may sometimes feel torn between a duty to represent their outside stakeholder group and their duties to make decisions in the interests of the organisation as a whole.

The general common law position is that all directors must act in the interests of the organisation as a whole, rather than in the interests of his or her nominator.

This was illustrated in Bennett vs Board of Fire Commissioners of NSW (1967) 87 WN (Part 1) NSW 307. In this case, the board was constituted by statute and included members who were elected by various constituencies. One member was clearly in conflict between his duty to the board and the duty he thought he owed to the outside body which nominated him for the appointment. Presiding Judge, Street CJ, summarised the position as follows:

... Each of the persons on such a board owes his membership to a particular interested group but a member will be derelict in his duty if he uses his membership as a means to promote the particular interests of the group which chose him... a board member must not allow himself to be compromised by looking for the interests of the group which appointed him rather than to the interests for which the board exists.

Appointments by a Minister

In the private sector it is common practice for the new board to elect its own chair. This practice helps establish some group identity and puts the relationship between board and chair on a strong footing. In the public sector the Minister has, and usually exercises, the power to make all board appointments. It may assist board performance if board members can play a greater role in appointing new members to fill skill gaps they have identified. It may also be useful for board members to work closely with the Minister in the selection of the chair— or follow private sector practice of electing their own, where the government agrees that this is better practice.

Procedures to manage tensions in CAC board framework

The better practice protocols in Figure 2.1 should not be treated as a checklist and are not exhaustive. Rather, they suggest some procedures/protocols that might address governance tensions in CAC bodies. Each body is encouraged to develop its own tailored mechanisms and to regularly review their effectiveness.

1 The gender-specific language in 1967 is acknowledged.
Figure 2.1: Procedures to manage tensions in CAC board framework

<table>
<thead>
<tr>
<th>Procedures or protocols to:</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Provide a clear statement of the relationships between Minister, chair, organisation head, board and the portfolio department, including respective roles, responsibilities and accountabilities, powers, rights and limitations.</td>
<td>3 2 4</td>
</tr>
<tr>
<td>2. Provide a protocol for interaction between the chair, board, organisation head and the Minister and the Minister's Office.</td>
<td>3 2 4</td>
</tr>
<tr>
<td>3. Provide induction training for new directors that assists them to understand their duties within the legal and policy framework for the CAC body, establishing the precedence of individual enactments where necessary. It should also identify possible tensions and conflicts of interest or role, and suggest mechanisms for managing both.</td>
<td>3 2 4</td>
</tr>
<tr>
<td>4. Provide a training module for the chair, setting out the special role of that position in helping directors manage issues related to tensions in their role.</td>
<td>3 2 4</td>
</tr>
<tr>
<td>5. Develop with the Minister an agreed procedure to enable board members to have input to the appointment of new members, chair and organisation head.</td>
<td>3 2 4</td>
</tr>
</tbody>
</table>

Code: 1 Not addressed; 2 Developing; 3 Better practice; 4 Time for review.

Example of guidance on governance tensions

**Corporate Governance Handbook**

Australian Fisheries Management Authority, *Corporate Governance*, May 2003. This handbook provides useful guidance on a number of governance issues, including: the roles of the board and of management; compliance with legislation including that concerning the workplace, delegation of board powers or responsibilities; board committees; meeting protocols; and review of board performance.

Selected references and further information

Additional reference material includes the following.

CAC BOARDS

Guidance Paper No. 3

Better Practice Guide

Public Sector Governance

JULY 2003
Introduction

Statutory bodies such as those established under the Commonwealth Authorities and Corporations Act 1997 (CAC Act) operate at arm’s length from the Government. Sound governance arrangements that embody better practice principles should assist such bodies to meet the increasingly high expectations of Government, the Parliament and the general public.

The purpose of this paper is to promote better practice in the ‘boards’ (boards, or other governing bodies) of CAC bodies by assisting ‘directors and other officers’[^1] to better understand:

- the legislative provisions that prescribe the functions and accountabilities of CAC bodies and the duties of their directors;
- the role of the board in the governance of the CAC body, including its relationship with the Minister, the organisation head and other stakeholders; and
- approaches to public sector governance, including board appointments, that enable boards to function more effectively.

This paper should be read in conjunction with Guidance Papers Nos. 2 and 6.

Legal and policy framework

Role of the board, council or authority

Through their work on the board, directors ‘govern’ the authority or corporation. Like the directors of private corporations, they are subject to legislation that specifies their duties and responsibilities. Unlike private sector directors, they are generally obliged to take into account government policy when making decisions on the board[^2], if notified in accordance with the strict criteria laid down in ss. 28 and 43 of the CAC Act.

[^1]: ‘Directors’ are defined in the CAC Act as members of CAC body boards or governing councils, or, in the case of authorities with no governing council, members of the authority.

[^2]: Four CAC Act bodies are excepted, namely: the Australian National University, the Australian Broadcasting Commission, the National Registration Authority for Agricultural and Veterinary Chemicals, and the Australian Industry Development Corporation.
CAC bodies are accountable to a portfolio Minister (and/or a shareholder Minister) and to the Parliament as well as being subject to scrutiny by the Australian National Audit Office. Bodies other than Government Business Enterprises may also be subject to scrutiny by, for example, the Office of the Commonwealth Ombudsman.\(^2\)

It is up to the board to determine how it will perform these functions, keeping in mind the statutory duties of directors. All CAC bodies are required to form an audit committee. However, the formation of other committees, for example on governance, appointments, ethics, or special projects, is discretionary. Similarly, boards may choose how they: monitor and assess the performance of the CAC body and its management; conduct meetings; consult with stakeholders; make decisions; and assess their own performance.

Boards should also consider the optimum competency and skill mix and number of independent board members required to effectively discharge their duties.

Although boards may be able to delegate some of their functions, for example to an organisation head, board members cannot delegate their individual accountability.

**Legislative provisions**

The principal matters covered by the CAC Act are:

- reporting by an authority or a company to a Minister or, through a Minister, to the Parliament;
- contents of the annual report of operations of an authority;
- audit of financial statements of a Commonwealth authority or company by the Auditor-General;
- banking and investment powers of authorities;
- submission to the responsible Minister of budget estimates each financial year by authorities and companies other than Government Business Enterprises and partly-owned companies;
- compliance of Commonwealth authorities and wholly-owned companies with general policies of the Government; and
- conduct of directors and officers of authorities, including the consequences of the directors and officers contravening civil penalty provisions.\(^4\)

Provisions concerning the general responsibilities and legal liabilities of directors and other officers of Commonwealth companies subject to the CAC Act can also be found in the *Corporations Act 2001*—duties such as care and diligence, good faith and avoiding improper use of position and information. In addition to these, the CAC Act requires directors to: notify the Minister of significant events (ss. 15 and 40); to keep the Minister and the Finance Minister informed (ss. 16 and 41); and, if notified by the responsible Minister, to carry out the general policies of the Government (ss. 28 and 43). Possible tensions between these duties are explored in Guidance Paper No. 2 (Potential conflicts in the governance of CAC bodies).

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\(^2\) Australia Post and Telstra are subject to scrutiny by the Office of the Commonwealth Ombudsman. Telstra is also subject to scrutiny by the Telecommunications Ombudsman.

Under s. 9 of the CAC Act, boards must submit an annual report to the Minister. The CAC body's enabling Act may contain additional reporting requirements. For example, the Australian Heritage Commission is required to report on the state of the national estate at the end of the relevant period.

Where the CAC body’s enabling Act identifies it as a Statutory Agency for the purposes of the Public Service Act 1999, directors and other officers are also bound by the Public Service Values (s. 10) and Code of Conduct (s. 13).

Directors and other officers should also be aware that State or Territory legislation may affect their legal responsibilities and liabilities as directors. They should also be cognisant of occupational health and safety obligations to their staff under the Occupational Health and Safety (Commonwealth Employment) Act 1991 and under relevant State or Territory legislation.

**Policy environment**

The Minister’s powers, under ss. 28 (authorities) and 43 (companies) of the CAC Act, to provide written notification to the board about general government policy, must be exercised after consultation with the board. The board is then obliged to ensure that the policy is carried out by the authority or company itself and by any subsidiaries.

The enabling Act may also empower the Minister to provide specific written directions concerning the Government’s policy priorities or particular actions that he or she requires of the board. If the board needs any further assistance in understanding government policy, where there is a departmental representative on the board, that person should be well placed to provide it.

The board is responsible for ensuring that the CAC body conforms with statutory requirements and performs well in terms of its corporate goals.

**Elements of better practice**

The suggested elements of better practice for CAC boards include operating procedures and practices.

**Principles**

The elements of better practice include structures, procedures and mechanisms to direct, guide or monitor conformance with legal obligations and the ethical enhancement of performance. These elements are based on and embody principles of public sector governance, including accountability, transparency, integrity, stewardship and efficiency. To any such list could be added leadership—senior board members need to model and reward behaviour that reflects the public service values and code of conduct.

**Suggested procedures or protocols**

Figure 3.1 below provides suggested better practice procedures and protocols for CAC boards. The figure should not be treated as a checklist and is not exhaustive. Rather it should be used as the basis for assessing whether current governance arrangements for a board in any CAC body can be improved. Each body is encouraged to develop its own tailored arrangements and to review its effectiveness regularly.
Figure 3.1: Better practice protocols for CAC Act boards

<table>
<thead>
<tr>
<th>Procedures or protocols:</th>
<th>Assessment</th>
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</thead>
<tbody>
<tr>
<td><strong>Clear roles and responsibilities</strong></td>
<td></td>
</tr>
<tr>
<td>1 Clear statement of relationships between Minister, board, chair and organisation head, including the scope of powers and responsibilities of each party, performance standards and reporting.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td>2 Clear map of governance arrangements, including documentation of legal responsibilities of directors.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td>3 Statement of Matters reserved for the Board or Board Charter.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td>4 Code of conduct to guide directors in relation to behaviour expected of them to maintain confidence in the integrity of the board.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td><strong>Role of chair</strong></td>
<td></td>
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<tr>
<td>5 To be independent. Clear statement of chair's role (including promoting the effectiveness of the board's deliberations and liaising with stakeholders).</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td><strong>Appointment protocol</strong></td>
<td></td>
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<tr>
<td>6 Regular audit to identify skills and personal qualities of chair/members (or directors) needed by the board, as well as current and projected skill gaps.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td>7 Procedure for identifying potential candidates and a transparently merit-based selection procedure. Appropriate balance of independent members.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td>8 Comprehensive and detailed director's letter of appointment.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td>9 Re-appointment subject to review of performance.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td><strong>Induction and training</strong></td>
<td></td>
</tr>
<tr>
<td>10 Comprehensive induction procedures for new board members.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td>11 Director development program.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td><strong>Conducting board business</strong></td>
<td></td>
</tr>
<tr>
<td>12 Protocol for conducting board business, including criteria for admitting business items, decision-making, code of conduct, interaction with management, access to information, record keeping.</td>
<td>3 2 4 1</td>
</tr>
<tr>
<td>13 Protocol for identifying and handling conflicts of interest and role.</td>
<td>3 2 4 1</td>
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</table>

5 Members of CAC Boards can be described with different terminology, depending on the enabling Act. Terms such as ‘director’, ‘member’ or ‘commissioner’ are common. For the purposes of this guide, they are interchangeable.
### Committees

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<tbody>
<tr>
<td>14</td>
<td>Audit Committee of independent directors literate in financial statements. Committee develops/approves procedure for ensuring compliance with legal and financial accountability requirements, including regular reporting.</td>
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<tr>
<td></td>
<td>1 3  2  4</td>
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<tr>
<td>15</td>
<td>Risk management committee develops and adopts procedure for identifying, assessing and managing risks – related to performance and compliance. The audit committee could undertake this.</td>
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<td></td>
<td>1 3  2  4</td>
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<tr>
<td>16</td>
<td>Ethics committee, chaired by independent director/member, with outside ethics adviser, approves code of conduct based on PS Values and Code of Conduct. This could develop mechanisms for ensuring adherence throughout the organisation.</td>
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<tr>
<td></td>
<td>1 3  2  4</td>
</tr>
<tr>
<td>17</td>
<td>Governance Committee monitors and reviews governance arrangements. This could incorporate ethics, as outlined above.</td>
</tr>
<tr>
<td></td>
<td>1 3  2  4</td>
</tr>
<tr>
<td>18</td>
<td>Nominations Committee, to nominate or suggest appropriate, competent and skilled directors to complement existing skill set.</td>
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### Strategy setting and performance monitoring

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<tbody>
<tr>
<td>19</td>
<td>Procedure for ensuring compliance with legal and financial accountability requirements, including regular reporting.</td>
</tr>
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<tr>
<td>20</td>
<td>Strategic plan, including indicators of performance and reporting schedule.</td>
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<tr>
<td>21</td>
<td>Utilise risk management approach to set higher-level strategy as well as more operational strategies and plans.</td>
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<tr>
<td></td>
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</tr>
<tr>
<td>22</td>
<td>Plan for ensuring compliance with human resource management requirements and development of human resources, with performance indicators and reporting schedule.</td>
</tr>
<tr>
<td></td>
<td>1 3  2  4</td>
</tr>
<tr>
<td>23</td>
<td>Stakeholder consultation, plan with indicators of performance and reporting schedule.</td>
</tr>
<tr>
<td></td>
<td>1 3  2  4</td>
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<tr>
<td>24</td>
<td>Whistleblower system to allow information about corruption, incompetence or errors of judgement to reach the board.</td>
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### Board performance assessment

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<tbody>
<tr>
<td>25</td>
<td>Procedure for assessing performance of board as a whole and of individual members.</td>
</tr>
<tr>
<td></td>
<td>1 3  2  4</td>
</tr>
<tr>
<td>26</td>
<td>Procedure for regular review of board succession plans, the competency and skill set, size and commitment of the board.</td>
</tr>
<tr>
<td></td>
<td>1 3  2  4</td>
</tr>
</tbody>
</table>

**Code:** 1 Not addressed; 2 Developing; 3 Better practice; 4 Time for review.

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6 These are suggestions of committees that CAC boards could consider. It does not indicate that all organisations should have all these committees.
Indemnities and insurance premiums for officers

The CAC Act deals with the limits of indemnities for officers (refer ss. 27M and 27N). Most CAC bodies have put into effect insurance policies in respect of Professional Indemnity and ‘Directors and Officers’ reimbursement. Under the Finance Ministers Orders made under section 48 of the CAC Act, the report of operations must include certain details including premiums paid and indemnity provided.

Example of appointment protocols

Appointment protocols

The protocol developed by Nipissi University, Canada, concerns appointments to the governing board. It is notable for drawing an explicit connection between the needs and the spirit of the organisation’s mission, the role and duties of the board and the appointment process. Its criteria for board membership are closely based on this link, covering: relevant skills, knowledge and expertise; personal qualities; stakeholder and community representation (including labour, professional, ethnic minority); and functional representation (including financial, sectoral, business, community).

http://www.nipissingu.ca/documents.cfm?itemid=2863


Selected references and further information

Additional reference material includes the following.

- Standards Australia, Australian Standard: Good governance principles, forthcoming.
- NZ Ministry of Education, Tertiary Advisory Monitoring Unit, Good practice assistance for councils, key review questions, April 26 2002.


Guidance Paper No.4:
Executive Boards in FMA Agencies

Introduction

The purpose of this paper is to assist officers in Commonwealth departments and agencies subject to the Financial Management and Accountability Act 1997 (FMA Act) to understand the status and possible roles of executive boards. This paper is relevant to the majority of FMA agencies that have advisory boards, but not to agencies, such as Centrelink, which operate under the FMA Act but have a statutory, governing board.

This paper should be read in conjunction with Guidance Papers Nos. 6 and 8.

Legal and policy framework

In an FMA agency ultimate accountability for performance and compliance resides with the Chief Executive (CE). The CE is accountable (especially to the Minister and the Parliament) for ensuring that legislation within the agency’s jurisdiction is administered in accordance with all relevant statutory and common law requirements. Particular responsibilities of the CE in relation to financial management and reporting are set out in the FMA Act. The Public Service Act 1999 also sets out the duties of the CE and provides Values and a Code of Conduct for all employees of the Commonwealth.

An executive board in an FMA agency, such as a Commonwealth department, has no legal status. Apart from the CE, who may chair the meetings, no individual on such a board has legal accountability for the decisions it makes. In effect, the ‘executive board’ is an ‘advisory committee’ to the CE, although some CEs may choose to be bound by its advice, accepting personal risk in so doing. However, such arrangements can be inclusive of those who are responsible for both determining strategy and carrying out the functions. Such a committee can promote greater accountability of, and commitment to, decisions taken.

1 The FMA Act defines the agency head as the chief executive, rather than the chief executive officer.
Elements of better practice

Principles

The elements of better practice include structures, procedures and mechanisms to direct, guide or monitor the ethical enhancement of performance and conformance with legal obligations. These elements are based on, and embody, principles of public sector governance, including transparency, integrity, accountability, efficiency, and stewardship.

Issues and suggested procedures or protocols

Role of the executive board

Although overall legal accountability rests with the CE, the size and complexity of many agencies is such that it would be very difficult for one person to be sufficiently well-informed about every aspect of their operations to ensure compliance, to assess efficiency and to develop coherent strategies. The value of adding independent members, for example to challenge organisational attitudes and approaches, should be considered, not only for committees, such as the Audit Committee, but also for the board itself.

Ways in which executive boards can be used to assist the CE and the organisation include the following:

- **forum for reporting on cross-divisional responsibilities**: executive directors are often assigned responsibility for outcomes that cut across divisional boundaries. Progress against these targets can be discussed with colleagues and senior management;
- **providing advice**: board members can provide advice on the basis of more detailed understanding of the issues;
- **stakeholder liaison**: members can be assigned the task of liaison with groups of outside stakeholders, reporting their views on current or proposed policy;
- **communication**: members can convey information back to their own areas of the agency, engage in dialogue with and provide feedback to and from a wide range of staff;
- **strategy formulation**: members can assist in the development of major strategy (utilising the agency’s specified risk management framework and approach);
- **performance monitoring and evaluation**: members can analyse regular reports against major indicators and develop necessary modifications to business plans;
- **learning**: members can provide experience-based feedback from successes and failures that can assist the organisation to learn; and
- **committees**: under the FMA Act, the CE must set up an Audit Committee (compliance). In addition to Audit, there could be committees on Governance, Ethics, Human Resources, Performance, Strategy, Information (including Information, Technology and Communications) or Cross-divisional outcomes. A committee comprising a cross-section of staff from different levels and parts of the organisations could be used to provide a participatory governance mechanism.

Conflicts for executive board members

Whilst acting as board members, the officers concerned are expected to put aside personal allegiances and interests in favour of the organisation as a whole. In cases where this conflict is severe, members may need to withdraw from their role on the board, receiving no information and not participating in
discussions. The conflicts of role experienced by board members are explored in Guidance Paper No. 6, Conflicts of Personal Interest and Conflicts of Role.

Members of executive boards may also experience tensions due to the ambiguities in the role or the powers of these boards. Even if the agency head treats the board as a decision-making body, most participants are well aware that the agency head is still solely accountable for decisions—even if he or she chooses to accept majority or consensus advice from the board. Given this fact, and the common practice that the CE chairs executive board meetings, members may be uncertain of their role, unless the board’s charter sets out very clearly answers to the following issues:

■ what are the board’s powers and limitations? (Will the CE just make the decisions anyway? If he or she makes a practice of adopting the board’s advice, how should the risks of doing so be mitigated?);

■ how will the board conduct its deliberations? (Will vigorous discussion be encouraged? Will junior officers be penalised for not deferring to their seniors? Will there be a formal role of devil’s advocate, and will it be rotated?);

■ how will the board obtain the information it needs—especially if there is bad news that someone might wish to suppress?; and

■ how will the performance of the board as a whole and of individual members be assessed? (See Guidance Paper No. 5, Monitoring Board Performance).

The better practice protocols outlined in Figure 4.1 below should not be treated as a checklist and are not exhaustive. Rather, the protocols aim to encourage FMA agencies to assess whether current executive board arrangements can be improved. Each agency is encouraged to develop its own tailored arrangements and to review their effectiveness regularly.

**Figure 4.1: Better practice protocols for FMA agency boards**

<table>
<thead>
<tr>
<th>Procedures or protocols:</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 A clear board charter, setting out its role, powers and responsibilities in relation</td>
<td>1</td>
</tr>
<tr>
<td>to the chief executive and the Minister, its operating rules, performance criteria</td>
<td>2</td>
</tr>
<tr>
<td>and mechanisms for assessing performance.</td>
<td>3</td>
</tr>
<tr>
<td>2 A mechanism for handling conflict of interest and conflict of role.</td>
<td>1</td>
</tr>
<tr>
<td>3 Board committees to meet the needs of the organisation. In addition to Audit,</td>
<td>2</td>
</tr>
<tr>
<td>there could be Governance, Ethics, Human Resources, Performance, Strategy or Cross-</td>
<td>3</td>
</tr>
<tr>
<td>divisional committees.</td>
<td>4</td>
</tr>
</tbody>
</table>

**Code:** 1 Not addressed; 2 Developing; 3 Better practice; 4 Time for review.
Selected references and further information

Further information on executive boards in FMA agencies as well as guidance in particular situations, can be obtained from the Australian Public Service Commission.

Additional reference material includes the following.

MONITORING BOARD PERFORMANCE

Guidance Paper No. 5

Better Practice Guide

Public Sector Governance

JULY 2003
**Introduction**

The purpose of this paper is to promote better performance of boards and committees in Commonwealth organisations by assisting them to clarify their governance arrangements and assess their own performance.

This paper should be read in conjunction with Guidance Papers Nos. 3 and 4.

**Legal and policy framework**

The functions and powers of a governing board in a Commonwealth statutory body can be found in its enabling legislation. However, there is no general legal requirement that Commonwealth boards work to an established charter, or review their performance against that charter.

The *Commonwealth Authorities and Companies Act 1997* (CAC Act) has extensive provisions concerning the responsibilities of directors and officers (especially Division 4 of Part 3, ‘Conduct of Officers’), but not for the board as a whole. CAC authorities are required to prepare an annual report of operations in accordance with finance ministers orders issued under s48 of the CAC Act. This report must include specific information on directors (for example, the number of board meetings held and the number attended by each member, (clause 14)) and a Statement on Governance (clause 15). The Statement of Governance may include information on such matters as ‘whether there is any formal mechanism for reviewing the performance of directors’, (clause 15 (3)(b)). Implicit in this provision is an expectation that CAC bodies will generally follow better practice by instituting regular, systematic assessments of directors’ performance.

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Some CAC authorities may have in their legislation provisions that require the board to operate under a charter or that specify the board’s membership, purpose and/or mode of operation. Statutory authorities may also be required to prepare and submit a corporate plan to the relevant Minister. As a matter of good practice, the board should plan and review its own performance as an integral part of the organisation’s planning and review process.

The Financial Management and Accountability Act 1997 (FMA Act) does not specifically address board or executive committee arrangements. Annual reporting requirements explicitly call for information on governance matters. For departments and agencies subject to the FMA Act, the Requirements for Annual Reports\(^2\) issued by the Department of the Prime Minister and Cabinet and approved by the Joint Committee of Public Accounts and Audit stipulate that ‘the annual report must include a statement of the structures and processes that the department had in place during the year to implement the principles and objectives of corporate governance’ (section 12(1)). The ‘Requirements’ go on to suggest a list of topics to be covered in this part of the annual report, including ‘senior management committees and their roles’ (section 12(1)(b)).

### Elements of better practice

#### Issues and suggested procedures or protocols

It is a well-established part of good governance in the private sector that boards have a charter against which the performance of the board as a whole, and that of individual members, is regularly assessed. The content of the charter should be tailored to the circumstances of the organisation. Typically, a small organisation with a relatively narrow range of policy or operational concerns and little exposure to risks of conflicts of interest will have less need for a detailed board charter than a larger organisation with greater risk exposure. The former might also require less frequent and/or less intensive reviews of board performance than would be appropriate in larger, more complex organisations.

All boards or executive committees should have a charter or some other form of documentation that specifies such matters as:

- the functions, powers and membership of the board or committee;
- the role and responsibilities of members—for example, due diligence and good faith, commitment to acting in the best interests of the organisation as a whole, attendance, participation in discussions, to read and understand papers, to raise concerns, to deal with other members and staff with courtesy and respect, access to information, outside advice, confidentiality;
- the role of the chair—including: promoting full participation by all members; constructive questioning; strategic thinking; risk management; consideration of the right issues; decision-making and follow-up; adequate reporting; and relations with the organisation head, Minister and key stakeholders;

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\(^2\) Available via the Department of the Prime Minister and Cabinet’s website, www.pmc.gov.au.
processes for identifying and measuring conflict of interest;

- basic meeting procedures—for example, agenda, papers, minutes, declarations of interests and how these are to be handled, powers of the chair, voting procedures;

- policies on member remuneration (where relevant); and

- policies on board performance review.

As shown at Figure 5.1, there are four main types of governance review. The first (Box A) involves using an external, independent person or group to assess the performance of the governing board or committee. Such a review allows for an outside perspective that can reflect on some of the more subtle but crucial issues such as relationships between board members, balance in the board make-up, any tendencies towards group think, or an unwillingness to question more powerful individuals.

The second type of review (Box B), also uses external experts but canvases the broader structural issues in governance, including the formal and informal relationships between boards and committees, documentation of and action in accordance with committee powers.

Reviews using external experts (Boxes A and B) will generally take place less frequently than those using internal, self-assessment mechanisms. These types of review (Boxes C and D) can be coordinated through the board or committee secretariat and consist of a relatively brief self-assessment of the board/committee performance over the course of a planning cycle, usually a year.

Figure 5.1: Reviewing governance arrangements

Which form of review or evaluation is best in a given circumstance is a matter for judgement. Externally facilitated reviews every three years can establish a benchmark for more frequent (annual) internal assessments.
The factors to be assessed in a board performance assessment include:

- **board impact**: does the board add value to the organisation? Does it provide effective leadership and guidance on key strategic and performance issues? Does it contribute effectively to the risk identification and management process?

- **individual performance**: does the board operate well as a team? Do members question and debate issues when matters of concern are raised? Is the chair effective in fulfilling his or her role? Do members attend and actively participate in an adequate number of meetings?

- **board charter**: is there one? Is it up to date and relevant? Does it establish standards and procedures in the relevant areas of policy and practice?

- **regulatory requirements**: have the relevant legal requirements for the board and its members been identified and communicated to the board?

- **governance framework**: does the board operate within a coherent and consistent governance framework that includes key elements such as an audit committee and relevant subcommittees responsible for significant policy and procedural issues (for example, appointments, remuneration, financial management, corporate and business planning)? Is there regular review of the governance framework to test its effectiveness?

- **board functions**: does the board acquit its responsibilities in relation to oversight of the organisation, including relevant factors such as assessment of the chief executive, review and approval of the corporate plan?

It is important that the findings of reviews of governance arrangements and of board performance are acted upon within a reasonable timeframe. Staff and management as well as board or committee members themselves can become cynical if areas for improvement are identified but not addressed.

**Selected references and further information**

Further information on assessing board performance can be obtained from the Australian Public Service Commission. The Australian Institute of Company Directors can also provide assistance and information.

Additional reference material includes the following.


CONFLICTS OF PERSONAL INTEREST AND CONFLICTS OF ROLE

Guidance Paper No. 6

Better Practice Guide

Public Sector Governance

JULY 2003
Introduction

The purpose of this paper is to assist Commonwealth organisations to develop systems for ensuring that situations that give rise to conflicts of personal interest or of role will be recognised and either avoided or managed appropriately.

This paper should be read in conjunction with Guidance Paper No. 4.

Definitions

■ A conflict of personal interest is a situation in which the impartiality of an officer in discharging their duties could be called into question because of the potential, perceived or actual influence of personal considerations, financial or other. The conflict in question is between official duties and obligations, on the one hand, and private interests on the other.

■ Conflicts of role arise when an officer is required to fulfil multiple roles that may be in conflict with each other to some degree. Unless properly handled, such conflicts can impair the quality of working relationships across government organisations and lead to a loss of credibility and effectiveness.

Sources of conflict of interest

The main conflicts of personal interest for an officer (or director) of a particular Commonwealth organisation typically involve directorships or other business or professional interests with companies or bodies with commercial, regulatory or policy relationships related to the operations of the Commonwealth organisation.
Conflicts of role, or a perception of conflict, can occur when, for example, the Secretary of a department sits on the board of a CAC body within the same portfolio, and/or a member of a professional body or community advocacy group is a director of the board of a CAC body.

Legal and policy framework

Provisions concerning conflict of personal interest affecting public officials can be found in core legislation, such as the Australian Public Service Act 1999 and the Commonwealth Authorities and Companies Act 1997 (CAC Act) and in the individual statutes that establish agencies (for example, the Commonwealth Services Delivery Agency Act 1996, which established Centrelink). Guidelines can be found in service-wide codes of conduct (for example, the APS Code of Conduct and the yet-to-be-revised Guidelines on Official Conduct of Commonwealth Public Servants) and in the governance protocols of departments and agencies.

Elements of better practice

The suggested elements of better practice in the identification and management of conflicts of personal interest consist of both principles and procedures designed to give an appropriate level of assurance that decision-making will not be, nor be perceived to be, compromised by lack of impartiality.

Principles

Conflicts of interest and role need to be considered within an ethical framework that requires officers to act with integrity and impartiality as well as in good faith and in the best interests of the organisation they serve. Transparency is fundamental—officials should be responsible for disclosing personal interests that could give rise to an actual or perceived conflict of interest in all decision-making situations. Accountability complements responsibility—adherence to the requirements for disclosure and management of conflicts needs to be monitored and enforced. Consistently requiring all manner of conflicts to be identified and dealt with properly is an essential part of building an ethical organisational culture.

Suggested procedures or protocols

These procedures to manage conflicts of interest and conflicts of role are intended to be generic—that is, to apply across bodies operating under the FMA Act and under the CAC Act. However, certain types of conflict of interest are a more regular feature of the operating environment for CAC boards than of FMA departments (see Figure 6.1).

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1 Especially sections 13(7) and 17.
2 Especially sections 22(1), 22(2), 26(2)(A), 27(F)(1), 27(G), 27(J) and 27(K).
3 For example, sections 21 and 22, especially 21(3) and (4).
### Conflict of personal interest

Protocols on conflict of interest usually contain definitions of different types and/or grades of conflict of personal interest. They will usually promote transparency, requiring officers to declare relevant interests and to follow certain procedures once conflicts of interest have been identified. These procedures are designed to assure both the reality and appearance of probity in decision-making.

A grading system for conflicts of personal interest should consider the point at which conflicts should be avoided and differing methods to manage them, depending on their nature and severity. For example, methods of avoiding or managing a personal conflict of interest for an existing or prospective officer include divestment, resignation, confidentiality agreements, exclusion from receiving related material, and withdrawal from discussions and/or decision making.

### Conflict of roles

Officials who are called upon to wear two or more ‘hats’ may find that they have difficulty resolving tensions between their different roles. For example, a Secretary of a department may be required to sit on the governing board of a statutory body in the same portfolio—a body from which the department purchases services. In such a case, the secretary can be simultaneously:

- chief policy adviser to the Minister and can be expected to oversee the body’s compliance with government policy objectives;
Given the potential for perceived conflict and misunderstanding, it is important that there be an open discussion of the way in which the individual will discharge their responsibilities. If it were considered necessary for a portfolio Secretary to be excluded from sensitive board discussions, such as those concerning forthcoming budget strategy, then this could be treated according to an agreed protocol—for example, the Secretary may offer advice and then leave. Relevant papers should not be forwarded on such items.

How the Secretary would bring matters of government policy to the board’s meetings could be the subject of a special agreement—on occasion it might be appropriate for the board to be addressed by other representatives of the department. If the Secretary had concerns as a customer, they could be pursued through an outside stakeholder-consultation process and brought to the attention of the board by independent members as required. Having dealt with the two other ‘hats’, the Secretary would then be able to fulfil his/her role of board member.

Examples of guidance on managing conflicts of interest

A good example of guidelines prepared by and for a particular organisation is the paper on governance, published by the Australian Fisheries Management Authority (AFMA) to assist its board members. It provides a governance framework, including an account of the responsibilities of board members, a guide to board decision-making, and a guide for disclosing personal interests and for dealing with various types and levels of conflict of interest, so as to abide by the requirements of the CAC Act and the APS values.

A lesson regarding conflicts of interest was provided by the Hughes Aircraft Case (see Guidance Paper No. 2), as follows. If a board member has a pecuniary interest (or a conflict of interest) in relation to a matter before the board and that member is not disqualified from participating in the decision making process where so required by statute, this may be relevant to any subsequent judicial review of the decision of the board.

Selected references and further information

Further information on conflicts of interest as well as guidance in particular situations, can be obtained from the Australian Public Service Commission.

Additional reference material includes the following.


4 Fishery Administration Paper No. 4, Corporate Governance, May 2003.
CROSS-AGENCY GOVERNANCE
Guidance Paper No. 7
Better Practice Guide
Public Sector Governance
JULY 2003
Introduction

This paper provides Commonwealth departments and agencies with guidance on the governance of significant policy and operational activities that cut across agency boundaries. This paper is primarily concerned with those circumstances where a major initiative requires some form of joint governance. It does not deal with issues of day-to-day inter-agency coordination and collaboration. Nor is it directly concerned with governance issues where non-government organisations or organisations from other levels of government are involved. However, many of the principles of collaborative effort that apply to such circumstances also apply to cross-agency arrangements.

Cross-agency governance arrangements are becoming more common as governments seek to address increasingly complex and/or wide-ranging policy and operational issues. They are also facilitated by the application of new information and communication technologies that enable the rapid formation of ‘virtual’ organisations to perform specific policy or operational tasks. Delivering the right mix of outputs to contribute to cross-agency outcomes can therefore require levels of organisation and governance that go beyond traditional forms of coordination and collaboration and which extend into the creation of separate actual or ‘virtual’ organisations focussed on the joint objectives.

Practice in this area of public administration is still developing, and to some extent the application of better practice is a matter of innovative and flexible arrangements that address the specific policy or operational circumstances.¹

Legal and policy framework

There is no documented general legal or policy framework for cross-agency governance arrangements in the Commonwealth. It is important, however, that such arrangements meet accepted standards of good governance and that they are initiated as soon as a cross-agency issue is identified. This is especially important during the policy development phase of the annual Budget package. All cross-agency arrangements should have clear lines of accountability and the responsibilities of the parties should be clearly identified and understood. It is also important that risks and opportunities are identified and shared in accordance with each agency’s contribution and level of responsibility.

Because the Commonwealth’s legislative framework for the governance of its organisations stresses the ultimate accountability of chief executives (mainly in the case of agencies subject to the Financial Management and Accountability Act 1997) and/or directors (mainly in the case of bodies subject to the Commonwealth Authorities and Companies Act 1997), joint activities need to clearly identify how such accountability requirements are to be met in the collaborative arrangements. Cross-agency policy development or operational arrangements should not inadvertently result in an accountability gap where responsibility for outcomes is unclear or ambiguous.

Elements of better practice

Where a cross-agency initiative involves significant resources (financial or human), high policy risks, and/or long time-frames (generally over a year), the departments and agencies involved need to negotiate and agree on the terms of the collaboration. Documentation of the roles, responsibilities and contributions of the parties involved can help in the planning process and reduce the risk of misunderstandings in the implementation phase.

Such arrangements will generally derive from a specific decision of the Government and/or legislation and should therefore be cleared with the relevant Ministers (who may themselves have shared responsibilities in the relevant policy area). The detail and elaboration of the joint documentation depends on the nature of the arrangements under consideration (see Figure 7.1 below). It can range from an exchange of correspondence, through a formal service level agreement to a detailed set of contracts (especially where one or more of the organisations involved are separate legal entities).

Similarly, the specifics of the governance arrangements need to match the scale, nature and complexity of the task or activity (for example, the nation-wide delivery of integrated welfare services through Centrelink, or a time-bound project such as the Commonwealth’s involvement in the Sydney Olympics). A key determinant is the extent to which the activity falls primarily within the province of one agency or falls more or less evenly across two or more agencies.

In ‘lead agency’ arrangements it may be the case that the lead organisation has primary policy responsibility (that is, rather than an operational role), effectively becoming an actual or de facto purchaser of services from one or more other agencies to facilitate implementation. Such arrangements are particularly common in the social welfare area. Partnership or joint venture forms may also involve parties that are predominantly concerned with policy matters joining forces with one or more other agencies that have an operational focus in delivering or overseeing the delivery of programs.
Where more formal mechanisms are contemplated (for example, service level agreements, contracts, joint boards or committees) it is important that the associated documentation clearly articulates:

- the objectives of the arrangement, including desired outcomes, and timeframes;
- the roles and responsibilities of the parties, including their capacity to contribute, and positions on governing boards or committees;
- the details of the activity, including specifications of services or projects to be undertaken;
- resources to be applied by the parties and related budgetary issues;
- the approach to identifying and sharing the risks and opportunities involved;
- agreed modes of review and evaluation; and
- agreed dispute resolution arrangements.

Figure 7.1: Forms of cross-agency governance

<table>
<thead>
<tr>
<th>Types of Activity</th>
<th>Main Types of Cross-Agency Governance Arrangements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Lead Agency</strong></td>
<td>Single agency leading the project with other partner(s) fulfilling specific, subsidiary roles.</td>
</tr>
<tr>
<td><strong>Partnership</strong></td>
<td>Equal responsibility and level of involvement for partners, without a separate entity being created.</td>
</tr>
<tr>
<td><strong>Joint Venture</strong></td>
<td>Creation of a separate entity with detailed terms of reference.</td>
</tr>
</tbody>
</table>

**Policy Development**
Formulation of major new policy position. Cross-agency governance appropriate where policy risks are high.

- Appropriate where the policy issues are centred in one agency, with some involvement of others. Especially appropriate where delivery agencies are to be involved in policy development phase.
- Appropriate where the core policy issues extend across two or more agencies. May also be useful where different agencies’ perspectives need to be resolved.
- Generally not necessary unless it is anticipated that the policy development process will lead to the establishment of a separate, ongoing entity with program design and/or implementation responsibilities.

**Program Design**
Detailed design phase after principal policy decisions have been taken. Cross-agency governance appropriate where the design phase is lengthy and detailed.

- Appropriate where the program is primarily the concern of a single agency. Can be fairly informal.
- Appropriate where the program is evenly shared across two or more agencies.
- Generally not necessary.

**Program Delivery**
Policy implementation, including direct delivery and/or contract management. Cross-agency governance appropriate where multiple policy objectives involved and/or major resource costs are involved.

- Appropriate where one agency has prime carriage of most of the program. May also be appropriate in a purchaser/provider environment where the lead agency (usually the policy department) purchases implementation services from other agencies.
- Appropriate where the program is evenly shared across two or more agencies. May involve partnership agreements sharing resources, responsibilities and risks.
- Appropriate when involving a major new initiative that requires a separate entity for implementation. Can be governed by board with representatives of relevant agencies.
Examples of cross-agency governance arrangements

The more prominent examples of cross-agency governance arrangements tend to relate to social policy issues such as income support and housing. Environmental, security and indigenous policy matters are also now dealt with in this way. This is because these issues are often complex, sensitive, and likely to cut across agency boundaries. Another feature of such arrangements is that they often involve close consultations or collaboration with external stakeholders such as community groups and peak bodies. As a result, the cross-agency governance aspects are often nested within a wider framework of relationships with non-government organisations and/or agencies from other levels of government.

UK Sure Start Program: The United Kingdom’s Sure Start program is aimed at improving the health and well-being of families and children up to the age of four years. Sure Start is the responsibility of a Unit that is the jointly accountable to the Departments of Education and Skills and Health. The Sure Start Unit has staff drawn from across the Civil Service and the voluntary sector. Its work is overseen by a Ministerial Steering Committee with representatives from eight government departments. This arrangement allows for a tight focus on the client group and the objectives of the program while allowing adequate involvement of the interested organisations. Similar cooperative arrangements have been replicated within the specific programs run through the Sure Start structures.

Australians Working Together (AWT) Policy Development: The AWT program announced in May 2001 aimed to provide a more responsive and personalised social support system for Australians. The policy development process incorporated extensive external consultations, that commenced with the creation of a Reference Group (the ‘McClure Committee’, whose final report was released in August 2000). At the same time, the lead agency, the Department of Family and Community Services (FACS), chaired an interdepartmental committee (IDC) that coordinated development of a government statement, Welfare Reform: A Stronger, Fairer Australia (December 2000).

Subsequently, a Task Force chaired by the Department of the Prime Minister and Cabinet (PM&C) was established. It included representatives from three policy departments, a service delivery agency and the two finance/treasury departments. The Task Force was supported by a secretariat made up of staff from five Commonwealth agencies. Its focus was the development of Cabinet submissions through the budget process, as well as assisting in the external Consultative Forum. After the major policy decisions were made, the IDC took on the task of consultations and advice on micro-policy issues and implementation.

FACS/Centrelink Business Partnership Agreement (BPA): Centrelink is the primary agency delivering FACS’ income support and related services. In 2001–02, Centrelink delivered pensions, benefits and other services totalling $56 billion, at a cost to FACS of $1.7 billion. The relationship between FACS and Centrelink is governed by a BPA, which acknowledges joint responsibility for performance. The BPA outlines the roles and responsibilities of the two parties. FACS is responsible for providing Centrelink with appropriate policy advice, direction and funds to enable effective service delivery, and Centrelink is responsible for implementing strategies for payment control as part of its approach to service delivery.

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Selected references and further information

Much of the available information on cross-agency governance comes from overseas examples and studies, especially in the United Kingdom (under the ‘Joined Up Government’ approach) and Canada. At the time of writing, however, in Australia, the Management Advisory Committee had foreshadowed its intention to carry out a study of governance across agency boundaries in the near future. Agencies should ensure they are informed as this work progresses.

Additional reference material includes the following.


- Lindquist, Evert, ‘Culture, control or capacity: meeting contemporary horizontal challenges in public sector management’, in *New players, partners and processes: a public sector without boundaries?*, edited by Meredith Edwards and John Langford, National Institute for Governance, University of Canberra and Centre for Public Sector Studies, University of Victoria (Canada), Canberra, pp. 153–75.


SUMMARY OF CURRENT LEGAL REQUIREMENTS THAT MAY BE APPLICABLE TO CAC AND FMA BODIES

Guidance Paper No. 8

Better Practice Guide

Public Sector Governance

JULY 2003
Guidance Paper No.8:

Summary of Current Legal Requirements that may be Applicable to CAC and FMA bodies
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</thead>
<tbody>
<tr>
<td>Annual Report to stakeholder</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Interim Reports to stakeholder</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>✓</td>
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<td>✓</td>
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<tr>
<td>Audit of financial statements</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
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<tr>
<td>Submit budget estimates to stakeholder</td>
<td>X</td>
<td>✓</td>
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<td>✓</td>
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<tr>
<td>Notify stakeholder of significant events</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Provide stakeholders with special reports, documents and information as required</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Disclose directors' interests</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Prepare Corporate Plan for stakeholder</td>
<td>X</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Comply with general government policies or directions</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Implement Fraud Control Plan</td>
<td>X</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Pursue recovery of legally recoverable debts where economical to pursue</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Ability to delegate CEO powers and functions and give instructions</td>
<td>✓</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✓</td>
<td>✕</td>
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<td>✕</td>
</tr>
<tr>
<td>Must not misapply or improperly dispose of, or improperly use property</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✕</td>
</tr>
<tr>
<td>Accounts to be true and fair</td>
<td>✓</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✕</td>
</tr>
<tr>
<td>Must not improperly use a credit card</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✕</td>
</tr>
<tr>
<td>Dealing with money (payments into specified accounts and making of investments)</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✕</td>
</tr>
<tr>
<td>Keep accounts and records as required and/or enable access to prescribed person</td>
<td>✓</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✕</td>
</tr>
<tr>
<td>To have regard to sound commercial practice</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✕</td>
</tr>
<tr>
<td>Managing Director not to engage in other paid employment without approval</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✕</td>
</tr>
<tr>
<td>Prepare Statement of Corporate Intent for stakeholder</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✕</td>
</tr>
<tr>
<td>Promote efficient, effective and ethical use of resources</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✕</td>
</tr>
<tr>
<td>Keep stakeholder informed of risk management strategies</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
<td>✕</td>
</tr>
<tr>
<td>Exercise care and diligence in the exercise of powers and discharge of duties</td>
<td>✓</td>
<td>✕</td>
<td>✕</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✕</td>
</tr>
</tbody>
</table>
This is not a comprehensive listing of requirements and should not be relied upon as such. Its aim is to provide a guide to relevant obligations applicable to CAC Act and FMA Act bodies and their personnel. It should also be noted that where there is a specific requirement not covered in the legislation, that requirement may in fact be covered by a more general requirement (e.g., the obligation not to misuse a credit card may be covered by the duty to act in good faith and for a proper purpose).

A wholly-owned Commonwealth company means a Commonwealth company, other than a company any of the shares in which are beneficially owned by a person other than the Commonwealth (s 34(2) of the CAC Act).

The inclusion of ✓ in the column for ‘Individual CAC Enabling legislation’ indicates this provision may exist in at least some CAC enabling legislation.

The requirements of Governance Arrangements for Commonwealth GBEs, issued June 1997.

Some CAC Bodies may also be FMA bodies. Note the enabling legislation for ATSIC and ASIC and the FMA Regulations Schedule 1, Part 2, in relation to bodies that are FMA agencies only in regard to public money they hold.

The stakeholder would be the shareholder in the case of companies or the Minister and/or the Finance Minister (on behalf of the Commonwealth) for all government entities.

However, there are requirements for specific/additional information to be included in annual reports.

Note the proposal under CLERP9 for it to be compulsory for the top 500 companies to have an audit committee.

In effect this is likely to be covered by sections 57 and 66 which relate to “assisting the Agency Minister to fulfil the Agency Minister’s accountability obligations to the Parliament to provide factual information as required...”

Section 306 is an obligation on directors.

Section 21 relates to directions regarding the management and leadership of APS employees.

CAC Act authorities that receive at least 50 per cent of funding for their operating costs from the Commonwealth may be required to comply with the Commonwealth Fraud Control Guidelines 2002, which requires the implementation of a Fraud Control Plan.

For CAC bodies also subject to the FMA Act, the relevant obligations relate to public money.

Trustees do in some cases have specified powers to invest and there are specific obligations in relation to trust money.

Note however that paragraphs 4.1 to 4.8 set out obligations regarding dividend policies and capital structure.

Note however section 31 that deals with forfeiture by APS employee of non-Commonwealth remuneration.

Note however that paragraph 1.6 details the principal objective for each GBE is to add shareholder value and this includes a requirement to operate efficiently.

Note this is subject to the business judgment rule.

Note schedule 1, item 2(4) requires directors to state in financial statements whether or not they have reasonable grounds to believe that the authority will be able to pay its debts as and when they fall due.

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Corporations Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Must not make improper use of inside information or position</td>
<td>✓ (s 182 to s 184)</td>
</tr>
<tr>
<td>Exercise of powers and discharge of duties in good faith and for a proper purpose</td>
<td>✕ (s 181 &amp; s 184)</td>
</tr>
<tr>
<td>Prevent insolvent trading</td>
<td>✓ (s 588)</td>
</tr>
</tbody>
</table>

Legend

✓ May apply
● Obligation on employee
✗ May not apply
⇁ Obligation on official (Under the FMA Act, an official is a person who is in or part of an Agency. This may include employees.)
★ Obligation on director
✠ Obligation on officer (Under the Corporations Act and CAC Act, this is broadly defined and will cover, for example, a secretary of a corporation, a receiver, a liquidator or a person concerned in or taking part in management.)
☆ Obligation on Chief Executive (This may cover, for example, a Head of an Executive Agency, a Secretary of a Department or an Agency Head)

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