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Policy and Guidelines Paper

Commercial Policy Framework: Guidelines for Governing Boards of Government Businesses

Preface

This NSW Treasury policy and guidelines paper, Guidelines for Governing Boards of Government Businesses (TPP17-10), is a component of the NSW Government's Commercial Policy Framework. The Commercial Policy Framework is a suite of policies aiming to replicate in commercially-focused government businesses the disciplines and incentives that lead private sector businesses toward efficient commercial practices.

The purpose of the Guidelines is to outline the Government's expectations for standards of corporate governance that should be adopted by all governing boards.

This 2017 edition of Guidelines for Governing Boards of Government Businesses withdraws and supersedes the previously issued edition (TPP09-2). This revised version applies to all governing boards of commercially-focused government businesses where the board:

- is empowered to govern the management of the business and sets strategic and operational directions
- has responsibility for the performance of the business.

The Guidelines have been developed with consideration to the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (3rd Edition). They are structured around seven principles that the NSW Government considers best practice.

This policy also includes 13 practice guides which provide examples, templates and further information on how these recommendations should be implemented.

Michael Pratt AM
Secretary
NSW Treasury

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Note
General inquiries concerning this document should be initially directed to your relevant Government business Treasury contact: Commercial Assets, NSW Treasury: Commercialpolicy@treasury.nsw.gov.au

This publication can be accessed from the Treasury's website www.treasury.nsw.gov.au

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1 Introduction

This NSW Treasury policy and guidelines paper, Guidelines for Governing Boards of Government Businesses (TPP17-10), outlines the Government's expectations for standards of corporate governance and aligns with the standards expected in the private sector. The Guidelines also take into consideration the context of government ownership.

The Guidelines are a component of the NSW Government's Commercial Policy Framework and they apply to all governing boards of government businesses which are subject to the Framework. The Guidelines also extend to all government businesses outside of the Framework that have a commercial focus.

The Guidelines aim to:

- replicate within government governing boards the appropriate disciplines, incentives and governance standards that lead private sector businesses towards efficient commercial practices
- minimise risks concerning corporate governance, and optimise the performance and accountability of governing boards.

This version has been updated:

- reflecting developments in corporate governance practices since the 2009 release of TPP09-2
- improving the clarity and readability of the Guidelines by introducing a principles-based approach
- enhancing alignment with the latest edition of ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (3rd edition)
- making the Guidelines easier to implement by introducing checklists and Practice guides.

Applying the Guidelines will ensure that governing boards of government businesses have greater consistency in their approaches to corporate governance - particularly in the areas of performance, accountability and expectations of shareholders.

1.1 Government as shareholders

With Government ownership comes a unique and non-traditional shareholder relationship where the government is considered both the owner and a member of the Key Management Personnel (KMP). While the governing board are ultimately responsible for the planning, directing and controlling the activities of a government business, the government holds the ability to indirectly affect these activities.

As such, under the AASB Standard 124: Related Party Disclosure and TC16-12, the government is classified as a member of the KMP.

In this government shareholder role, the government businesses will have either:

- a shareholder as defined by their legislations (e.g. SOC) or corporatisation (company); or
- an accountable Minister holding the government shareholder role.

1.2 Corporate governance for governing boards

There is an expectation that government-owned businesses should have greater standards of public accountability. As a result, the corporate governance of governing boards is regarded as a critical foundation. Good governance ensures government businesses are properly managed to meet the expectations of the shareholders, their representatives and ultimately the people of NSW.

Clear and appropriate governance arrangements ensure shareholders have sufficient arms-length oversight of their investment while limiting interference in the independence of governing boards. From a shareholder perspective, having clear governance expectations acts as a mechanism to improve performance and accountability.

1.3 Application

These guidelines apply to all governing boards of government businesses with a commercial focus where the board:

- is empowered to govern the management of the entity and sets strategic and operational directions
- has responsibility for the performance of the entity.

Government businesses that fall into this criterion include but are not limited to:

- State Owned Corporations
- Government businesses within the Total State Sector Accounts classified as public non-financial corporations and public financial corporations
- Semi-commercial government businesses within the general government sector (functions and/or service delivery on a commercial basis)
- *Corporations Act 2001* companies where the government is a shareholder.

It is accepted, however, that not all the recommendations in these guidelines are appropriate for all commercial governing boards because their businesses vary in size, structure, scope and business activities.

It is the board's responsibility to implement the relevant and appropriate recommendations in the best manner they see fit.

Advisory and other general government boards across the public sector that do not fit the criterion above are encouraged to consider the extent to which they should also adopt certain principles that are fit to their specific circumstances.

These Guidelines will collectively refer to:

- **shareholders** to encompass the shareholders' role that is relevant to the individual government business
- governing boards as **boards**.

1.4 Reporting requirements – if not, why not

Boards are required to use 'if not, why not' reporting in the adoption of the recommendations in these Guidelines. If a recommendation is considered 'not appropriate', a board has the option of not following the recommendation but the board is required to disclose reasonable justification as to why not. It should also identify which policies and practices have been adopted in place of those outlined in these Guidelines.

All recommendations should to be reported with the 'if not, why not' approach as part of their business plans. Guidance on 'if not, why not' reporting is given in **Practice guide 2**. A reference guide is also available in **Practice guide 1** which lists all the recommendations made.

A high-level summary is to be included in the government business' annual report, detailing which governance standards have been adopted and why.

1.5 NSW Treasury's role as a representative of the shareholder

NSW Treasury, as the principal financial adviser to the Government, monitors the financial performance and position of all government businesses.

Given the unique relationship with boards, there is an expectation that NSW Treasury act as a representative of the shareholder in the capacity of financial and corporate monitoring and this role should be acknowledged by government businesses.

2 Principles and recommendations

This section sets out the principles and recommendations that are considered best practice in corporate governance by the NSW Government. They represent the shareholders' expectations of how a board should function.

Governance Principles
Principle 1: Lay solid foundations for management and oversight
A board should establish and disclose the respective roles and responsibilities of its directors and management, and how their performance is monitored and evaluated.
Principle 2: Structure the board to add value
A board should be of an appropriate composition, skills mix and commitment to enable it to discharge its duties effectively.
Principle 3: Act ethically and responsibly
A board should lead by example when it comes to acting ethically and responsibly.
Principle 4: Safeguard integrity in corporate reporting
A board should have formal and rigorous processes that independently verify and safeguard the integrity of its corporate reporting.
Principle 5: Make timely disclosure
A board should make timely disclosure of all matters as required and requested by the shareholders.
Principle 6: Acknowledge the rights of shareholders
A board should acknowledge the rights and roles of its shareholders and NSW Treasury as their representative by providing them with appropriate information to allow them to exercise those rights effectively.
Principle 7: Recognise and manage risk
A board should establish a risk management framework and regularly review the effectiveness of that framework.

Principle 1: Lay solid foundations for management and oversight

Lay solid foundations for management and oversight

A board should establish and disclose the respective roles and responsibilities of its directors and management, and how their performance is monitored and evaluated.

Recommendation	Rationale
Develop and implement a board charter setting out the roles and responsibilities of the board and the matters delegated to management. **Ensure all directors are aware of the board charter and understand the roles and responsibilities it sets out.**	To be effective in their respective positions, directors should have a clear understanding of their roles and responsibilities, and of what is expected from them by the government business and shareholders. Clarifying the division of labour between directors and senior executives will also assist with ensuring the proper management of a government business. Roles and responsibilities should be documented in a board charter.
Undertake required probity checks for the preferred candidate once shareholders have approved the interview panel's decision and before any offer of appointment. **This can be delegated to the company secretary.**	It is important to a government business that directors appointed to the board act with integrity and honesty. Ensuring required probity checks are undertaken reduces this reputational risk.
Ensure the company secretary is accountable directly to the board on matters to do with the proper functioning of the board.	The company secretary plays an important role in ensuring that board policy and procedures are followed, and coordinating the completion and dispatch of agenda and briefing materials. For this reason, he or she should be directly accountable to the board. Where a business does not have a company secretary, the corporate governance officer is considered the equivalent.
Have a diversity policy covering directors, senior executives and employees. **Annually report the government business' collective progress towards achieving measurable objectives in respect to gender, cultural background, Aboriginal people and people with a disability.** **This is to be included in the annual report.**	It should be a priority for a government business to establish a diverse board and to foster diversity at all levels of the organisation. Diversity adds breadth and variety of experience, skills, insight and perspective. At a board level, this can lead to better decision-making outcomes and helps to avoid group think. Transparency, including disclosing the diversity policy and measurable objectives for achieving diversity, demonstrates that diversity is a priority of the government business.

Lay solid foundations for management and oversight	
Evaluate board performance annually. **Disclose to shareholders a summary of the evaluation report, together with any actions taken or planned as a result of the findings.** **Carry out an external and independent evaluation of the board at least every three years.**	To maintain a board with effective leaders, all boards and board members should have their performance evaluated, including external and independent evaluations at least every three years. Boards who perform regular performance evaluations find improvements in terms of leadership, teamwork, accountability, decision making, communication and more efficient board operations. They also find increased clarity of roles and responsibilities. Providing a summary of the board evaluation reports to shareholders instils in them confidence that a board is functioning effectively. It is also an important tool for shareholders in determining which potential candidate is best suited to fill a board vacancy.
Periodically evaluate senior executive performance and annually report to shareholders whether an evaluation was undertaken.	Senior executive performance is also vital to an organisation's success. It is therefore essential that the business has in place a formal process for regularly reviewing the performance of its CEO and other senior executives and addressing any issues that may emerge from those reviews.

Practice guides and further guidance

- **Practice guide 3**: Director duties and obligations
- **Practice guide 4**: Board charter
- **Practice guide 5**: Probity checks
- **Practice guide 6**: Diversity policy
- **Practice guide 7**: Board evaluations
- **The Australian Institute of Company Directors** provides steps to develop a board charter
- **ASX recommendation 1.4** provides further information on the role of the company secretary
- NSW Treasury CEO Appointment Guidelines for Government Businesses

Principle 2: Structure the board to add value

Structure the board to add value

A board should be of an appropriate composition, skills mix and commitment to enable it to discharge its duties effectively.

Recommendation	Rationale
Have a board nomination committee with at least three members, a majority of whom are independent directors, an independent chair and a committee charter. **Report annually on the number of board nomination committee meetings and individual attendance of members.**	Even though the board has limited power in appointing directors, the board is still expected to nominate candidates for shareholders' consideration. Forming a board nomination committee may assist directors properly identify and assess whether potential candidates have the necessary skills and experience to fill a vacancy. The nomination committee should also assess whether candidates put forward by a shareholder have the right skills and experience required to fill a vacancy.
Have a succession plan and crisis management procedures.	The skills, knowledge and experience required to effectively steer a government business will change over time in response to market developments, opportunities and challenges. Setting procedures to ensure adequate succession planning and crisis management will allow the board to mitigate these risks to the business.
Tenure for board directors should generally be limited to two terms of three years each.	For commercial governing boards, there is an expectation that directors' tenure should be limited to two three-year terms. However, there may be circumstances where one or more additional terms are appropriate. For instance, where a director transitions to being chair, a third term may be considered. Limiting appointment terms ensures the management of a government business is refreshed periodically to limit 'group think'.
Have a board plan.	Having a board plan will help the chair best structure the board to add value. A board plan is a roadmap which details what skills the board requires and a set of measures to indicate the implementation progress to achieving the right mix of skills.

Structure the board to add value	
Have and disclose to shareholders a skills matrix of the board covering all board directors.	To ensure the board meets the right skills and diversity mix as detailed in the board plan, the chair should develop a skills matrix for the board which separately identifies each director. Any gaps identified by the skills matrix should be addressed through professional development initiatives for directors. Alternatively the board can leverage executives and/or consultants to fill the gap. The chair should also make available each board director's skills matrix to shareholders when requested. Disclosure of an individualised skills matrix for all board directors provides the shareholder with confidence that the board has the required skills mix.
Have a majority of independent directors on the board. Each director should be limited to sitting on three government boards. **Disclose names of independent directors, their length of service and why the board considers them to be independent.** **Ensure the board chair is independent from the CEO.**	Directors should be independent from the business to protect the rights and interest of the shareholders. Therefore, ensuring there is a majority of independent directors, including an independent chair, on the board is important to align the board's decision-making with shareholder interests rather than with those of management.
Have a program for inducting new directors and provide appropriate professional development opportunities for directors.	Newly appointed directors should undergo an induction program to allow them to contribute to decision-making at the earliest opportunity. All directors should undertake relevant continuous education programs during their tenure to maintain their effectiveness as leaders.

Practice guides and further guidance

- **Practice guide 8**: Director appointment process
- **Practice guide 9**: Board skills matrix
- **Practice guide 10**: Director independence
- **Practice guide 11**: Board induction and continuous education
- **ASX recommendations 2.3 - 2.5** provide details for assessing director independence and the importance of having a board with a majority of independent directors
- **ASX recommendation 2.1** details the duties of a nomination committee
- **The Australian Institute of Company Directors** provides more information on succession planning
- **The Australian Institute of Company Directors** provides more information on strategic plan development
- **Department of Premier and Cabinet NSW Government Boards and Committees Guidelines**

Principle 3: Act ethically and responsibly

Act ethically and responsibly

A board should lead by example when it comes to acting ethically and responsibly.

Recommendation	Rationale
Have a code of conduct for directors.	There is a high public expectation that a government business acts in a manner that is both ethical and socially responsible on an ongoing basis. Acting ethically and socially responsibly is critical to preserve the good reputation of a government business and its shareholders. To demonstrate commitment to maintaining ethical standards, a board should establish a code of conduct which is a meaningful statement of its core values. This code of conduct should align with the Ethical Framework for the government sector, set out in Part 2 of the *GSE Act* 2013. It should be separate from the board charter which sets out the respective roles and responsibilities of the board. It is important that a code of conduct is not only established, but also enforced. Compliance with the code of conduct should be monitored and, if necessary, actions should be taken to correct any instances of non-compliance.

Practice guides and further guidance

- **Practice guide 12**: Code of conduct
- **ASX recommendation 3.1** provides further guidance on establishing a code of conduct
- ***Government Sector Employment Act* 2013 No 40 Part 2** sets out the Ethical Framework for the government sector

Principle 4: Safeguard integrity in corporate reporting

Safeguard integrity in corporate reporting

A board should have formal and rigorous processes that independently verifies and safeguards the integrity of its corporate reporting.

Recommendation	Rationale
For State Owned Corporations: **Have a board audit committee with at least three members, all of whom are non-executive directors.** **The majority of the board audit committee should:** ▪ **be independent directors** ▪ **have an independent chair that is not the chair of the board** ▪ **have a committee charter** ▪ **have members with relevant qualifications.** **Report annually on the number of committee meetings and individual attendance of members.** ***For government businesses that are not SOCs:*** **Adhere to requirements as directed by TPP 15-02 and TPP17-06.**	A board audit committee is an essential component of good governance. It provides an efficient and effective mechanism to bring the transparency, focus and independent judgement needed to oversee the corporate reporting process. To form a board audit committee that is both independent and effective, all members should be financially literate and at least one member should have relevant qualifications and experience (that is, a qualified accountant or other finance professional with experience of financial and accounting matters).
Receive from CEO and Chief Financial Officer (CFO) a declaration that the financial records of the entity have been: ▪ **properly maintained** ▪ **comply with the appropriate accounting standards and give a true and fair view of the financial position and performance of the entity** ▪ **that the opinion has been formed on the basis of a sound system of risk management and internal control which is operating effectively.**	In order to promote accountability between the board and management, it is recommended that boards receive a declaration that the financial records have been properly maintained. For listed entities under the *Corporations Act 2001* (Cth), a CEO and CFO declaration is a requirement.
Ensure the proper management and maintenance of all other official records, including the full and accurate records of all decisions and actions taken by the board.	These documents are considered operational, administrative and functional records of the entity and therefore are state records. Under the *State Records Act 1998*, these records are required to be maintained and managed in accordance with the Act.

Practice guides and further guidance

- **ASX recommendation 2.1** provides more information on an audit committee's duties
- **TPP 15-03** Internal Audit and Risk Management Policy for the NSW Public Sector
- **TPP 17-06** Certifying the Effectiveness of Internal Controls Over Financial Information

Safeguard integrity in corporate reporting
▪ **Government's Prequalification Scheme for Audit and Risk Committee Independent Chairs and Members** (SOCs are exempt from this policy however it is recommended that they take into consideration its principles).

Principle 5: Make timely disclosure

Make timely disclosure

A board should make timely disclosure of all matters concerning it as required and requested by shareholders.

Recommendation	Rationale
Ensure there are processes in place to facilitate proactive and timely disclosure of all material information related to the commercial performance of the government business and on matters which could raise community concerns. This should be acknowledged as part of the board charter.	The *Reporting and Monitoring Policy for Government Businesses* provides guidance to government businesses on their reporting requirements. A key part of this is the Statement of Corporate or Business Intent (SCI/SBI). The SCI/SBI sets out performance objectives and targets for the business, taking into account the strategic concerns and preferences of the shareholders. The SCI/SBI must be signed by the chair on behalf of the board. However from time-to-time material information related to the SCI/SBI is required outside of the normal reporting process. Therefore, boards should have a policy for timely disclosure to its shareholders. This can be incorporated into the board charter. There is also an expectation that a government business act in a manner that upholds public best interests. Therefore it is important that boards also notify the shareholders in a timely manner of any decisions that may raise community concerns Timely disclosure should not be confused with the requirements under the *Government Information Public Access Act 2009*. Rather it should be seen as good practice to keep shareholders informed of material issues and decisions when they arise.

Practice guides and further guidance
▪ **Practice guide 2**: Governance disclosure requirements ▪ **TPP05-2** NSW Treasury Reporting and Monitoring Policy for Government Businesses

Principle 6: Acknowledge the rights of shareholders

Acknowledge the rights of shareholders

A board should acknowledge the rights and roles of its shareholders and NSW Treasury as their representative by providing appropriate information to allow them to exercise those rights effectively.

Recommendation	Rationale
The Chair is responsible for ensuring processes are in place to facilitate effective communication with shareholders. **Acknowledge the role NSW Treasury plays as a representative of the shareholders.** ***For government businesses that are not SOCs:*** **Acknowledge the role the appointing Minister's cluster department plays as a representative of the shareholder for responsibilities under enabling legislation.**	The chair acts as an important link between the board and the shareholders. Shareholders should be able to hold the board and, through the board, management, to account for the performance of the government business. Critical to this is the provision of appropriate information about the business and its performance and governance to shareholders, and communicating openly and honestly with them. Therefore boards should have processes in place to communicate effectively and actively consult with the shareholders and give them ready access to balanced and understandable information about the business. NSW Treasury, as the principal financial adviser to the Government, monitors the financial performance and position of all government businesses. Given this unique nature of the shareholder relationship with boards, there is an expectation that NSW Treasury act as a representative of the shareholder in the capacity of financial and corporate monitoring and this role should be acknowledged by government businesses.

Practice guides and further guidance

- Engagement should go beyond compliance with enabling legislation and regulatory requirements to promote shareholder confidence.

Principle 7: Recognise and manage risk

Recognise and manage risk

A board should establish a sound risk management framework and regularly review the effectiveness of that framework.

Recommendation	Rationale
For State Owned Corporations: **Have a board risk committee with at least three members, a majority of whom are independent directors, an independent chair and a committee charter.** **This could be a combined audit and risk committee** ***For government businesses that are not SOCs:*** **Adhere to requirements as directed by TPP 15-03 and TPP 12-03.**	It is important that a government business has a sound system of risk oversight and management and internal control. The system should be designed to identify, assess, monitor and manage risk, and inform shareholders of material changes to the risk profile of the government business. A board risk committee is an efficient and effective mechanism to bring the transparency, focus and independent judgement needed to oversee the government business' risk management framework.
Annually report on the number of board risk committee meetings and individual attendance of members.	The board determines the risk committee arrangements to oversee the risk management framework for the government business efficiently and effectively while ensuring it meets any applicable Treasury requirements (TPP 15-03 and TPP 12-03).
Review the government business' risk management framework at least annually and disclose whether this review has taken place.	If there is no board risk committee then the board should disclose the reasons underpinning why a committee is not necessary and explain the processes the board employs for overseeing the risks facing the organisation.
Have an internal audit function or if there is no internal audit function, disclose: ▪ **that fact** ▪ **the processes employed for evaluation** ▪ **how the board is continually improving effectiveness of risk management and internal control processes.**	An internal audit function brings a systematic, disciplined approach to evaluating and continually improving the effectiveness of a government business' risk management and internal control processes.
Disclose any material exposure to political, economic, social, technological, environmental and legal risks, and how these risks will be managed.	It is important that the board regularly reviews the business' policies on risk oversight and management to satisfy itself that management has created and put into practice a good system of risk management and internal control.

Practice guides and further guidance

- **Practice guide 13**: Risk management framework
- **TPP15-03** NSW Treasury Internal Audit and Risk Management Policy for the NSW Public Sector
- **TPP12-03** NSW Treasury Risk Management Toolkit for NSW Public Sector Agencies
- **TPP16-02** NSW Treasury Guidance on Shared Arrangements and Subcommittees of Audit and Risk Committees
- **ASX recommendation 7.1** provides more information the duties of a risk committee
- **The Australian Institute of Company Directors** provides more information on an effective risk management framework and types of risks to consider

3 Practice guides

Practice guide 1: Board governance checklist

Board governance checklist

Principle 1: Lay solid foundations for management and oversight

Board charter:

- ❑ Have a board charter setting out the respective roles and responsibilities of the board and management.
- ❑ Ensure newly appointed or reappointed directors are aware of the board charter and understand the roles and responsibilities it sets out.

Background checks:

- ❑ Undertake required probity checks for the preferred director candidate once they have been selected by the interview panel.

Role of company secretary:

- ❑ Ensure the company secretary is accountable directly to the board on matters to do with the proper functioning of the board.

Diversity policy:

- ❑ Have a diversity policy covering directors, senior executives and employees.
- ❑ Annually report the government business' collective progress towards achieving measurable objectives in respect to gender, cultural background, Aboriginal people and people with a disability.

Board evaluation:

- ❑ Annually evaluate board performance.
- ❑ Disclose to shareholders a summary of the evaluation report, together with any actions taken or planned as a result of the findings.
- ❑ Undertake an external and independent evaluation at least every three years.

Senior executive evaluation:

- ❑ Periodically evaluate senior executive performance.
- ❑ Annually report to shareholders whether an evaluation was undertaken.

Principle 2: Structure the board to add value

Nomination committee:

- ❑ Have a board nomination committee with at least three members, a majority of whom are independent directors, an independent chair and a committee charter.
- ❑ Annually report on the number of board nomination committee meetings and individual attendance of members.

Succession planning and crisis management:

- ❑ Have succession planning and crisis management procedures.
- ❑ Tenure for board directors should generally be limited to two terms of three years each.

Board skills matrix:

- ❑ Have a board plan.
- ❑ Have and disclose to shareholders a skills matrix of the board covering all board directors.

Director independence:

- ❑ Have a majority of independent directors on the board.
- ❑ Each director should be limited to sitting on three government boards.
- ❑ Disclose names of independent directors, their length of service and why the board considers them to be independent.
- ❑ Ensure the board chair is independent from the CEO.

Board induction:

- ❑ Have a program for inducting new directors.
- ❑ Provide appropriate professional development opportunities for directors.

Principle 3: Act ethically and responsibly

Code of conduct:

- ❑ Have a code of conduct for directors.

Principle 4: Safeguard integrity in corporate reporting

Audit committee:

- ❑ Have a board audit committee with at least three members, all of whom are non-executive directors and a majority of whom are independent directors, an independent chair who is not the chair of the board, a committee charter and relevant qualifications of members.
- ❑ Annually report on the number of board audit committee meetings and individual attendance of members.

or

- ❑ Adhere to requirements as directed by TPP15-02 and TPP 17-06.

CEO and CFO declaration:

- ❑ Receive from CEO and CFO a declaration that the financial records of the entity have been properly maintained and comply with the required standards and controls.

Principle 5: Make timely disclosure

Timely disclosure policy:

- ❑ Have a written policy for timely disclosure of all material information related to the commercial performance of the government business and on matters that would raise community concerns.

Principle 6: Acknowledge the rights of shareholders

Processes for communication with shareholders:

- ❑ The chair is responsible for ensuring processes are in place to facilitate effective two-way communication with shareholders.
- ❑ Acknowledge the role NSW Treasury plays as a representative of the shareholders for financial performance and corporate governance.

or

- ❑ Acknowledge the role the appointing Minister’s cluster department plays as a representative of the shareholder for responsibilities under enabling legislation.

Principle 7: Recognise and manage risk
Risk committee: ❑ Have a board risk committee with at least three members, a majority of whom are independent directors, an independent chair and a committee charter. Annually report on the number of board risk committee meetings and individual attendance of members. or ❑ Adhere to requirements as directed by TPP 15-03 and TPP 12-03. **Risk management framework:** ❑ Review the government business' risk management framework at least annually. ❑ Disclose whether an annual review has taken place. **Internal audit:** ❑ Have an internal audit function or, if there is no internal audit function, disclose the processes employed for evaluation and continually improving effectiveness of risk management and internal control processes. **Material risks:** ❑ Disclose any material exposure to political, economic, social, technological, environmental and legal risks, and how these risks will be managed.

Practice guide 2: Governance disclosure requirements

Government businesses are required to disclose information related to boards under relevant legislation and as set out in these Guidelines. The governance disclosure requirements are set out in the summary below.

'If not, why not' reporting

A government business must disclose in its annual Business Plan provided to Treasury any recommendations in these Guidelines that have not been followed together with an explanation as to why. The following three step method for effective 'if not, why not' reporting should be followed to ensure disclosure is sufficiently detailed:

1. identify any recommendations the government business has not adopted;
2. explain why the organisation has not followed each recommendation; and
3. explain how its practices are consistent with the "spirit" of the relevant principle or recommendation of the Guidelines to demonstrate that the organisation understands the relevant issues and has considered the impact of its alternative approach.

It is also considered best practice for a high-level summary of this report to be included in the annual report as part of corporate governance reporting.

Summary of disclosure requirements

	On request	Business plan	SBI / SCI	Annual report	Public website
Detailed 'if not, why not' report against all recommendations in these Guidelines	✓	✓			
Summary of 'if not, why not' report	✓			✓	
Names, title and appropriate qualification of directors	✓			✓	✓
Frequency of meetings of the board, and committees, and individual attendance by directors	✓			✓	
The names of board committees, their function and membership	✓			✓	
Salary or other benefits paid to directors (excluding amounts paid to executive directors)	✓			✓	
Board charter and code of conduct	✓				✓
Diversity policy	✓			✓	✓
Measurable objectives for diversity and progress towards achieving them	✓		✓	✓	
Whether a board evaluation was conducted (including whether the evaluation was external) and a summary of the findings and actions planned or taken	✓	✓			

Summary of disclosure requirements

	On request	Business plan	SBI / SCI	Annual report	Public website
Whether senior executive evaluations were conducted	✓	✓			
Succession planning and crisis management procedures	✓				
A skills matrix for each individual board director and a board skills matrix	✓	✓			
Whether a review of the government business' risk management framework was conducted and the results	✓		✓		
Material economic, environmental and social sustainability risks and how they will be managed.	✓	✓	✓		

Practice guide 3: Director duties and obligations

Board directors are subject to two overlapping sets of legal duties or obligations: statutory duties in the *Corporations Act 2001* (Cth) and common law fiduciary duties.

- At common law and under the *Corporations Act 2001* (Cth), directors are obliged to:
  - act in good faith
  - avoid disclosure of confidential information
  - avoid conflicts of interest
  - exercise diligence, care and skill
  - act honestly and exercise powers for a proper purpose
  - act in the best interests of the company as a whole.
- Directors of statutory State Owned Corporations (SOCs) are subject to the statutory duties in the *State Owned Corporations Act 1989* (SOC Act) and enabling legislation constituting the board, and the same fiduciary duties at common law[1].

Directors may also have additional responsibilities and obligations under other relevant statutory enactments and should familiarise themselves with all relevant legislation.

[1] *State Owned Corporations Act 1989 (NSW)* sch 10, cl 3(11)

Practice guide 4: Board charter

The charter should be written by the board in consultation with the shareholders, the portfolio minister (if not a shareholder) and NSW Treasury and should complement any board charter that exists under legislation.

The box below provides guidance on contents of a board charter.

Board charter – contents

For a governing board of a commercially-focused government business, responsibilities of the board for inclusion in the charter are generally:

- providing leadership and setting the strategic objectives of the business
- appointing, and when necessary replacing, the CEO (or equivalent), in some cases requiring shareholder consultation or approval
- ratifying the appointment, and when necessary replacement, of other senior executives
- providing input into and final approval of senior executives' development of the SCI or SBI, including performance objectives and the underlying corporate strategy
- ensuring that the entity has in place an appropriate risk management framework and setting the risk appetite within which the board expects management to operate
- overseeing management's implementation of the entity's strategic objectives and its performance generally
- approving and reviewing the progress of major capital expenditure, capital management, and acquisitions and divestitures
- ensuring procedures are in place to manage the timely disclosure of material information to shareholders
- overseeing the entity's process for making timely disclosure to the shareholders and other relevant stakeholders, including provision of information under the *Reporting and Monitoring Policy for Government Businesses*
- overseeing the integrity of the entity's accounting and corporate reporting systems, including the external audit
- approving the business' remuneration framework (where applicable)
- ensuring compliance with relevant government policies
- monitoring the effectiveness of the business' governance practices.

The board charter should be annually reviewed to ensure it remains relevant and up to date with developments within the government business and corporate governance generally. The board charter should be made publicly available on the business' website in a clearly marked corporate governance section.

Practice guide 5: Probity checks

General probity checks to assess whether potential candidate credentials are genuine should be undertaken prior to nomination. These checks determine that relevant experience as presented by candidates are true and accurate reflections of their employment history, and whether the candidate is of good fame and character.

More robust probity procedures should be undertaken for the preferred candidate by the Company Secretary before they are recommended for appointment. Robust probity procedures give the NSW Government and the public sufficient confidence that an appointee has a history of personal integrity and a demonstrated capacity to manage their financial and business affairs. They should include:

- a National Criminal Record Check
- International Criminal Record Checks if a candidate has lived in an overseas countries for more than 12 months, or has resided in Australia for less than 12 months
- a check of the Australian Securities and Investment Commission's (ASIC's) Register of Persons Banned and Disqualified under the provisions of the *Corporations Act 2001*
- a check of ASIC's Enforceable Undertakings Register listing enforceable undertakings accepted under the provisions of the *Australian Securities and Investments Commission Act 2001* and the *National Consumer Credit Protection Act 2009*
- a check of the Australian Prudential Regulation Authority's (APRA's) list of individuals disqualified from holding prudentially significant roles within APRA-regulated entities under the provisions of the *Superannuation Industry (Supervision) Act 1993* and the *Insurance Act 1973*
- a check of APRA's list of Enforceable Undertakings accepted from people or corporations under the provisions of the *Superannuation Industry (Supervision) Act 1993* and the *Insurance Act 1973*
- an Australian Financial Security Authority National Personal Insolvency Index check.

The following information should be made available by the board nomination committee to the shareholders or the appointing Minister:

Probity checks

	Initial appointment	Re-appointment
Biographical details, including their relevant qualifications and experience and the skills they bring to the board	✓	✓
Details of any other material directorships currently held by the candidate	✓	✓
Details of the candidates other NSW public sector roles, if any, including directorships and positions on advisory boards	✓	✓
Details of whether the candidate is a registered lobbyist.	✓	✓
Any material adverse information revealed by the checks the entity has performed about the director	✓	✓
Details of any interest, position, association or relationship that might influence, or reasonably be perceived to influence, in a material respect his or her capacity to bring an independent judgement to bear on issues before the board and to act in the best interests of the Government Business and its shareholders generally	✓	✓
If the board considers that the candidate will, if appointed, qualify as an independent director, a statement to that effect	✓	✓
The term of office currently served by the director	×	✓

Practice guide 6: Diversity policy

The box below provides suggested content for a diversity policy based on **ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (3rd edition).**

Content of a diversity policy

1. Articulate the corporate benefits of diversity in a competitive labour market, and the importance of being able to attract, retain and motivate employees from the widest possible pool of available talent.
2. Express the government business's commitment to diversity at all levels.
3. Recognise that diversity not only includes gender diversity but also includes matters of age, disability, ethnicity, marital or family status, religious or cultural background, sexual orientation and gender identity.
4. Emphasise that in order to have a properly functioning diverse workplace, discrimination, harassment, vilification and victimisation cannot and will not be tolerated.
5. Ensure that recruitment and selection practices at all levels (from the board downwards) are appropriately structured so that a diverse range of candidates are considered and that there are no conscious or unconscious biases that might discriminate against certain candidates.
6. Identify and implement programs that will assist in the development of a broader and more diverse pool of skilled and experienced workers and that, over time, will prepare them for senior management and board positions.
7. Recognise that employees (female and male) at all levels may have domestic responsibilities and adopt flexible work practices that will assist them meet those responsibilities.
8. Introduce key performance indicators for senior executives to measures the achievement of diversity objectives and consider linking part of their remuneration (either directly or as part of a "balanced scorecard" approach) to the achievement of those objectives.

When developing a diversity policy, governing boards are also required to take into consideration the *Government Sector Employment Act 2013* No 40. Section 63 of the Act provides that:

> *"workforce diversity includes (but is not limited to) diversity of the workforce in respect of gender, cultural and linguistic background, Aboriginal people and people with a disability"*

A government business should also ensure that its diversity policy is consistent with any stated public sector diversity policy set by the Government including the Premier's Priorities.

As a commercially-focused government business, there is an expectation that any diversity policy implemented will align and uphold the NSW Government's commitment to being an employer of equal opportunity.

Practice guide 7: Board evaluations

Boards differ in scope for performance improvement, their competitive environment and the range of performance challenges they face. Accordingly, board evaluations can vary in terms of their range, difficulty and cost. Types of performance evaluation include self-assessment, peer evaluation and external evaluation.

For all boards, self-evaluations should be performed on an annual basis and an external and independent evaluation should be undertaken at least every three years. The results of these evaluations should be provided to shareholders.

The shareholders also reserve the right to "audit" the performance of boards, by appointing an external consultant to make an assessment of the board's operations.

The boxed text provides a framework which may be useful for boards in determining the most appropriate method of performance evaluation.[2]

> **Performance evaluation framework**
> What are the objectives of the evaluation?
> Who will be evaluated?
> What will be evaluated?
> Who will be asked?
> What techniques will be used?
> Who will perform the evaluation?
> What will be done with the results?

Performance evaluation has two components: the performance of the board as a whole and the performance of individual directors as follows.

Evaluating individual performance

The following provides guidance as to what individual performance evaluation may be based on:

- attendance at and contributions to board meetings and committees
- attendance at training sessions
- stakeholder feedback including, where relevant, the portfolio minister
- willingness to question, probe and challenge senior executives as appropriate.

A non-executive director should be responsible for the performance evaluation of the chair, after collecting feedback of other directors.

Evaluation overall board performance

The board's overall performance should be evaluated using the following indicators based on targets and objectives outlined in the SCI/SBI where applicable:

- alignment of the business' strategic direction with objectives set by the shareholders
- management of senior executives
- short term and long term financial results of the business
- achievement of non-financial objectives such as reform milestones and service delivery standards
- management of risk and compliance issues
- adherence to corporate governance standards including promoting and adhering to the board charter and code of conduct
- adherence to government policies including those within the Commercial Policy Framework stakeholder feedback including, where relevant, the shareholders.

[2] Kiel, Geoffrey C and Nicholson, Gavin J (2005) "Evaluation Boards and Directors", *Corporate Governance: An International* Review 13(5) p .41

Practice guide 8: Director appointment process

Under a Premier's Memorandum (M2015-04)[3], all appointments to NSW government boards are required to follow the Public Service Commissioner's *Appointment Standards: Boards and Committees in the NSW Public Sector*[4].

Appointments will also need to take into account the *Department of Premier and Cabinet's NSW Government Boards and Committees Guidelines*[5].

The appointment process is summarised below:

Director appointment process		
Candidate identification and assessment		
1. The relevant shareholders or Portfolio Minister are notified of a board vacancy.	2. Vacancy is advertised if necessary under legislation and potential candidates are identified by the nomination committee. Potential candidates can also be identified by shareholders and/or Portfolio Minister. The nomination committee is responsible for assessing whether all potential candidates have the required skills and experience.	3. Potential candidates are provided to the Treasurer to approve some/or all of the candidates to interview Those approved will progress to the interview phase.
Interview process and assessment		
4. Shortlisted candidates are interviewed.	5. Interview report is developed, identifying preferred candidate for appointment.	6. Required probity checks are conducted for the preferred candidate by the Company Secretary.
Appointment		
7. Appointment paperwork is created and submitted to relevant shareholders and Portfolio Minister for approval.	8. Approval process is required from the Treasurer, Portfolio Minister and DPC is informed of shareholder appointments for Cabinet consideration.	9. DPC notifies Treasury of successful appointments and Treasury notifies the successful and unsuccessful candidates of their outcome.

[3] Premier's Memorandum Appointments to NSW Government boards and committees (M2015-04)
[4] Public Service Commission's Appointment Standards: Boards and Committees in the NSW Public Sector
[5] Department of Premier and Cabinet's NSW Government Boards and Committees Guidelines

Practice guide 9: Board skills matrix

Below is an example board skills matrix which illustrates how board skills can be assessed on both an individual and a collective basis.

Board skills matrix						
	name	name	name	name	name	Board (No. of members)
Total directors	N/A					5
Experience	Scale 1-3*					
Experience in senior corporate leadership role	3	1	3	2	1	3
Senior experience in multiple government roles	3	3	3	2	1	4
Relevant industry experience	2	2	1	1	3	3
Board roles at listed entities (last 3 years)	1	1	1	2	3	2
Committee membership	**Individual (tick relevant boxes)**					
Audit Committee	✓	✓		✓	✓	4
Risk Committee		✓	✓	✓		3
Remuneration Committee		✓	✓		✓	3
Nomination Committee	✓		✓		✓	3
Tertiary qualifications						
Accounting	✓	✓	✓			3
Economics		✓				1
Finance	✓		✓	✓	✓	4
Law					✓	1
Other				✓		1
Gender						
Female	✓				✓	2
Male		✓	✓	✓		3
Tenure						
0-3 years		✓			✓	2
3-6 years	✓		✓			2
6-9 years		✓				1
* 1=No experience , 2= 2-3 years' experience, 3= 3-5 years' experience						

Practice guide 10: Director Independence

A director is defined as independent if he or she "is not allied with the interests of management, a substantial security holder or other relevant stakeholder and can and will bring an independent judgement to bear on issues before the board."[6]

Factors relevant to assessing the independence of a director

Examples of interests, positions, associations and relationships that might cause doubts about the independence of the director include if the director:

- is, or has been, employed in an executive capacity by the business or any of its subsidiaries and there has not been a period of at least three years between ceasing such employment and serving on the board
- is, or has within the last three years been, a partner, director or senior employee of a provider of material professional services to the business or any of its subsidiaries
- is, or has been within the last three years, in a material business relationship (e.g. as a supplier of customer) with the entity of any of its child entities, or an officer of, or otherwise associated with, someone with such a relationship
- is a substantial shareholder of the business or an officer of, or otherwise associated with, a substantial shareholder of the business
- has a material contractual relationship with the business or any of its subsidiaries other than as a director
- has close family ties with any person who falls within any of the categories described above; or
- has been a director of the entity for such a period (10 years or greater) that his or her independence may have been compromised.

In each case, the materiality of the interest, position, association or relationship needs to be assessed to determine whether it might interfere, or might reasonably be seen to interfere, with the director's capacity to bring an independent judgement to bear on issues before the board and to act in the best interests of the business and its shareholders generally.

In cases where it is assessed that there is a material impact that hinders a director's independence, this should be reported to the Treasury.

The box below lists factors relevant to assessing director independence.[7]

[6] ASX Corporate Governance Council, Corporate Governance Principles and Recommendations, 3rd Edition, 2014, p.16

[7] Based on the ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 3rd Edition, 2014, p. 16

Practice guide 11: Board induction and continuous education

To be effective new directors should have a good understanding of the business and its industry. An induction program should be available to enable directors to gain an understanding of the:

- business' financial, strategic, operational and risk management positions and policies
- rights, duties and responsibilities of directors and senior executives
- roles and responsibilities of senior executives
- role of board committees.

All directors should undertake relevant continuous education programs during their tenure. It should include education concerning key developments in the business and in the industry and environment within which the business operates. Directors may wish to disclose in the annual report the training they have undertaken during the year.

Both induction and on-going education should include sessions on developments in corporate governance, ethics and government policy. Input by NSW Treasury in relation to government policies and applying commercial principles in the context of government ownership is highly desirable. On request, NSW Treasury can assist in helping to organise relevant material.

To enable directors to clearly understand the expectations and requirements of the board, directors should ensure that on appointment, below is a board induction checklist.

Board induction checklist

- ❑ The instrument of appointment specifying the term of the appointment and the level of remuneration
- ❑ A deed of indemnity, if a SOC
- ❑ A copy of the enabling legislation of the government business
- ❑ A copy of either the State Owned Corporations Act 1989 (NSW), if a SOC or the Government Sector Employment Act 2013 if not a SOC
- ❑ A list of fellow directors and the chair
- ❑ A copy of the business' constitution
- ❑ A copy of the board's code of conduct
- ❑ Copies of the board's and committee's charters
- ❑ A copy of the most recent business plan and related SCI or SBI
- ❑ A set of applicable policies under the Commercial Policy Framework
- ❑ The board and committee meeting schedule
- ❑ The most recent annual report
- ❑ Organisation charts
- ❑ Statutory history of the business
- ❑ Meeting minutes and/or papers from the previous board meeting
- ❑ Board meeting dates
- ❑ Risk management framework
- ❑ The board's strategic plan

Practice guide 12: Code of conduct

Conduct Guidelines for Members of NSW Government Board and Committees[8]

The Conduct Guidelines applies to all government boards and committees, and though not required by legislation, government businesses should also follow these Guidelines as part of their commitment to good practice.

The Conduct Guidelines require each board to have a code of conduct and include guidance on conduct relating to personal and professional behaviour, accountability, gifts and benefits, managing conflicts of interest and reporting suspected corrupt behaviour.

The Ethical Framework for the government sector[9]

Part 2 of the GSE Act establishes the Ethical Framework for the government sector which sets out the core values and principles that are to be demonstrated in the conduct of all government sector employees and heads of government sector agencies. The Framework's objectives are to:

- Recognise the role of the government sector in preserving the public interest, defending public value and adding professional quality and value to the commitments of the Government of the day.
- Establish an ethical framework for a merit-based, apolitical and professional government sector that implements the decisions of the Government of the day.

State Owned Corporations Act 1989 (NSW)

Schedule 10 of this Act sets out directors' duties relating to:

- disclosure of conflicts of interest
- abstention from voting on matters where such conflicts exist
- acting honestly
- performing duties with care and diligence
- not making improper use of information or use of the position of board member.

Schedule 10 also details a director's liabilities for contravention of these duties.

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[8] https://www.boards.dpc.nsw.gov.au/publications-folder/NSW_Government_Boards_and_Committee_Guidelines_-_Updated_September_2015.pdf

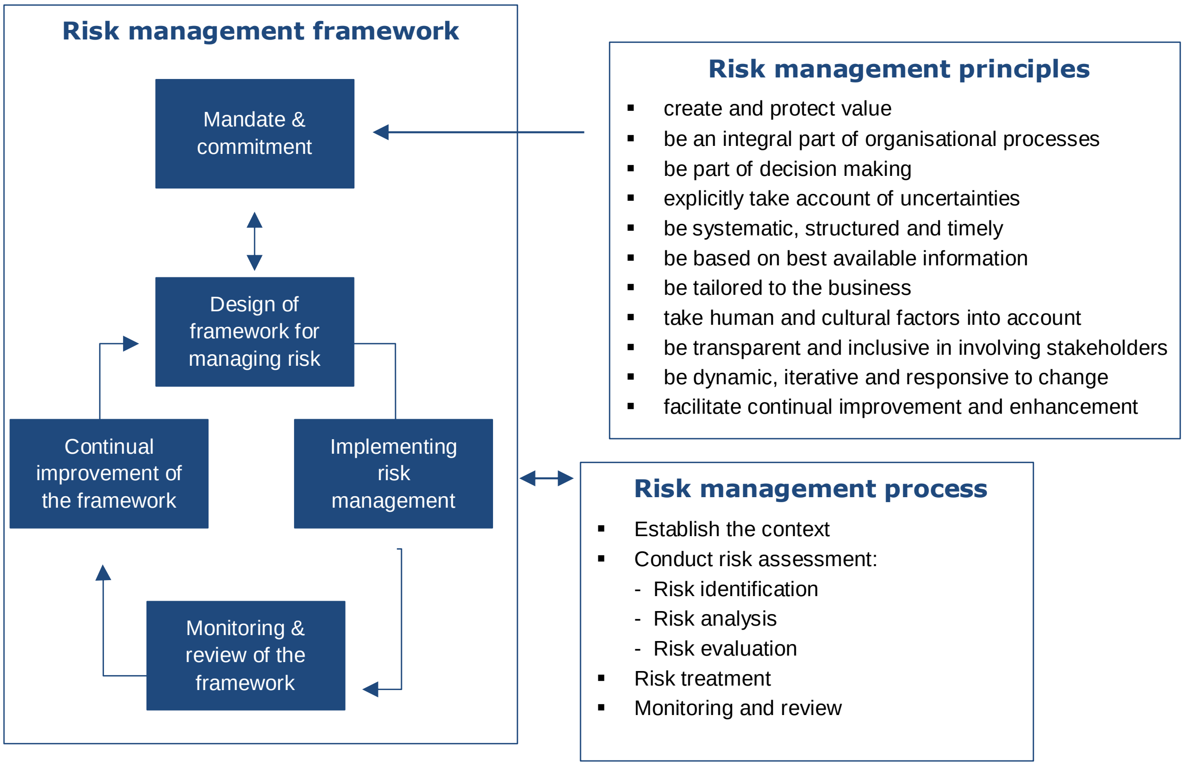
[9] https://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-2/the-ethical-framework-for-the-government-sector

Practice guide 13: Risk management framework

The NSW Government has an expectation that all department heads and governing boards establish and maintain a risk management process that is consistent with the current Australia/New Zealand (AS/NZS) risk management standard.

Governing boards should refer to the Risk Management Toolkit for NSW Public Sector Agencies (TPP12-03) when development their risk management framework.

The following diagram outlines the key components of a risk management framework and illustrates the interaction between risk managements principles, framework and processes.[10]



[10] Adapted from *AS/NZS ISO 31000:2009 Risk Management*. (note: this is currently being updated by Standards Australia)

Further information and contacts

For further Information or clarification on issues raised in the discussion paper, please contact the NSW Treasury Commercial Assets team, email: Commercialpolicy@treasury.nsw.gov.au