



New South Wales  
TREASURY

COMMERCIAL POLICY FRAMEWORK

**CEO CONTRACT GUIDELINES FOR  
GOVERNMENT BUSINESSES**

Office of Financial Management

**Policy &  
Guidelines Paper**

## **Preface**

The *CEO Contract Guidelines for Government Businesses* is a component of the NSW Government's *Commercial Policy Framework*.

The *Commercial Policy Framework* is a suite of policies that aims to replicate within NSW Government businesses the appropriate disciplines and incentives that lead private sector businesses towards efficient commercial practices.

These *Guidelines* provide guidance on key terms in the employment contracts of chief executives and managing directors of State Owned Corporations and other Government businesses not covered by the *Public Sector Employment and Management Act 2002 (NSW)*.

These *Guidelines* are based on best practice corporate governance standards in the context of Government ownership.

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## Executive Summary

*CEO Contract Guidelines for Government Businesses* provides non-prescriptive guidance to boards of Government businesses responsible for appointing or recommending for appointment chief executive officers and managing directors ('CEOs') where the CEO is not employed under the *Public Sector Employment and Management Act 2002 (NSW)*. This includes all State Owned Corporations but not Government departments, authorities and other bodies scheduled under the *Public Sector Employment and Management Act*. The key object is to ensure Government businesses attract and retain high quality CEOs by replicating appropriate private sector practices while also recognising public sector employment principles.

These *Guidelines* discuss key elements of CEO contracts particularly remuneration and termination. The *Guidelines* include the principles of when and how performance pay may be appropriate and supplement other Government policies relating to CEO performance appraisals.

A model termination clause is included which is strongly recommended to be followed in CEO contracts. Any material departures from the substance of the provisions in the model clause will require compelling justification, especially in obtaining any required approval from the relevant Ministers.

The *Guidelines* also detail disclosure requirements for CEO contracts and performance required under legislation and in line with private sector standards. These include disclosures relating to remuneration, details of performance and performance pay, non-standard contractual terms, as well as the method and term of appointment.

# 1. Background

## 1.1 Introduction

These *Guidelines* provide guidance in the employment contracts of chief executive officers and managing directors ('CEOs') where the *Public Sector Employment and Management Act 2002 (NSW)* ('*PSEM Act*') does not apply. They are based on appropriate private sector best-practice standards and regulations to ensure Government businesses are able to achieve commercial performance, often in competitive environments, through effective management and leadership from the CEO. This is overlaid, in the context of Government ownership, with appropriate public sector employment principles. The principles laid out are not generally prescriptive and allow for the different circumstances of individual Government businesses.

The objectives of these *Guidelines* are to assist Government businesses to:

- attract and recruit high quality CEOs
- motivate performance through appropriate rewards
- balance transparency with the right to privacy, and
- reflect community standards and the requirements of the Government, as representatives of the shareholders, the people of NSW.

## 1.2 Application of the Policy

These *Guidelines* are aimed at assisting boards of Government businesses that are responsible for appointing, or recommending for appointment, the CEO where the CEO is not employed under the *PSEM Act*. For the purposes of these *Guidelines*, Government businesses<sup>1</sup> are:

- State Owned Corporations ('SOCs') as scheduled under the *State Owned Corporations Act NSW (1989)*<sup>2</sup> ('*SOC Act*'), and
- other Government businesses not under the *SOC Act* ('non-corporatised Government businesses') that:
  - are not scheduled under the *PSEM Act*<sup>3</sup>, and
  - have a governing or managing board responsible for appointing, or recommending for appointment, the CEO.

Boards with an advisory capacity only are generally not responsible for the appointment of the CEO. However, some general principles of "best practice" in these *Guidelines*, such as the elements of performance agreements and appraisals, may be pertinent to all Government businesses regardless of their governance structure.

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<sup>1</sup> The term 'Government business' is a generic term used for convenience and includes:

- Public Trading Enterprises;
- Public Financial Enterprises; and
- General Government businesses (ie General Government non-Budget dependent agencies to which the *Commercial Policy Framework* applies).

<sup>2</sup> *State Owned Corporations Act 1989 (NSW)*, Schedule 1 and Schedule 5

<sup>3</sup> *Public Sector Employment and Management Act 2002 (NSW)*, Schedules 1 and 2

## 1.3 Relationship to Other Policies

### Monitoring and Accountability

CEO performance is reflected in the performance of the Government business as a whole. Consequently, the monitoring and accountability regime for Government businesses is an important backdrop for these *Guidelines*. The regime requires an annual written agreement between the Treasurer or the Voting Shareholders and the board/management of each business known as a Statement of Corporate Intent ('SCI') for SOCs and a Statement of Business Intent ('SBI') for non-corporatised businesses. The SCI or SBI must be signed by the CEO and provides the business and management with certainty as to the Shareholders'/Treasurer's expectations of financial performance. In the SCI/SBI, the board is required to confirm that the CEO has an employment contract and performance agreement.

### *State Owned Corporations Indemnity Policy*<sup>4</sup>

The *SOC Act* requires shareholder approval for SOCs to indemnify their officers, including CEOs. The pro forma Deed of Indemnity in the *Policy* indemnifies CEOs against certain liabilities incurred in the course of employment if conduct does not involve a lack of good faith, gross negligence or recklessness. This gives CEOs protection against risks related to performing their duties, while ensuring the business and the Government are not liable for actions of gross negligence or criminal behaviour.

## 1.4 Relationship with the *PSEM Act*

The *PSEM Act* regulates the employment and management of the NSW public service. The *Act* applies to members of the Chief Executive Service (CES) who are heads of departments under Schedule 1 or public authorities under Schedule 2, Part 2 and regulates their selection, appointment and remuneration. The *SES Guidelines*<sup>5</sup> and other Government memoranda and circulars<sup>6</sup> provide additional guidance to the operation of the *Act*.

The *PSEM Act* and the accompanying *SES Guidelines* cover: contracts of employment, including a model contract; performance agreements, including guidelines for developing performance agreements for members of the CES, removal from office and remuneration and entitlements

These *CEO Contract Guidelines for Government Businesses* offer guidance for Government businesses not subject to the *PSEM Act*. Many underlying objectives of the *PSEM Act* and *SES Guidelines* are maintained in relation to equity and transparency. However, these *Guidelines* recognise the rights and independence of SOCs and other Government businesses with a governing board outside the *PSEM Act* in setting remuneration levels and other terms and conditions of employment<sup>7</sup>.

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<sup>4</sup> NSW Treasury, *State Owned Corporation Indemnity Policy*, TPP 03-6, October 2003

<sup>5</sup> Premier's Department, *SES Guidelines – a Manual for Senior Executive Service Administrators and Officers*, 4<sup>th</sup> Edition, December 2005 available at [www.premiers.nsw.gov.au](http://www.premiers.nsw.gov.au)

<sup>6</sup> For example, Premier's Memorandum No. 2003-15 "*CEO Contracts – Performance Management and Salary Sacrifice Arrangements*", November 2003; Premier's Memorandum No. 2000-21 "*SES and CES Performance Pay*", August 2000; Premier's Memorandum No. 99-05 "*Chief Executive Performance Agreement Guidelines*", January 1999

<sup>7</sup> For example, SOCs have a legislative objective to be a "successful business" to act commercially and to ensure their competitive performance relative to the private sector. Hence, SOCs need the ability to attract staff as expert, experienced or as well trained as their private sector counterparts.

## 2. Contract of Employment

For some Government businesses, depending on their individual enabling legislation or founding documentation, the conditions of employment require approval or consultation with the Voting Shareholders/Treasurer and/or the Portfolio Minister<sup>8</sup>. These approvals and consultations should be conducted well before the employment contract between the Government business and the CEO is finalised and the appointment is made.

In addition, prior to the contract of employment being finalised and the appointment made, the board should be satisfied that the candidate's credentials and relevant experiences as presented during the selection process are true and accurate and that the selected candidate is of good fame and character.

### 2.1 Key contractual terms

The contract of employment should include:

- clear performance objectives, duties and responsibilities of the CEO including following policy directions of either the board or a Minister (where applicable) and complying with regulatory and legislative provisions
- remuneration and other employment benefits including the basis for calculating any performance pay (see section 2.2)
- a performance agreement (see section 2.3)
- clear termination provisions including a limited term, generally of between three years and five years with no automatic extension rights upon the end of this period (see section 2.4)
- provision for notice periods required for re-appointment (see section 2.5)
- conflict of interest declarations and ongoing disclosures. Generally, the CEO should not be a non-executive director of more than one other unrelated business requiring material time commitments<sup>9</sup>. The board should be satisfied that any other directorships or other external positions should not result in a real or apparent conflict of interest or otherwise adversely affect performance.
- use of mediation, arbitration or other alternatives to court or formal tribunal proceedings in the event of dispute
- confidentiality provisions
- post employment restrictions (where competitive issues may arise), and
- provisions for changing the terms of the contract.

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<sup>8</sup> Refer Appendix 4

<sup>9</sup> Research suggests a non-executive director role usually involves a time commitment of between 15 and 30 days a year and hence the suggested limit for CEOs who are expected to focus their energies on the company which employs them full time (refer UK Department of Trade and Industry, "Review of the role and effectiveness of the non-executive directors", January 2003 ("Higgs report"), paragraph 12.10 to 12.19, pp. 54-55.



## 2.2 Remuneration

The approach to remuneration will differ for State Owned Corporations and non-corporatised Government businesses. For the latter, remuneration should generally be consistent with the *PSEM Act* and any accompanying Government policy or guidelines in relation to chief executive remuneration such as remuneration levels determined by the Statutory and Other Offices Tribunal. Performance pay is not available to CEOs of non-corporatised Government businesses<sup>10</sup> (see section 2.2.2).

For all Government businesses, CEOs who also sit on the board should not receive the remuneration payable to non-executive board members (that is, they should not be “double dipping”)<sup>11</sup>. The fact that a CEO will sit on the board, with the additional responsibilities and liabilities this may involve, could be considered when setting the CEO’s level of remuneration.

### 2.2.1 CEOs of State Owned Corporations

Under the *SOC Act*, the Portfolio Minister determines remuneration after considering advice from the board<sup>12</sup>. This has been modified in some cases by individual enabling legislation so that the board determines remuneration which, for some SOCs, requires consultation with the Voting Shareholders as listed in **Appendix 4**.

CEOs should generally be offered market-based remuneration taking into account the operating environment of the business. Market-based salaries and payments often reflect a CEO’s performance both in the short term and over a longer period as businesses seek to provide incentives for senior executives to maximise short-term profits and longer-term growth and value. In the private sector, these incentives would usually consist of short-term performance payments (annual bonuses) as well as long-term performance incentives through options or share schemes on top of a base salary.

However, unlike their private sector counterparts, CEOs of Government businesses cannot be offered equity shares or options in the business limiting the type of incentives to reward performance, especially in relation to long-term performance incentives.

The remuneration for CEOs of Government businesses might consist of a:

- substantive base salary
- performance payment (or bonus) based on annual results and performance, and
- performance payment based on longer-term performance such as the enhancement of the value of the business and other relevant performance parameters over the term of the CEO’s tenure.

These *Guidelines* do not specifically advocate performance payments. It is up to the board or the relevant Minister (after considering advice from the board) to determine whether, in the circumstances, the introduction and payment of performance pay is appropriate to provide a

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<sup>10</sup> Premier’s Memorandum No. 2000-21, *SES and CES Performance Pay*, August 2000

<sup>11</sup> Premier’s Department, *Guidelines for NSW Board and Committee Members: Appointments and Remuneration*, as amended, 18 February 2005 at section 2.3. The Premier’s Department *Guidelines* apply to all employees of NSW public service Departments, statutory bodies outside the public service and State Owned Corporations.

<sup>12</sup> *SOC Act*, Schedule 9, section 3

market-based salary to the CEO and required to motivate performance in consultation with the Voting Shareholders/Treasurer as required<sup>13</sup>.

### ***Base salary for CEOs of SOCs***

The base salary reflects the skills, qualifications, experience and expected duties of the appointee as well as external market benchmarks. The following are relevant considerations in determining an appropriate level:

- decisions on remuneration made by the Statutory and Other Offices Remuneration Tribunal ('SOORT') for the CES and Senior Executive Service ('SES')
- community expectations of what are reasonable and acceptable levels of remuneration
- remuneration paid to CEOs in equivalent businesses within the industry or of similar sized companies in terms of employee numbers, revenue, competition faced, level of risk or other elements, and
- any relevant guidance that may be issued from time to time by the Government.

The goal is to ensure that rates are sufficient to attract the required level of expertise while also reflecting the expectations of the community for Government owned businesses.

### ***Performance pay for CEOs of SOCs***

Whether or not performance pay is suitable and the sum involved will depend on the individual circumstances of the SOC and their CEO. The board should consider whether for a market-based remuneration, there are objectives which are appropriately enhanced through performance pay. Circumstances where performance pay might be considered appropriate are where a Government business:

- is in active competition with private sector corporations, and/or
- is operating in a field where there is the potential for new entrants to the market.

If performance pay is considered appropriate, the structure, amounts and exact formula determined by the board will differ depending on the specific company and industry. However, incentive plans should have the following characteristics:

- payments should be linked to clearly defined short and long-term performance goals and indicators with rewards based on objective criteria. Incentives should be specifically linked to the CEO's annual performance agreement and appraisal (see section 2.3)
- goals and indicators should be specific, observable, measurable and difficult to manipulate. Goals set deliberately low can be relatively ineffective in motivating performance
- maximise incentives for both short-term and long-term performance that match the perspective of the shareholders, and
- the plan should attempt to match managers' risk and return to that of shareholders<sup>14</sup>.

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<sup>13</sup> Refer Appendix 4

<sup>14</sup> While recognising that shareholders bear a different type of risk than managers who have their human capital tied to the firm's future, management compensation should be tied to changes in returns to shareholders (through growth in the value of the business and the payment of dividends).

The board or sub-committee of the board (for example, a Remunerations Committee or a Compensation Committee) should determine the specific amount of performance payment paid each year. As a guide only **Appendix 1** contains a sample performance pay clause.

- **Short-term performance pay**

Short-term performance pay or incentives reward CEOs for performance in a single given time period (usually a financial year). They should be based on tangible improvements in either financial results such as profits and revenues or other annual non-financial performance objectives such as service delivery or performance milestones as contained in the CEO's performance agreement.

For example, one performance component could be linked specifically to financial and non-financial targets set in the SCI or SBI for a financial year. Whether the CEO has not met, met or exceeded the specific targets could be a component in determining the level of short-term performance pay.

- **Long-term Incentives**

In addition to annual performance, shareholders are interested in the long-term sustainability and growth of the investment in the business, measured by enhanced growth and reduced risks and liabilities over a period of time.

To align the longer term interests of the shareholders, an element of a CEO's remuneration could reflect his or her success in managing the company over a longer period, excluding cyclical factors or industry trends and isolating the true performance of the individual business in a defined period. A good reference point is the end of a contracted period of service, where comparisons can be made against measures taken at the time of appointment of the CEO (or from some other specific time in the past).

In the private sector, value is commonly measured by the total cumulative shareholder returns that combine the dividend payments with the growth in share price (and therefore the growth in value of the company). This growth is rewarded through equity grants in the form of stock options or share plans. Government businesses can replicate this through using value-based measures to assess the growth in the value of the business over the term of the CEO's contract. The management of assets over the duration of the CEO's tenure could also be assessed. These measures relate to the objective of Government businesses to maximise their net worth<sup>15</sup>.

As well as growth in value, longer-term incentive payments could be linked to long-term service delivery outcomes or achievement of a medium to long-term reform program that have been set by the Government. Appropriate and clear milestones for determining whether these goals have been achieved are critical where they will be linked to performance payment.

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<sup>15</sup> For example, *SOC Act*, section 20E(1)(a)

Legislative obligations<sup>16</sup> could also form part of the CEO's long-term evaluation, as well as other qualitative measures such as corporate reputation or other "balanced scorecard"<sup>17</sup> or "triple bottom line"<sup>18</sup> measures. Again, these measures should only be used as part of incentive plans where they can be reliably measured – for example, through external surveys or monitors.

### ***Benchmarking***

Benchmarking of remuneration is important in assisting boards to identify market-based CEO remuneration levels. Benchmarking identifies comparative ranges for particular industries, taking into account the extent of competition, the size of the business and market size, and industry norms.

The benchmarking information can assist the board to determine where in a broad range a CEO's salary would fall and how performance payments (if appropriate) might be structured in the context of differing elements of risk and public service attached to working in a Government-owned business.

If the board decided that deviation from the benchmarked range of salaries for a particular CEO was required or decided to substantially deviate from the recommendation from the external remuneration consultant, it should disclose this deviation and explain the reasons for it when seeking approval or consulting with the relevant Ministers.

Reputable external firms, in addition to providing benchmarking information, can also assist in grading and sizing a specific position and recommend an appropriate level of remuneration.

If no benchmarking or external study has been conducted, the board would need to disclose the method for setting the level of remuneration when undertaking Ministerial consultation or seeking Ministerial approval.

## **2.2.2 Remuneration of CEOs of non-corporatised Government businesses**

Non-corporatised Government businesses should generally remunerate their CEOs in accordance with the Chief Executive Service (CES) pay scale as covered under the *PSEM Act*, determined by the Statutory and Other Offices Remuneration Tribunal annually<sup>19</sup>. Non-SOC Government businesses should also apply any related Government policy, notwithstanding that the Government business may not be specifically scheduled in the *PSEM Act*, as non-corporatised Government businesses are generally subject to Government circulars, memoranda and guidelines. Note that performance pay is not available to members of the CES<sup>20</sup>.

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<sup>16</sup> For example, under the *SOC Act*, section 20E(1)(b)-(d), this would include exhibiting social responsibility, ecological sustainability, and responsibility towards regional development

<sup>17</sup> Kaplan, Robert S., and Norton, David P. *The balanced scorecard - measures that drive performance*. Harvard Business Review 1992 Jan/Feb, pp71-79

<sup>18</sup> Commonwealth Department of the Environment and Heritage, "Triple Bottom Line Reporting in Australia – A Guide to Reporting against Environmental Indicators", June 2003

<sup>19</sup> Annual determinations are made under the *Statutory and Other Offices Remuneration Act 1975 (NSW)*.

<sup>20</sup> Premier's Memorandum No. 2000-21, *SES and CES Performance Pay*, August 2000

## 2.3 Performance Agreements and Appraisals

### 2.3.1 Performance agreements

A performance agreement is a critical component of the contract of employment. The performance agreement for the CEO is with the Board and should complement and capture the essential elements of the entities SCI or SBI, other agreements with the appropriate Minister and the business plan. The CEO's performance agreement should reflect the key results that the business is striving towards. Any elements of the performance agreement linked to performance payments (if applicable) should be clearly stated and be able to be clearly and largely objectively measured.

The Government has issued *Guidelines for Developing Performance Agreements for Chief Executive Officers* for chief executives who report directly to a Minister, which provides a comprehensive system for monitoring and evaluating performance<sup>21</sup>. This includes designing performance agreements which define measures or indicators for achieving distinct strategies which in turn require meeting key accountabilities. These principles are also applicable for CEOs who are accountable to their board rather than to a Minister, with the wording changed to reflect the differences in governance structure. This section should be read in conjunction with those *Guidelines*.

For Government businesses, the performance agreement would include measures for accountability in areas such as financial management, industry performance, relations with key stakeholders and human resource practices. Indicators would include measurable improvements of performance that are within the control of the business. **Appendix 2** contains a sample performance agreement including the accountabilities, strategies and performance measures that might apply for Government businesses. In setting the level of goals, challenging but achievable goals generally lead to higher performance than goals set too low or impossibly high<sup>22</sup>.

Performance agreements, including goals and objectives for short-term performance payments (if applicable) should be reviewed annually between the board and CEO. Care should be taken when reviewing objectives for long-term performance payments (if applicable) where material changes should generally be restricted to where the SOC or the industry in which it operates has undergone significant structural change beyond the control of the SOC or its CEO.

### 2.3.2 Performance Appraisals

An appraisal of CEO performance should be done at least annually, monitoring performance against the performance criteria in the performance agreement. Discussions with the CEO are generally with the chair of the board. The appraisals should feed into the determination of performance payments (if applicable). In addition, a performance appraisal should be

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<sup>21</sup> , Premier's Memorandum No. 99-05, *Chief Executive Performance Agreement Guidelines*, January 1999. These have also been replicated in the *SES Guidelines*. See also Premier's Memorandum No. 2003-15, *CEO Contracts – Performance Management and Salary Sacrifice Arrangements*, November 2003.

<sup>22</sup> See for example, Locke, E.A. 1996, 'Motivation through conscious goal setting,' *Applied and Preventative Psychology*, vol 5, no. 2, pp 117-24

undertaken at least six months prior to the expiration date of the appointment<sup>23</sup> with the reviewer(s) then providing input to the board in relation to the suitability of the CEO for reappointment. As part of the SCI and SBI, boards are required to confirm that the CEO is appraised annually in line with his or her employment contract.

In evaluating the CEO, it is helpful to recognise two distinct elements of performance: organisational performance and personal performance. Feedback from key stakeholders are useful inputs in conducting a performance appraisal including all board members, Voting Shareholders, key employees, auditors, NSW Treasury and other relevant Government agencies, customers and the Portfolio Minister.

## 2.4 Termination

The CEO's contract should include a limited term of appointment, generally of not less than three years and not exceeding five years with no automatic extension rights upon the end of this period.

Under the *SOC Act*, the Governor, on the recommendation of the Portfolio Minister can remove the CEO but it is effected only upon the recommendation of the board. For some Government businesses, the enabling legislation or founding documentation provides for the board to remove the CEO after consultation with the Voting Shareholders/Treasurer or after consultation with the Voting Shareholders/Treasurer and the Portfolio Minister<sup>24</sup>.

When exercising the power of removal, the principles of procedural fairness should be afforded where possible. The content of the procedural fairness to be afforded will depend upon the particular facts and circumstances<sup>25</sup>.

Termination payments can be problematic where CEOs receive a substantial termination payment when performing poorly or where shareholders are unaware of the termination provisions which provide for compensation upon cessation of service irrespective of merit.

CEO contracts should contain clear exhaustive procedures relating to the termination of a CEO's services, including:

- any notice periods for the termination of service prior to the contracted period required by both the employer and the employee, and
- details of notice periods and payments in lieu of notice required by the employer and employee, differentiating between no-fault terminations and terminations for cause.

**Appendix 3** contains a model template. Any material variations to the substance of the provisions in the model template should have strong justification in terms of balancing the need to attract the best candidate with expectations of the shareholders and the community for Government-owned businesses. This justification will be critical when approval is required for the terms and conditions of employment from the Voting Shareholders/Treasurer and/or Portfolio Minister. In particular, the required notice periods and payments in lieu of notice

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<sup>23</sup> This follows the requirements for the public sector. Refer Premier's Memorandum No. 2000-24, *Reappointment to CES and SES Positions*, September 2000

<sup>24</sup> Refer Appendix 4 for the removal provisions for each SOC.

<sup>25</sup> *Jarratt v Commission of Police for New South Wales* [2005] HCA 50

may be shorter or longer according to the specific circumstances of the Government business and the CEO. The circumstances requiring longer notice periods should be outlined when seeking Ministerial approval.

## **2.5 Re-appointment**

Where a board decides to extend a CEO's term or re-appoint the incumbent CEO, Ministerial approvals or consultations required for appointments and setting conditions of employment under legislation for a new appointment will also apply for re-appointments.

Provisions may be required for periods of notice prior to the date of termination regarding the CEO's intention to seek re-appointment, the businesses intention to offer the CEO re-appointment and the proposed terms (having consulted and received required approvals) and the CEO's acceptance of the offer. In some specific circumstances<sup>26</sup>, the board may consider it appropriate to provide for payment in lieu of notice, where the board does not offer re-appointment and where the business has not met its obligations to inform the CEO of its intention within the required notice period.

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<sup>26</sup> For example, where renewal of the contract is contemplated by both sides upon initial appointment.

### 3. Disclosure requirements

#### 3.1 Annual Report

Disclosures required under legislation include<sup>27</sup>:

- *Annual Report*:
  - total remuneration package of the CEO (excluding performance-related incentive payments)
  - performance-related incentive payments
  - a statement on the performance of the CEO having regard to the agreed performance criteria under which the CEO was appraised, and
  - a summary of the key criteria for determining any performance-related incentive payments.
- *Financial Report*<sup>28</sup>:
  - a description and amount of any loans, advances or other moneys made to the CEO or related parties to the CEO.

In addition to the legislative requirements, the following elements of the CEO's remuneration and contract should be disclosed in the business's annual report in line with private sector standards:

- a breakdown of the individual components of the remuneration package classified under the following headings<sup>29</sup>:
  - primary including separately disclosing salary and fees, performance-related incentive payments and non-monetary benefits
  - post-employment including any superannuation or retirement benefits
  - any other compensations benefits including any termination payments made or payable
- the method and term of appointment of the CEO
- the rationale and objectives for the remuneration of the CEO
- any other additional contractual terms which are unusual, material and which are required to understand the accountability of the CEO within the entity and the benefits they gain as a result of their position. This includes any special rights or payments upon termination, and
- any terminations payments paid or payable during the financial year to a former CEO.

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<sup>27</sup> *Annual Reports (Statutory Bodies) Regulation 2000 (NSW)*, sections 11 and 14. The annual reporting legislation requires disclosures for 'executive officers' of or above SES level 5 (or equivalent remuneration for statutory SOCs). Further guidance on annual reporting requirements can be found in NSW Treasury Circular, *Annual Reporting Requirements – Executive Remuneration*, TC 00/24, 27 October 2000 and other Treasury circulars released periodically.

<sup>28</sup> *Public Finance and Audit Regulation 2000 (NSW)*, Schedule 1, Part 2, sections 2 and 3

<sup>29</sup> Guidance on definitions in the required classifications can be found in AASB 1046, *Director and Executive Disclosures by Disclosing Entities*, January 2004. Although AASB 1046 may not be mandatory for Government businesses, it reflects private sector standards of disclosure which should be adhered to. In the future, Australian Accounting Standards and Treasury's legislative requirements may be amended as part of the adoption of International Accounting Standards in Australia.



### **3.2 Disclosure to the Voting Shareholders and/or the Treasurer**

Any unusual prospective terms of employment or remuneration levels either outside benchmarked ranges or remuneration levels where no benchmarking has been undertaken contained in the CEO's contract should be communicated to the Voting Shareholders (for SOCs) or to the Treasurer well prior to matters being finalised and formalised. Standards of good practice corporate governance require giving the shareholder the opportunity to comment on a CEO's salary and any unusual contractual terms<sup>30</sup>.

### **Further Information**

General inquiries concerning this document should be initially directed to:

Commercial Policy Branch  
NSW Treasury  
Telephone: (02) 9228 3095  
Internet: [www.treasury.nsw.gov.au](http://www.treasury.nsw.gov.au)

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<sup>30</sup> This is analogous to the requirements of the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) ("CLERP 9") for private sector corporations to disclose remuneration details in a dedicated Remuneration Report and to put the annual remuneration plan to the non-binding vote of shareholders. In addition, consultation with the Voting shareholders before setting remuneration or the terms of employments is also a requirement under the enabling legislation of many SOCs.

## **APPENDIX 1 – SAMPLE PERFORMANCE PAYMENT CLAUSE<sup>31</sup>**

### **X. Performance Payment**

- X.1 The Annual Performance Payment shall be based on performance for a full year period and shall be determined annually by the board [with the concurrence of the Treasurer/Voting Shareholders] by reference to the performance criteria in the attached Performance Agreement.
- X.2 The parties agree that the Annual Performance Payment shall not exceed [insert relevant percentage]% of the annual fixed remuneration.
- X.3 The Annual Performance Payment shall be paid [within three months of the end of the financial year to which the Annual Performance Payment relates OR other applicable timeframe for payment<sup>32</sup>].
- X.4 The Long Term Performance Payment shall be based on performance over a [five] year period and shall be determined at the end of the [five] year period by the board [with the concurrence of the Treasurer/Voting Shareholders] by reference to the long term performance criteria in the attached Performance Agreement.
- X.5 The parties agree that the Long Term Performance Payment shall not exceed [insert relevant percentage]% of the annual fixed remuneration of the final year of the contract.

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<sup>31</sup> This clause is a guide only. As discussed in Section 2.2.1, whether or not performance pay is appropriate, the amounts involved, and the suitability of short term and long term components should be determined by the board and will depend upon the individual circumstances of the SOC and CEO.

<sup>32</sup> For example, within [three] months of the anniversary each year of the Employee's appointment

## APPENDIX 2 – SAMPLE PERFORMANCE AGREEMENT

KEY ACCOUNT-ABILITY	STRATEGY	PERFORMANCE MEASURES
Strong financial management	Strive for achievement of SCI/SBI targets	Financial performance targets met (within $\pm$ x%) Increase in firm value exhibited Clear financial objectives Realistic budgets developed and maintained
	Actively manage risk	No unjustified legal actions All Treasury management risk (credit, interest rate, liquidity, foreign exchange) managed, monitored and reported with early and appropriate remedial action taken when required Clean audit report (or remedial action in place for any auditing issues identified in prior audits)
	Manage capital programs	Capital works programs delivered on time and on budget Key risks identified early and adequate action taken to mitigate risk
Industry performance	Strive to achieve non-financial performance targets	Meet or exceed set service delivery levels Achieve key milestones set by the Government for industry reform or change
	Meet or exceed industry performance benchmarks	Key financial indicators are at or above industry benchmarks Market share (if applicable) maintained or grown
	Corporate reputation maintained or enhanced	Customer satisfaction levels increased by [x]% Surveys or indicators of public perception indicates enhanced regard for the organisation
Good relations with key stakeholders	Maintain and enhance good relationship with Government	Ensure Voting Shareholders, Portfolio Ministers and Treasury are appropriately and adequately informed in a timely manner as required under legislation, regulation or Government policy Comply with reporting requirements and deadlines to Treasury
	Work collaboratively with the board/Minister	Board kept informed and provided with adequate, timely and accurate information on organisational performance and issues eg monthly reports timely and accurate Supports and makes meaningful contribution and input to board deliberations and Government policy (if applicable)
Good people management practices*	Ensure staff are satisfied with their work environment	Staff productivity enhanced by x% Staff feedback and surveys indicate staff morale maintained or improved Turnover at an acceptable level and stable Staffing levels adequate
	Lead management team	Senior managers satisfied with leadership of organisation Turnover of senior management minimal and senior managers retained at reasonable cost Suitable programs in place for nurturing potential leaders

The above is a sample only of some specific areas. The content, terminology and format should be tailored to the needs of each Government business in the context of their objectives and strategic plan.

Further sample strategies and measures for good people management practices can be found in the sample performance agreement contained in *Chief Executive Performance Agreement Guidelines*<sup>33</sup>.

<sup>33</sup> Premier's Memorandum No. 99-05, *Chief Executive Performance Agreement Guidelines*, January 1999, and replicated in the Premier's Department, *SES Guidelines – a Manual for Senior Executive Service Administrators and Officers*, 4<sup>th</sup> Edition, December 2005

## APPENDIX 3 – MODEL TERMINATION CLAUSE

### Y. Termination

Y.1 Unless the Employee's employment has earlier been terminated under clauses Y.2 to Y.5 or it is otherwise agreed, the Employee's employment as Chief Executive Officer under this Contract will terminate on [date of termination] ("Date of Termination").

Y.2 The [name of business] may terminate the Contract prior to the Date of Termination for any or no reason provided that [name of business] shall give [six (6)] months notice in writing or in lieu of notice by the payment of [six (6)] months salary and benefits as though the notice period had been worked.

For the avoidance of doubt, benefits to be paid include any pro-rata Performance Payment that the Employee would have been entitled to had the Contract not been terminated<sup>34</sup>.

Y.3 The [name of business] may terminate the Contract prior to the Date of Termination where the Employee has not satisfactorily met any of the terms and conditions of this Contract provided that [name of business] shall give [three (3)] months notice in writing or in lieu of notice by the payment of [three (3)] months salary<sup>35</sup>.

Y.4 The Employee may terminate the Contract prior to [date of termination] by giving three (3) months notice in writing to [Government business]. The notice period may be less if mutually agreed between the parties.

Y.5 Notwithstanding clause Y.2 and Y.3, [Government business] may terminate the Contract prior to the Date of Termination without notice if the Employee:

- a) commits an act of a serious or persistent breach of the terms and conditions of the Contract
- b) acts dishonestly, fraudulently, is wilfully disobedient or is guilty of misconduct
- c) wilfully breaches, fails to observe or otherwise neglects their discharge of duties to [Government business]
- d) wilfully breaches or fails to observe any of the provisions of any Act of Parliament, rules, regulations, [licences] applicable to the conduct, operation or management of [Government business]
- e) fails to comply with lawful instruction or directions duly authorised
- f) is convicted for an offence precluding or inhibiting the performance of duties under the Contract
- g) undertakes any activity or action which bring the reputation of [Government business] into disrepute
- h) becomes incapacitated which prevents the performance of duties under the Contract, or
- i) becomes bankrupt or makes a composition, arrangement or assignment for the benefit of his/her creditors.

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<sup>34</sup> To avoid doubt, the calculation of any pro-rata performance pay under this clause may need to be detailed either in the performance agreement or separately within the employment contract.

<sup>35</sup> If not defined elsewhere salary is the annual fixed remuneration excluding any performance payments

- Y.6 Notwithstanding clause Y.2 and Y.3, if the Employee's employment is terminated under clause Y.5, the Employee will be paid only those entitlements due to him/her under annual leave and long service leave [refer any relevant clauses<sup>36</sup>].  
The Employee will not be entitled to be paid any other monies as a consequence of or in connection with the termination of his/her employment.
- Y.7 Upon termination of employment for any reason, the Employee agrees to immediately return to [Government business], all property of [Government business].  
This includes, but is not limited to [list property such as a mobile telephone, car, personal digital assistant and computer].
- Y.8 Upon termination of employment for any reason, the Employee shall resign without claim for compensation from all directorships and other offices held in conjunction with the Employee's employment. The Employee appoints the chair of [Government business] as the Employee's attorney to execute any resignations.
- Y.9 Where the Employee is removed from the office of Chief Executive Officer in accordance with [insert statutory reference], the Employee's employment will terminate immediately. Where the Employee is removed from office other than for a reason which would justify termination of employment under Y.5, the [Government business] will pay to the Employee a sum in lieu of notice under either Y.2 or Y.3, with the Board to decide whichever is appropriate.

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<sup>36</sup> If required given the structure of the remuneration package, the basis upon which an employee's entitlements are paid out upon termination should be documented.

## APPENDIX 4 – SOC LEGISLATIVE REQUIREMENTS FOR CEO APPOINTMENT, REMOVAL, REMUNERATION AND EMPLOYMENT CONDITIONS

Legislation	State Owned Corporation	CEO appointment and removal	CEO remuneration	CEO employment terms and conditions
<i>State Owned Corporation Act 1989</i> Section 20K Schedule 9	Newcastle Port Corporation Port Kembla Port Corporation Sydney Ports Corporation Hunter Water Corporation Sydney Water Corporation	By the Governor on the recommendation of the Portfolio Minister and the board	Determined by the Portfolio Minister after considering advice from the board	Fixed by the board after consultation with the Portfolio Minister
<i>Energy Services Corporations Act 1995</i> Schedule 2	EnergyAustralia Integral Energy Country Energy Macquarie Generation Eraring Energy Delta Electricity TransGrid			
<i>NSW Lotteries Corporatisation Act 1996</i> Section 11B	NSW Lotteries Corporation	By the board after consultation with the Voting Shareholders	Determined by the board	Fixed by the board after consultation with the Voting Shareholders
<i>Superannuation Administration Authority Corporatisation Act</i> Schedule 3	Superannuation Administration Corporation (Pillar)			
<i>Waste Recycling and Processing Corporation Act 2001</i> Section 8	Waste Recycling and Processing Corporation	By the board after consultation with the Voting Shareholders and the Portfolio Minister	Determined by the board	Fixed by the board after consultation with the Voting Shareholders
<i>Transport Administration Act 1988</i> Sections 14, 18I, 19R and 35J	Rail Corporation NSW Transport Infrastructure Development Corporation Rail Infrastructure Corporation Sydney Ferries	By the board after consultation with the Voting Shareholders and the Portfolio Minister	Determined by the board after consultation with the Voting Shareholders	Fixed by the board after consultation with the Voting Shareholders
<i>Landcom Corporation Act 2001</i> Section 9	Landcom			
<i>State Water Corporation Act 2004</i> Section 8	State Water	By the board after consultation with the Voting Shareholders and the Portfolio Minister	Determined by the board after consultation with the Voting Shareholders	Fixed by the board after consultation with the Voting Shareholders and the Portfolio Minister

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- Premier's Memorandum No. 2000-24, *Reappointment to CES and SES Positions*, September 2000
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- UK Department of Trade and Industry, *Review of the Role and Effectiveness of Non-executive Directors*, January 2003 ('Higgs Report')

## **Legislation and Regulations**

*Annual Reports (Statutory Bodies) Regulation 2000 (NSW)*

*Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth) ('CLERP 9')*

*Public Finance and Audit Regulation 2000 (NSW)*

*Public Sector Employment and Management Act 2002 (NSW)*

*Public Sector Employment and Management (General) Regulation 1996 (NSW)*

*State Owned Corporations Act 1989 (NSW)*

*The Statutory and Other Offices Remuneration Act 1975 (NSW)*

Enabling legislation of State Owned Corporations modifying the *State Owned Corporations Act* in relation to CEO appointments:

*Energy Services Corporations Act 1995 (NSW)*

*Landcom Corporation Act 2001 (NSW)*

*New South Wales Lotteries Corporatisation Act 1996 (NSW)*

*State Water Corporation Act 2004 (NSW)*

*Superannuation Administration Authority Corporatisation Act 2001 (NSW)*

*Transport Administration Act 1988 (NSW)*

*Waste Recycling and Processing Corporation Act 2001 (NSW)*