

Auditing for the Australian Capital Territory

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AUDITOR-GENERAL
AUSTRALIAN CAPITAL TERRITORY



PA 01/04

5 June 2002

The Speaker
ACT Legislative Assembly
South Building
London Circuit
CANBERRA ACT 2601

Dear Mr Speaker

In accordance with *Section 17* of the *Auditor-General Act 1996*, I transmit to the Speaker my Report titled *Governance Arrangements of Selected Statutory Authorities* for presentation to the Legislative Assembly by the Speaker.

This Audit was conducted by Jo Benton, Director, Performance Audits and Administration.

The Audit was undertaken with the assistance of Malcolm Prentice, Russell Livermore and Katinka Mutandadzi.

Administrative support was provided by Megan Walters.

Yours sincerely,

John A Parkinson

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1 SUMMARY AND AUDIT OPINION

INTRODUCTION

1.1 This report presents a summary of the results of a performance audit that reviewed the enabling legislation of sixteen statutory authorities and the extent to which those authorities are complying with aspects of their legislation and related guidance. *Annex A* contains a list of the statutory authorities examined during the audit. *Annex A* also identifies each authority's enabling legislation.

1.2 This report is not intended to be a comprehensive analysis of all aspects of the corporate governance arrangements for statutory authorities in the Territory. Rather, the report discusses a number of key issues relating to the governance of a selected group of statutory authorities. The findings and suggested actions arising from the audit, however, are likely to be relevant to other statutory authorities with corporate governance responsibilities and similar bodies in the Territory.

1.3 The Audit did not examine any statutory authorities that have purely advisory functions. Accordingly, the opinions, comments and suggested actions made in this report are not intended to be extrapolated to such authorities.

WHAT IS CORPORATE GOVERNANCE

1.4 Broadly speaking, corporate governance refers to the processes by which organisations are directed, controlled and held to account¹. Governance is concerned with structures and processes for decision making, accountability, control and behaviour principally at the top of organisations. Corporate governance is also concerned with the relationship between the board and the responsible minister, the board and management, the board and individual directors and the board and the shareholders.

1.5 Corporate governance is underpinned by the principles of openness, integrity and accountability. An effective system of corporate governance will help facilitate decision making and appropriate foci for accountability and responsibility within and outside an organisation. 'Effective governance is also essential for building confidence in public sector entities – which is in itself necessary if public sector entities are to

¹ ANAO Discussion Paper, Corporate Governance in Commonwealth Authorities and Companies, July, 1999.

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be effective in meeting their objectives.’² Although a number of general principles of good corporate governance are widely accepted, there, is however, no single model of good corporate governance.

1.6 It should be noted that corporate governance is not dependent on or related to the specific operational functions of an authority. Rather, corporate governance is concerned with the way in which the performance of authorities’ specific operational functions is oversighted and those responsible for the overall operation of the authority are held to account.

AUDIT OBJECTIVE

1.7 The objective of this audit was to provide an independent opinion to the Legislative Assembly on:

- the adequacy of the statutory governance arrangements for selected statutory authorities;
- the adequacy of central agency guidance and the governance practices of selected statutory authorities; and
- whether the statutory authorities included in the audit are complying with key aspects of their enabling legislation, other related legislation and central agency guidance.

1.8 The independent opinions on the Audit objectives are set out on the following page.

² International Federation of Accountants, Governance in the Public Sector: A Governing Body Perspective, Study 13, August, 2001, page 1.

AUDIT OPINIONS

Legislative governance arrangements for statutory authorities are inadequate.

Central agency guidance and the governance practices of a number of authorities have shortcomings that need to be addressed.

Statutory authorities are generally complying with key aspects of their enabling legislation, other related legislation and central agency guidance.

There are several governance practices where more rigorous approaches should have been adopted.

BASIS FOR THE AUDIT OPINIONS

Statutory and Regulatory Provisions

1.9 The opinion that *statutory governance arrangements for statutory authorities are inadequate* is based on the following findings.

The Roles of Boards, Chairpersons and CEOs (Chapter 4)

- There are significant variations in the legislated governance arrangements for individual authorities.
- The governance responsibilities of boards are not completely stated in the enabling legislation of any of the authorities reviewed.
- The roles of the chairpersons of boards are not comprehensively stated in the enabling legislation of any of the authorities reviewed.
- Only five out of sixteen authorities are responsible for appointing their own chief executive officers.
- In all authorities there are inherent conflicts between the responsibilities of ministers, boards, and their CEOs that could give rise to unproductive tensions that may not be in the best interests of the authorities concerned.

The Roles of Board Members (Chapter 5)

- Apart from the Stadiums Authority Act, none of the legislation reviewed makes any reference to the specific responsibilities of individual board members.
- The particular responsibilities of board members who are nominated or elected to boards because they have special qualifications, or as representatives of stakeholder groups or as public service members, are not addressed in legislation.

Disclosure of Personal Interests (Chapter 6)

- The disclosure of personal interest provisions in the enabling legislation of statutory authorities is inconsistent and insufficient.

Ministerial Directions (Chapter 7)

- The enabling legislation of most authorities reviewed provides for the responsible minister to give them directions relating to the

performance of their functions. In all cases such directions must be made public.

- In only one authority, however, is the minister required to consult an authority before giving it a direction.
- In only a minority of cases does legislation provide for authorities to be paid the costs of complying with ministerial directions.
- The enabling legislation of some statutory authorities also provides for the minister to give them directions on dividends or similar payments, the application of enabling legislation, matters to be addressed and borrowing limits. In only a few cases is the minister required to make such directions public.
- In some cases the minister is not required to consult with the authority before giving it such directions.
- In none of these cases does the legislation provide for authorities to be paid the costs of complying with such directions.

Board Audit Committees (Chapter 9)

- There is no legislative requirement for the boards of statutory authorities to establish audit committees and half of the authorities reviewed have not done so.

Minutes of the Meetings of Boards (Chapter 10)

- The enabling legislation of the ACT Health and Community Care Service Board, the Long Service Leave Board and the National Exhibition Centre Trust, does not require their boards to keep minutes of meetings.

Common Seals (Chapter 11)

- The enabling legislation of only six statutory authorities indicates whose authority is required before their common seal is affixed to a document.

Summary

1.10 Governance arrangements for statutory authorities are inadequate because the statutory roles and responsibilities of the key participants are not adequately defined and those that are defined give rise to inherent conflicts between the participants. In addition, personal disclosure requirements are inconsistent and inadequate and arrangements for ministerial intervention in the affairs of authorities are also inadequate. Finally, structural governance arrangements, including the absence of any

requirement for authorities to establish audit committees, are also inadequate.

Governance Guidance and Practices by Statutory Authorities

1.11 The opinion that *Central agency guidance and the governance practices by a number of statutory authorities have shortcomings that need to be addressed* is based on the following findings.

Disclosure of Governance Arrangements (Chapter 3)

- There is no requirement in the Chief Minister's Annual Report Directions for authorities to report on their governance arrangements.

The Roles of Board Members (Chapter 5)

- Most authorities advised that they conduct some form of induction training for new board members, however, almost no authorities provided their board members with any other form of professional training or development.

Disclosure of Personal Interests (Chapter 6)

- Most statutory authority boards have not formally adopted the model code of conduct for the disclosure of private interests issued by the Chief Ministers' Department.

Board Appointments (Chapter 8)

- There is no central guidance on the development of selection criteria for the members of the boards of statutory authorities or on selecting the members of boards on the basis of merit.
- The remuneration of part time board members varies widely with the members of some boards receiving token or no remuneration for their services.

Board Audit Committees (Chapter 9)

- Those board audit committees that have been established have been provided with charters or terms of reference by their boards, however, no audit committee has been provided with a charter that fully complies with better practice standards.
- Extant audit committees have a varying range of responsibilities, however, no audit committee has all of those responsibilities that fully complies with better practice standards.

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- The membership of the audit committees of six statutory authorities is inconsistent with better practice standards.
- Although audit committees have been given varying degrees of procedural guidance by their boards, no audit committee has been given all that guidance which fully complies with better practice standards.

Common Seals (Chapter 11)

- Authorities use their seals for different purposes and no authority has formally decided on the types of contracts and other documents that should be formalised by affixing their seal to them.

Summary

1.12 Central agency guidance and governance practices by authorities have a number of shortcomings that need to be addressed because there is no requirement for authorities to report on their governance arrangements and most authorities have not adopted the model code of conduct for the disclosure of private interests. In addition, there is no central agency guidance on the processes to be used for selecting the members of the boards of authorities and some board members receive token or no remuneration for their services. Finally, those audit committees that have been established to not meet better practice standards.

Compliance with Statutory Provisions

1.13 The opinion that *statutory authorities are generally complying with key aspects of their enabling legislation, other related legislation and central agency guidance* is based on the following findings.

Board Appointments (Chapter 8)

- Legislated processes for the appointment of chairpersons, deputy chairpersons and members appear to have mostly been followed.

Minutes of the Meetings of Boards (Chapter 10)

- All authorities reviewed kept minutes of the meetings of their governing boards.
- The minutes of most statutory authorities were signed by their chairpersons to indicate that the minutes were a true and accurate record of the proceedings of their meetings.

Common Seals (Chapter 11)

- Except for the Canberra Tourism and Events Corporation, all statutory authorities keep a register of the use of their seal.

Summary

1.14 Notwithstanding the deficiencies in legislative arrangements and central agency guidance referred to earlier in this chapter, statutory authorities are generally complying with key aspects of their enabling legislation, other related legislation and central agency guidance.

More Rigorous Approach Warranted

1.15 The opinion that *there are several governance practices where more rigorous approaches should have been adopted* is based on the following findings.

Disclosure of Personal Interests (Chapter 6)

- The Stadiums Authority and individual directors may not be complying with the Stadiums Authority Act in that potential conflict of interest issues are not being properly addressed.
- The Chairman of the Building and Construction Industry Training Fund Board disclosed an indirect conflict of interest at one meeting but did not withdraw from either the meeting or the decision making processes as required by the Building and Construction Industry Training Levy Act.
- The Chairman of the Canberra Tourism and Events Corporation did not formally advise the responsible minister, as required by the Canberra Tourism and Events Corporation Act, that the Corporation had determined that a member of the board had disclosed a conflict of interest in a particular matter and had been excluded from determination of the matter.

Board Appointments (Chapter 8)

- During the Audit it was noted that the members of the Construction Industry Long Service Leave Board had not been formally appointed in accordance with the Long Service Leave (Building and Construction Industry) Act. This matter has now been regularised.
- Deputy chairpersons have not been appointed to the Canberra Tourism and Events Corporation and Healthpact as provided for in their enabling legislation.

- Two members of the Canberra Public Cemeteries Trust have occupied their positions since the 1960s and documentation supporting their appointment could not be located.

SUGGESTIONS FOR FURTHER ACTION

1.16 In order to address the issues raised in the preceding section, the Audit has made a number of suggestions for further action. These suggestions include changes to legislation and changes to existing practices. Two other suggestions are also made.

Suggested Legislative Changes

1.17 Many of the suggestions for legislative change made by the Audit in this report would involve amending the legislation of a number of statutory authorities. This would be an extensive task. The task could be made easier if new legislation were enacted to provide guidance on governance and related matters for all statutory authorities in the Territory. Such legislation would override the outdated provisions in existing enabling legislation. This arrangement would also facilitate any further legislative enhancements to governance arrangements that were considered necessary in the future. This approach has been adopted in a number of other jurisdictions such as the Commonwealth and New South Wales.

1.18 Accordingly, it is suggested that consideration be given to incorporating the suggestions for legislative change made in this report in one new enactment that would provide standard procedures for all governance matters for all statutory authorities. Such an enactment would also set a standard framework for essential administrative practices for statutory authorities such as recording of minutes of meetings of governing bodies and the use of common seals.

1.19 An issue for consideration in this approach is whether all statutory authorities should have exactly same governance arrangements. All authorities are not the same and therefore some differences in governance arrangements may be appropriate in some cases. For example, at one extreme the boards of some authorities govern what are in effect commercial business undertakings. Other boards are primarily responsible for overseeing bodies that undertake regulatory or quasi-government functions. A further type of board is largely responsible for providing advice to the Government.

1.20 Most governance arrangements would be suitable for all types authorities. Some arrangements, however, may need to be tailored to suit

different classes of authorities. The different types of governance arrangements could be catered for within the overarching legislative framework suggested above by specifying different governance responsibilities for different classes of boards. This approach has been adopted in New South Wales where the State Owned Corporations Act caters for two different types of corporations. Separate schedules to the Act list the names of the authorities that fall into each category.

1.21 The suggested changes, which are set out in the relevant chapters of this report, are summarised in the following paragraphs. It would be for subsequent consideration, which governance arrangements should be common to all authorities and which arrangements should be made specific to different classes of authorities. Such consideration should take into account the underlying reasons for the establishment and continuing existence of particular statutory authorities.

1.22 It is suggested that legislation be prepared which:

The Roles of Boards, Chairpersons and CEOs (Chapter 4)

1. specifies the publication of complete statements of the governance responsibilities of the boards of authorities;
2. makes chief executive officers of appropriate authorities responsible to their governing boards for the efficient and effective financial management of their authorities;
3. makes the boards of appropriate statutory authorities responsible for the formal approval and adoption of their authorities' annual financial statements;
4. specifies the full range of responsibilities of chairpersons of boards of statutory authorities;
5. provides for a position of deputy chairperson for all statutory authorities;
6. requires CEOs or the senior staff member, of appropriate authorities to be responsible for managing the affairs of their authority under the strategic guidance of their boards;
7. gives boards of appropriate authorities responsibility for appointing their CEOs, or where they do not have CEOs, the senior officer on the staff of their authorities;

The Role of Board Members (Chapter 5)

8. specifies the full range of individual responsibilities for members of the boards of authorities;
9. clarifies the responsibilities of nominee board members or board members with special qualifications, vis-à-vis their individual responsibilities as board members and their collective responsibilities as members of boards;

Disclosure of Personal Interests (Chapter 6)

10. standardises the disclosure of interest provisions of board members;
11. extends the scope of disclosure requirements to include non-pecuniary interests;

Ministerial Directions (Chapter 7)

12. provides for all ministerial directions to all authorities relating to the performance of their functions to be in writing and to be fully disclosed to the Legislative Assembly and in authorities' annual reports;
13. provides for all ministerial directions on dividends or similar payments, the application of enabling legislation, matters to be addressed and borrowing limits to be in writing and disclosed to the Legislative Assembly and in authorities' annual reports;
14. provides for ministers to always consult with authorities before giving them directions;
15. provides for compensation to be paid, in appropriate circumstances, to authorities where compliance with ministerial directions relating to the performance of their functions results in a net financial cost to them (where it is decided that compensation would be inappropriate, the ministerial direction should indicate to the authority how it is to meet the costs of the direction);
16. would expand the membership of the board of the Building and Construction Industry Training Fund by the addition of one independent person;

Board Appointments (Chapter 8)

17. specifies the periods of appointment of trustees of the Cemeteries Trust;
18. provides for the reappointment of the members of boards where enabling legislation is silent on the matter;

Board Audit Committees (Chapter 9)

19. requires the boards of all statutory authorities to establish and maintain an audit committee, unless the establishment of such a committee is considered by individual boards to be clearly inappropriate in their circumstances;

Minutes of the Meetings of Boards (Chapter 10)

20. requires all authorities to keep minutes of the meetings of their boards;
21. provides for chairpersons to sign their minutes as true records of their deliberations within, say one month, of their confirmation; and
22. provides for the common seals of statutory authorities to be used only where authorised by their boards.

Suggestions for Better Practice

1.23 In addition to suggested legislative changes referred to above, it is suggested that the following proposals for better practice be implemented. It should be noted that a number of agencies have advised that they have already decided to implement a number of the suggestions for better practice made by in this section.

Disclosure of Governance Arrangements (Chapter 3)

23. The Chief Minister's Annual Report Directions be amended to require statutory authorities to provide a complete statement of their governance arrangements in their annual reports.

The Role of Boards, Chairpersons and CEOs (Chapter 4)

24. Pending the passage of legislation to codify the governance responsibilities of boards, boards give consideration to formally adopting the better practice responsibilities outlined in Chapter 4.

25. The Chief Minister's Annual Report Directions be amended to require that the chairpersons of statutory authorities be responsible for signing transmittal letters stating that their annual report has been prepared in accordance with the requirements of the Chief Minister's Annual Report Directions and meets all legislative requirements.
26. Pending the passage of legislation to codify the responsibilities of chairpersons, boards give consideration to formally adopting the proposed better practice responsibilities outlined in Chapter 4.

The Roles of Board Members (Chapter 5)

27. Pending the passage of legislation to codify the responsibilities of board members, boards formally give consideration to adopting the individual responsibilities for board members outlined in Chapter 5.
28. All authorities sponsor formal induction programs for new board members, noting that it may be more effective if some aspects of board member induction training were conducted centrally.
29. New board members be strongly encouraged to attend formal training on the duties of company directors in a public sector context.
30. Board members be invited to attend industry focused professional development activities on a selective basis.

Disclosure of Personal Interests (Chapter 6)

31. The code of conduct and personal interest declaration arrangements for members of boards be enhanced and made mandatory as outlined in Chapter 5.
32. A standing item be included on the agenda of all board meetings requiring that personal interests in respect of business to be considered at that meeting be disclosed.

Board Appointments (Chapter 8)

33. Vacant positions of Deputy Chairperson on the boards of authorities be filled promptly.
34. Formal merit selection procedures be developed and used for the selection, appointment and reappointment of all board members.

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35. Copies of appointment documentation be retained and filed in a secure location.
36. Copies of the instruments of appointment of persons to the boards of authorities be provided to authorities for their records.
37. Members of all boards with corporate governance responsibilities be remunerated.

Board Audit Committees (Chapter 9)

38. Pending the passage of legislation to require the boards of authorities to establish audit committees, boards give consideration to formally deciding whether the establishment of an audit committee would be appropriate in their circumstances.
39. Boards review the charters they have provided to their audit committees against the better practice guidance contained in Chapter 9.
40. Boards review the responsibilities they have given their audit committees against the better practice guidance contained in Chapter 9.
41. Boards review the membership of their audit committees against the better practice guidance contained in Chapter 9.
42. Boards review the procedures of their audit committees against the better practice guidance contained in Chapter 9.
43. Boards review the frequency of the meetings of their audit committees, with a view to them meeting at a frequency similar to that of the board as a whole.

Minutes of the Meetings of Boards (Chapter 10)

44. The form of minute books used by authorities be structured in such a way that their integrity is maintained and that there is no scope for the minutes of particular meetings to be mislaid.
45. Pending the passage of legislation, boards formally give consideration to adopting procedures whereby the chairman signs records of meetings within say, one month, of their confirmation.

Common Seals (Chapter 11)

46. Boards formally resolve those types of contracts and other documents that should be formalised by affixing their common seal.
47. Boards determine who should sign documents on which the Authority's seal is affixed.
48. Boards ensure that their seals are kept in a secure place.
49. All authorities keep a register of the occasions on which their seal is used.

Other Suggestions

50. It appears that the board of the Stadiums Authority may not be addressing potential conflict of interest issues. Accordingly, it is suggested that the composition of the board be reviewed and any potential for conflict of interest matters be addressed (Chapter 6).
51. It appears that the Chairman of the Building and Construction Industry Training Fund may have participated in the consideration of a matter where he had an indirect conflict of interest. Accordingly, it is suggested that consideration be given to action that should be taken over the matter (Chapter 6).

CHIEF EXECUTIVES' RESPONSES

1.23 In accordance with section 18 of the *Auditor-General Act* 1996, a final draft of this report was provided to the Chief Executives of the Chief Minister's Department and the Department of Treasury and the Chief Executive Officers of each of the statutory authorities addressed during the audit for their consideration and comments. Substantive comments received from the Chief Executives are set out in the following paragraphs.

1.24 Responses were also received from the Chief Executive Officers of most statutory authorities. Their responses were generally supportive of the Audit's suggested actions for improving the governance arrangements of statutory authorities.

COMMENTS BY THE CHIEF EXECUTIVE OF THE CHIEF MINISTERS DEPARTMENT

Subject to the exceptions addressed below, the general objectives, findings and suggestions contained in the report are supported. An effective system of corporate governance is important to facilitate responsible decision making and accountability by the boards of statutory authorities.

In particular, I agree that it would be beneficial for a more consistent approach to be adopted in establishing the legislative frameworks for statutory authorities and other like bodies, while noting that flexibility needs to be retained to address particular requirements. Differing approaches are appropriate for example for authorities engaged in commercial activities or exercise executive authority as compared with bodies which are essentially advisory in nature. The current inconsistencies are largely a product of history and prevailing fashion.

As the Audit itself notes, there is no single model of good corporate governance given the different roles and operations (commercial, regulatory and advisory) of statutory authorities. Governance is not, however, merely the adoption of a set of standards or principles. Governance covers the broader and less certain concepts of propriety, common sense, leadership and judgement. These are not quantifiable and it is difficult to legislate for them. Any initiative to legislate for 'good governance' would need to recognise the limited nature of black letter law.

I note that the suggestions for better practice in relation to the annual reports of statutory authorities have been anticipated in the 2002 revisions to the Annual Reports Directions.

There are only three areas where I do not support the Report's recommendations.

The first of these issues concerns some refinement to the recommendation that authorities generally be given the authority to appoint their own Chief Executives. In principle, I support this proposal. In addition, I consider that:

- a. Boards also should be required to consult formally with the relevant Minister prior to finalising the appointment;*
- b. where such appointees hold Public Service positions, Boards also consult with the administering Chief Executive of the relevant department, with the formal appointment under the Public Sector Management Act being the responsibility of that Chief Executive;*
- c. all such appointments should be undertaken through an open merit*

process, with the relevant Department being represented on the selection panel when the appointment is to a Public Service position; and

- d. where Boards do not have their own staff but are instead supported by the relevant department, the selection of such staff is properly a matter for the department, contrary to the suggestion in the report, but with the requirement that the chair of the board should be consulted in advance about all such appointments.*

I do not agree that the selection of all board members be subject to formal merit selection procedures. The requirements for the selection and appointment of board members are set out at Chapter 10 of the revised Cabinet Handbook which has recently been released by the Chief Minister. The requirements include the specification of the relevant skills and background of proposed appointees. These requirements which are quite comprehensive in nature and which are also covered by the Statutory Appointments Act 1994 are considered to be sufficient, noting that such appointments are ultimately and properly an established prerogative of the Government of the day.

I also do not agree with the proposal that members of all boards be remunerated. Where substantial commercial activities are involved, Boards are remunerated at rates independently determined by the ACT Remuneration Tribunal. Remuneration is generally not provided for advisory boards. I consider that the Report at paragraphs 8.45 to 8.47 seriously misjudges the contribution made by members of ACT Boards and authorities. Members of the ACT community willingly and actively participate on such bodies without regard to financial reward. Indeed, in many instances I am aware that the lack of remuneration is seen as a positive feature of their participation. I do not consider that there is any direct linkage between the level of remuneration and the level of contribution of board members.

COMMENTS BY THE CHIEF EXECUTIVE OF THE DEPARTMENT OF TREASURY

Treasury agrees that effective governance is essential for accountability purposes and maintaining the integrity of public sector administration. Many recommendations of the Report will address a number of deficiencies identified in governance arrangements and compliance issues, and will improve the effective operations of the authorities concerned.

Although the principles of good governance should apply to all public entities, not all of the report's specific recommendations will necessarily

be applicable in all cases. It is important therefore that in any consideration of overarching legislation the governance principles can be applied to suit the different statutory and managerial frameworks of public authorities.

In Treasury's view, the issue of a Ministerial directions power over a statutory authority needs to be considered at the outset from a position of the roles and responsibilities of the minister and the authority. Treasury believes that independence is a widely misused term when used in a blanket way. Accordingly, it is a valid aim for legislation to as clearly as possible prescribe issues that are a matter for:

- *the Minister to determine;*
- *the Assembly; or*
- *other boards and authorities or persons to determine.*

As a general comment, it is usually inappropriate for an authority/board to have broad policy setting responsibilities with policy related issues remaining the responsibility of the Minister. As much as is possible the clear delineation of responsibilities in terms of policy and strategic settings; operational policy (or protocols); regulatory functions and operational matters will avoid conflicting and overlapping roles.

CONCLUDING COMMENTS

1.25 Both Chief Executives and the Chief Executive Officers of the statutory authorities addressed during the audit generally support the Audit's findings. These responses are welcomed.

1.26 The Chief Executive of the Chief Minister's Department has indicated that there are three areas where he does not support the Audit's suggestions. Each of those matters is discussed below.

Appointment of Chief Executives

1.27 The Chief Executive suggests that some refinement be made to the Audit's suggestions that authorities be given the authority to appoint their own chief executive officers. The Audit agrees that boards should be required to consult formally with the relevant minister prior to finalising each appointment. In addition, the audit agrees with the Chief Executive's suggestion that appointments should be undertaken through an open merit selection process.

1.28 The Audit does not agree, however, that departmental chief executives should have the final say in the appointment of chief executives where appointments are made under the Public Sector

Management Act. No reason is given by the Chief Executive to support this preference.

1.29 For the reasons outlined in the report, the Audit considers that the boards of statutory authorities should be responsible for appointing their own chief executive officers through an open merit selection process subject to a requirement that they consult with the minister before finalising the appointment. Concerns associated with present arrangements were clearly illustrated to the Audit by the Chairman of the Gambling and Racing Commission in commenting on the proposed report of the audit.

1.30 The Chairman's comments were:

One of the issues which concerns the Commission is the way in which the Chief Executive is appointed and, at least in formal terms, is responsible to the Under Treasurer. This issue has given the Commission considerable cause for concern and which we believe should be raised in the context of this report. Lest it be misrepresented, I should emphasise that these comments are not intended to convey any criticism of the Government. They are matters that go to structural issues that arise from difficulties in the application of the Public Sector Management Act.

In the case of the Commission, its Chief Executive is both the senior full time staff member responsible for its day to day operation and a member of the Commission. He is an executive engaged under the Public Sector Management Act. His appointment was the result of a selection process which involved advertising the vacancy and the preparation of a recommendation by a committee chaired by the then Chief Executive of the Department of Treasury. A Commission member and myself were also members of the selection committee.

The committee made a recommendation to the then Chief Executive of the Chief Minister's Department. Subsequently, the Chief Executive of the Chief Minister's Department appointed the Commission's Chief Executive and the Chief Executive of the Department of Treasury entered into a performance agreement with him.

It seems to the Commission that these arrangements are quite incompatible with the Chief Executive's role as the Chief

Executive of a statutory authority which is quite separate from and not answerable to either the Department of Treasury or the Chief Minister's Department. The fact that the Chief Executive and I agreed to the terms of his performance contract before it was signed off by the then Chief Executive of Treasury does not meet the Commission's concerns.

The agreement is subject to assessment by the Chief Executive of Treasury without any necessary consultation with me or other members of the Commission. It clearly provides the potential for inappropriate influence and direction to be imposed on both the exercise of the day to day management of the staff and the statutory responsibilities of the Commission. The problem arises because of the failure of the Gaming and Racing Control Act and the Public Sector Management Act to adequately deal with these issues.

In our view, the Chief Executive should be appointed on the recommendation of the Commission and not be placed in a de facto line management position within a department. The formal appointment of the Chief Executive should be by the Public Service Commissioner subject to a requirement that he or she has regard to or act in accordance with a recommendation from the Commission.

Selection of Board Members

1.31 The Chief Executive of the Chief Minister's Department has advised that he does not agree that the selection of all board members be subject to formal merit selection procedures. The Chief Executive states that such appointments are ultimately and properly an established prerogative of the government of the day.

1.32 For the reasons set out in the report, the Audit disagrees with the Chief Executive. The members of the boards of statutory authorities play an important role in their governance. For this reason it is most important that each board member have appropriate and adequate experience, qualifications and personal attributes to make a unique and valuable contribution to the functioning of their boards. Where there is no formal merit selection process and appointments are made exclusively by the government of the day, there is a perception, at least, that some appointments could be made for inappropriate reasons. Such a perception is not in the public interest and the process should be discontinued.

Remuneration of Board Members

1.33 The Chief Executive has advised that he does not agree that the members of all boards should be remunerated. The Chief Executive states that where substantial commercial activities are involved, Boards are remunerated at rates determined by the ACT Remuneration Tribunal. Remuneration is generally not provided for advisory boards.

1.34 The 16 statutory authorities addressed during the audit all have significant responsibilities. They are all required to prepare annual financial statements in accordance with the provisions of the *Financial Management Act 1996*. All are involved in business activities and/or regulatory or quasi-government functions. None of the authorities addressed during the audit have only advisory functions. Accordingly, the Audit's suggestion that members of boards be remunerated relates to those statutory authorities that have corporate governance responsibilities. The Audit's suggestions are not intended to encompass those authorities that have purely advisory functions.

1.35 For the reasons set out in the report, the Audit considers that the members of boards with corporate governance responsibilities should be remunerated. The audit identified two authorities that do not remunerate their board members. The most significant of those is the University of Canberra. The comments by the Vice Chancellor and President of the University of Canberra in commenting on the suggestion that board members be remunerated may be of interest to readers of this report.

1.36 The Vice Chancellor's comments were:

For the University, one of the quite significant changes suggested in the report concerns the possibility of remuneration of members of Council. There are some issues in relation to this notion which need to be considered.

For example, there might be an expectation that remunerated governing board members would have a significantly higher level of responsibility than governing board members who provide their services in an honorary capacity. This would possibly be problematic within a University Council, as well as in comparison between university councils/senates. Also, it would be unusual, in a company bound by corporations law (unlike UC), to have a board of as many as 22 members, the maximum size of the University Council.

The University is not opposed to the notion of remunerated directors, on the contrary, canvassing of this possibility is welcomed, but it should go hand in hand with consideration of optimal size of such a remunerated board. There are significant differences in the way a small board operates from that of one the size of the University Council. Just analysing the committee structure used by universities highlights one major difference. The notion of elected members would be another matter to be considered and debated.

The University is very willing to engage in discussion on the issues of board remuneration, board size and the inter-relationships which might exist between these factors.

2 REPORT STRUCTURE AND AUDIT APPROACH

REPORT STRUCTURE

2.1 This Report comprises nine substantive chapters, each of which contains a number of significant findings. Individual chapters address:

- disclosure of governance arrangements;
- the roles of boards, their chairpersons and chief executive officers;
- the roles of board members;
- disclosure of personal interests by board members;
- ministerial directions;
- board appointments;
- board audit committees;
- minutes of the meetings of authority boards; and
- use of common seals by statutory authorities.

AUDIT APPROACH

2.2 The Audit's approach was to analyse enabling legislation, selected records and practices of those statutory authorities selected for audit against the Audit's objectives stated in paragraph 1.6. Arising from that process the Audit made a number of preliminary findings. Where adverse findings were made, the Audit has suggested actions that could be taken to redress its concerns.

2.3 The Audit's preliminary findings and suggestions were discussed with the staff in each authority. Following refinement of its findings and suggested actions, a copy of the draft report was forwarded to the chief executive officers of each of the authorities for their formal consideration in accordance with section 18(1) of the *Auditor-General Act* 1996.

2.4 In addition, many of the findings and suggested actions contained in this report relate to statutory and whole-of-government issues. Accordingly, the Audit also held discussions with appropriate executives in the Chief Minister's Department and the Department of Treasury to seek their comments on a range of issues. A copy of the draft report was also forwarded to the Chief Executives of the Chief Minister's

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Department and the Department of Treasury for their formal consideration in accordance with section 18(1) of the Act.

2.5 As required by section 18(2) of the Act, where written comments were received on the proposed report, those comments were taken into account in finalising the report. Formal comments on the proposed report received from Chief Executives and Chief Executive Officers are included in full later in this chapter.

2.6 The audit report does not comment on the effectiveness or otherwise of the way in which the statutory authorities perform their functions. Rather, the audit looked at the way in which the top structure of each authority, that is its board, oversights the performance of its governance functions and the way in which the authority as a whole is held to account.

2.7 The audit was conducted in accordance with those Australian Auditing Standards applicable to performance audits and included those tests and other procedures that the Audit considered necessary in the circumstances.

3 DISCLOSURE OF GOVERNANCE ARRANGEMENTS

INTRODUCTION

3.1 In recent years corporate governance has been the subject of increasing levels of attention in both the public and private sectors. The importance of good corporate governance has been highlighted in the private sector by the corporate excesses of the 1980's and the recent failures of a number of high profile private sector corporations. Poor performance, however has not been limited to the private sector, as a number of public sector entities at both the Commonwealth and State/Territory level have also been found wanting in recent years.

3.2 Effective corporate governance practice includes formalising governance arrangements and making them clear to all stakeholders. In this regard the 'Moving Forward Service and Renewal' initiative currently being implemented in the Territory public sector aims to address a number of Territory authority governance issues.

3.3 This chapter specifically:

- addresses existing disclosure requirements for public sector authorities; and
- outlines private sector disclosure requirements.

SIGNIFICANT FINDINGS

- *All authorities, except the University of Canberra, are required to prepare their annual reports in accordance with the Chief Minister's Annual Report Directions.*
- *The University of Canberra is, however, subject to a range of related and relevant Commonwealth governance and financial guidance that are more appropriate to its circumstances.*
- *Apart from a requirement for most authorities to include details of their boards in their annual reports, there is no requirement in the Chief Minister's Annual Report Directions for authorities to report on their governance arrangements.*

DISCLOSURE FRAMEWORK FOR PUBLIC AUTHORITIES

3.4 Annual reports are the principal way in which authorities account for their performance through ministers to the Legislative Assembly and to the community. Annual reports are therefore primarily accountability documents.

3.5 The *Annual Reports (Government Agencies) Act 1995* sets the framework for annual reporting across the ACT public sector. The framework includes identifying which public bodies must provide annual reports and the format of those reports. Pursuant to this Act, the Chief Minister issues *Annual Report Directions*, which provide detailed requirements for reporting by affected authorities.

3.6 The Chief Minister's Annual Report Directions requires authorities to include in their annual reports material on a wide range of matters including an overview and major achievements, financial issues and whole of government issues. Those authorities required to prepare independent reports are required to include 'details of the board and board members'. Apart from this requirement, however, there is no requirement for authorities to report on their governance arrangements.

3.7 All authorities addressed during the audit, except the University of Canberra are subject to the Act and are required to comply with the Chief Minister's Annual Report Directions. The University is exempt from preparing its annual report in accordance with the Chief Minister's Annual Report Directions. The matter of annual reporting arrangements was the subject of consultation and agreement at the time of the transfer of jurisdiction for the *University of Canberra Act 1989* from the Commonwealth to the Territory.

3.8 All of the authorities subject to the Act, except the Agents Board and the Canberra Public Cemeteries Trust, are required to present independent annual reports to their minister for transmittal to the Legislative Assembly. The Agents Board and the Canberra Public Cemeteries Trust are required by the Annual Report Directions to have their annual reports annexed to a departmental Chief Executive's annual report. The disclosure obligations of those agencies whose reports are annexed to a Chief Executive's annual report are less comprehensive than for authorities that are required to present independent annual reports.

Audit Comments

3.9 The Annual Reports (Government Agencies) Act supplemented by the Chief Minister's Annual Report Directions is a suitable framework

for ensuring the disclosure of governance arrangements in public authorities. The detailed information on governance arrangements that might be disclosed within that framework is discussed in the following section.

SCOPE OF DISCLOSURE REQUIREMENTS

3.10 The Australian Stock Exchange listing rules requires all listed companies to include in their annual reports a statement of the main corporate governance practices that were in place during the reporting period. For this purpose most entities include a separate section in their annual report on their main governance practices. The rules also require entities without an audit committee to explain why an audit committee has not been put in place.

3.11 The Stock Exchange has issued a guidance note to assist entities in preparing their statements of corporate governance practices. Much of the material in the guidance note is of relevance to public sector entities. In this context the following matters are suggested for consideration in preparing a statement of an entity's governance practices:

- board composition, including the mix of executive and non-executive board members, the criteria for membership, procedures for appointing board members and the personal details of each board member;
- policies relating to the appointment and retirement of board members;
- the main procedures for establishing and reviewing remuneration arrangements for the chief executive officer and non-executive board members;
- the oversight of the preparation of the entities' financial statements and internal controls, including the composition and responsibilities of audit committees;
- the board's approach to identifying areas of significant business risk and to putting arrangements in place to manage them;
- policies on the establishment and maintenance of appropriate ethical standards, including whether a code of ethics or code of conduct has been established; and
- the resources that are made available to board members to assist them to carry out their duties, including access to independent professional or legal advice.

3.12 The guide also notes that entities may wish to establish board audit committees and nominations committees to make recommendations to the board on matters within their charters of responsibility. These committees can serve to implement and support the function of a board in overseeing the management of an entity. Because of their smaller size, such committees are often able to consider matters more effectively than a full board.

3.13 The functions of audit committees are discussed in Chapter 9. Nominations committees are responsible for considering candidates for board membership and recommending their appointment to the board.

3.14 The approach taken by the Stock Exchange is supported in part by a recent report of the International Federation of Accountants on Governance in the public sector³. That report stated that governing bodies of public sector entities need to report publicly the process for making appointments.

Audit Comments

3.15 ***Suggestion for Better Practice*** - It is suggested that consideration be given to amending the Chief Minister's Annual Report Directions to require statutory authorities to include a statement of governance arrangements that were in place during the reporting period. The guidance contained in the Australian Stock Exchange's guidance paper, as discussed in this section, could be used as an initial guide to the specific matters that might be required to be included in such statements.

3.16 Although the University of Canberra is not subject to the Chief Minister's Annual Report Directions, it has advised the Audit that it has no objection to including a statement of its governance arrangements, as outlined in this section, in its annual reports.

CONCLUSION

3.17 Effective corporate governance practice includes formalising governance arrangements and making them clear to all stakeholders. The Annual Reports (Government Agencies) Act, supplemented by the Chief Minister's Annual Report Directions, is a suitable framework for ensuring that this takes place in public authorities. At present, however, the extent of the disclosure of governance arrangements in the public sector is insufficient by comparison with established practice in the private sector.

³ IFAC Study 13, page 16.

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Adoption of disclosure requirements similar to those introduced by the Australian Stock Exchange would redress this shortcoming.

4 THE ROLES OF BOARDS, CHAIRPERSONS AND CHIEF EXECUTIVE OFFICERS

INTRODUCTION

4.1 Each of the sixteen authorities addressed during the Audit was established by a separate Act of the Legislative Assembly. These Acts are listed at Annex A. The enabling legislation of those authorities provides them with their functions and powers. That legislation and other applicable legislation provide for their governance and management arrangements.

4.2 In most cases the enabling legislation was introduced into the Legislative Assembly over the past ten years. In some cases, however, the enabling legislation was made Territory law by the adoption of older Commonwealth or State statutes. For example the enabling legislation for the Canberra Public Cemeteries Trust, the Agents Board, the Legal Aid Commission, the Long Service Leave Board and the National Exhibition Centre Trust all predate self-government.

4.3 The earliest Act, that is the *Cemeteries Act* 1933, pays minimal attention to corporate governance matters whereas the latest Act reviewed, the *Stadiums Authority Act* 2000, prescribes governance responsibilities for the Authority's Board and requires individual directors to be honest and diligent in their affairs.

4.4 The governance arrangements set out in each Act are different. The main areas of difference are in the roles of the boards of authorities, the roles of chairpersons, and the duties and responsibilities of board members. Other differences include, the periods of appointment of board members, the disclosure of board members' interest provisions, the responsibilities of chief executive officers, requirements for keeping minutes of the meetings of boards, and requirements for the use of authorities' common seals.

4.5 This chapter reports on the Audit's review of legislated responsibilities of statutory authorities' boards, their chairpersons and chief executive officers. The other matters referred to above are discussed in this and subsequent chapters of this Report.

4.6 This chapter specifically addresses:

- the governance roles of the boards of statutory authorities;
- the responsibilities of chairpersons;

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- the responsibilities of chief executive officers; and
- the appointment of chief executive officers.

SIGNIFICANT FINDINGS

- *There are significant variations in the legislated governance arrangements for individual authorities.*
- *The governance responsibilities of boards are not completely stated in the enabling legislation of any of the authorities reviewed.*
- *The roles of the chairpersons of boards are not comprehensively stated in the enabling legislation of any of the authorities reviewed.*
- *Only five authorities are responsible for appointing their own chief executive officers.*
- *In all authorities there are inherent conflicts between the responsibilities of ministers, boards, and their CEOs that could give rise to unproductive tensions that may not be in the best interests of the authorities concerned.*

GOVERNANCE RESPONSIBILITIES OF BOARDS

Background

4.7 All statutory authorities should have at their head a group that is responsible for giving leadership and setting strategic direction. That group also oversees the management of the entity's activities including the way it addresses significant risks, defines control mechanisms, monitors performance, ensures compliance with statutory requirements and liaises with stakeholders including the responsible minister. Boards should also have responsibility for formally approving the annual report of the entity, including the financial statements. A board that undertakes these responsibilities well is likely to be one that serves its stakeholders well.

4.8 Other functions of the board would be expected to include appointing or recommending the appointment of the chief executive officer and management team and evaluating the performance of the chief executive officer. Other important board functions include preventing

conflicts of interest and evaluating its own performance.

4.9 It is important to note, however, that boards are not expected to manage their authorities' day to day business activities. Rather they provide strategic guidance to the overall functioning of their authorities.

4.10 The Audit reviewed the enabling legislation to identify if the responsibilities summarised in the previous paragraphs are contained in enabling legislation. The Audit also reviewed related legislation for its relevance to the governance responsibilities of boards.

Enabling Legislation

4.11 The review disclosed that the enabling legislation for only two statutory authorities included more than a minimal reference to their board's governance functions. These were the *Stadiums Authority Act 2000* and the *Hotel School Act 1996*.

4.12 Section 9 (1) of the Stadiums Authority Act states that the board has general responsibility for the policies and management of the authority. Sub-section 9 (2) states that:

‘the board is required to –

- (a) decide the strategies and policies to be followed by the authority; and
- (b) ensure that the authority performs its functions in a proper, effective and efficient way’.

4.13 The Hotel School Act prescribes similar responsibilities for the board of the Australian International Hotel School.

Audit Comments

4.14 Although the legislation of these authorities broadly state the governance responsibilities for their respective boards, the relevant provisions of the legislation are not a complete statement of expected contemporary governance responsibilities of boards.

4.15 ***Compliance with Legislation*** – The Audit reviewed the minutes of the two authorities whose legislation contains more than a minimal reference to the governance responsibilities of their boards. The minutes indicate that both boards appear to be addressing their governance responsibilities as specified in their legislation.

4.16 As the enabling legislation of the other authorities addressed during the audit does not prescribe governance responsibilities for their boards no review for compliance by those boards was undertaken.

4.17 *Suggestions for Legislative Change* – The enabling legislation of none of the statutory authorities reviewed by the Audit provides their boards with a comprehensive statement of their responsibilities. Accordingly, it is suggested that relevant legislation be amended to ensure that it provides boards with a comprehensive statement of their governance responsibilities as outlined in this section.

4.18 *Suggestions for Better Practice* – Pending introduction of the legislative change referred to in this section, it is suggested that the boards of statutory authorities formally give consideration to adopting the governance responsibilities referred to in this section.

Financial Management Act 1996

4.19 The *Financial Management Act* 1996 provides, at Section 54, for the chief executive officers of statutory authorities to be responsible, ‘under the responsible minister’, for the efficient and effective financial management of their authorities. Sub-section 60(1) of the Act states that the annual financial statements of an authority must have endorsed on them or attached to them a statement of responsibility signed by the CEO of the authority.

4.20 Sub-section 60(2) of the Act states that the statement of responsibility shall comprise:

- (a) a statement of the chief executive officer’s responsibility for the preparation of the financial statements and the judgements exercised in preparing them; and
- (b) a statement that, in the opinion of the chief executive officer, the financial statements fairly reflect the financial operations and service performance of the authority during the year to which they relate and the financial position of the authority at the end of the year.

Audit Comments

4.21 The legislative requirement under the Financial Management Act for CEOs to be responsible for the efficient and effective financial management of their authorities is inconsistent with better practice. It formally excises the boards of statutory authorities from one of their key

responsibilities and could lead to conflicts between the boards of statutory authorities and their chief executive officers on a range of strategic issues.

4.22 Accordingly, there would seem to be a good case for amending the Financial Management Act to make chief executive officers responsible to their governing boards for the efficient and effective financial management of their authorities. The case would seem to be persuasive for those authorities that are commercial business undertakings. The case may be less persuasive, however, for some other types of authorities.

4.23 *Suggestions for Legislative Change* - Accordingly, it is suggested that consideration be given to amending the Financial Management Act to make chief executive officers of appropriate statutory authorities responsible, to their governing boards, for the efficient and effective financial management of their authorities. In addition, the boards of appropriate statutory authorities should be made responsible for the formal approval and adoption of the annual financial statements of their authorities in accordance with a resolution of their boards.

Annual Reports (Government Agencies) Act 1995

4.24 The *Annual Reports (Government Agencies) Act 1995* provides at sub-sections 8(5) and 8(6) for authorities to present to the responsible minister a report relating to their operations in such a form and including such information as the minister directs. Pursuant to the Act the Chief Minister issues Annual Reports Directions that specifies detailed reporting requirements.

4.25 Those directions include a requirement for a transmittal certificate to accompany each annual report. A transmittal certificate must state that the report has been prepared in accordance with the requirements of the Chief Minister's Annual Report Directions and meets all legislative requirements. The sample transmittal certificate included in the Annual Report directions is signed by the chief executive officer. In practice some certificates are signed by CEOs and some are signed by chairpersons.

Audit Comments

4.26 The apparent expectation in the Chief Minister's Annual Report Directions that CEOs should sign the transmittal certificate, suggests that the boards of statutory authorities have no formal role in the approval of their authority's annual reports. This is also inconsistent with better practice. It formally excises the boards of statutory authorities from one

of their key accountability mechanism and could also lead to conflicts between the boards of statutory authorities and their CEOs on a range of strategic issues.

4.27 *Suggestions for Better Practice* - Accordingly, it is suggested that consideration be given to amending the Chief Minister's Annual Report Directions to require that chairpersons of statutory authorities be responsible for signing transmittal letters in accordance with a resolution of their boards.

RESPONSIBILITIES OF CHAIRPERSONS

Background

4.28 Chairpersons have key roles to play in ensuring that governing bodies work effectively. The way in which they perform their role is critical to the success of their authority. In a recent report on governance in the public sector, the International Federation of Accountants has recommended⁴ that the role of the chairperson should be formally defined in writing to include responsibility for providing effective strategic leadership to the governing board.

4.29 Chairpersons should be non-executive members of their boards. They should not also hold the position of chief executive officer of their authority. Notwithstanding their part time role, the demands on the time of a chairperson may be quite heavy. He or she needs to not only be competent to fill the role but also have sufficient time to devote to the authority's affairs.

4.30 A chairperson's role is to provide leadership and ensure that the individual members of the board work together as a cohesive team to enable it to carry out its responsibilities effectively. This includes ensuring that all members of the board have access to all relevant information and advice in a timely manner to assist them in taking decisions on particular issues.

4.31 Chairpersons also have a key role in developing and maintaining good relations between the minister, board members, chief executive officers and senior executives in administering departments. These are often difficult and complex matters. Their successful management will depend to a large part on the inter-personal skills of chairpersons and recognition by all of their complementary and interrelated roles. Such relationships should, however, be established on the basis of clearly

⁴ IFAC Study 13, page 35.

articulated lines of responsibility, organisational and individual roles and operating procedures. Within this framework open and full communication between each of the parties is essential if optimal results are to be achieved.

4.32 In addition, chairpersons should play an important procedural role in facilitating the effective consideration of board business. A major expectation of chairpersons is that they will ensure that the knowledge and skills of individual members of their boards are fully utilised during debates on particular issues.

4.33 The procedural responsibilities of chairpersons normally would be expected to include ensuring that all members have a reasonable opportunity to debate and vote and to preserve order at meetings. It is expected that chairpersons would:

- ensure that a quorum is present at all meetings;
- open and close meetings;
- accept motions and amendments;
- control debates, including ensuring that all directors have an opportunity to adequately contribute to the discussion on individual motions;
- oversight voting, including casting deliberative and casting votes as necessary; and
- adjourn disorderly meetings.

4.34 In all these matters chairpersons should act in the interests of their authorities and be consistent and impartial.

4.35 The position of deputy chairperson is an important back-up appointment that facilitates the expeditious functioning of boards if and when chairpersons do not attend meetings.

4.36 The Audit reviewed enabling legislation to identify whether the legislation requires chairpersons to perform the types of functions outlined in this section. The Audit also reviewed the legislation to identify whether the position of deputy chairperson was established for each board.

Review of Legislation

4.37 The enabling legislation of all authorities reviewed provides for all boards to have a chairperson. In all cases the position of chairperson

is a different position to that of chief executive officer.

4.38 In almost all cases chairpersons are given powers to convene meetings and to preside at all meeting at which they are present. In most cases, chairpersons are also given the power to cast deliberative and casting votes.

4.39 The Audit's review of the enabling legislation showed that the full responsibilities normally of chairpersons as outlined above are not fully stated in any of the legislation reviewed. In addition, the enabling legislation of most authorities does not give chairpersons explicit powers to give directions to board members on the procedures to be adopted at meetings of boards. The only chairpersons who have this power are the chairpersons of the Canberra Tourism and Events Corporation, the Cultural Facilities Corporation, the Gungahlin Development Authority, the Kingston Foreshore Development Authority and the Stadiums Authority.

4.40 The enabling legislation for most statutory bodies reviewed provides for a deputy chairperson to be elected by board members or appointed by the responsible minister. The legislation of four of the statutory authorities reviewed, however, does not provide for a position of deputy chairperson. They are the ACT Gambling and Racing Commission, the Long Service Leave Board, the Building and Construction Industry Training Fund and the Canberra Public Cemeteries Trust.

Audit Comments

4.41 ***Suggestions for Legislative Change*** – As the experience of chairpersons will vary considerably it is possible that they may not be fully aware of their responsibilities and how important they are to the successful conduct of an authorities functions. This could lead to board consideration of important matters being deficient and in extreme cases of inappropriate or incorrect decisions being taken. Accordingly, it is suggested that consideration be given to amending appropriate legislation to ensure that all chairpersons are legislatively assigned the responsibilities outlined in this section.

4.42 As noted, the enabling legislation for four Authorities does not provide for the appointment of deputy chairpersons. It is suggested that consideration be given to amending appropriate legislation to provide for a position of deputy chairperson on the board of each authority.

4.43 *Suggestions for Better Practice* – Earlier in this section a number of suggestions were made for prescribing in legislation the responsibilities of chairpersons. Pending the introduction of such legislation, it is suggested that the boards of individual statutory authorities give consideration to formally adopting them.

RESPONSIBILITIES OF CHIEF EXECUTIVE OFFICERS

Background

4.44 Chief executive officers of statutory authorities are normally an authority's senior full time officer. They are more than administrators. They are expected to provide leadership to all of the authority's staff and strategic management of the authority's activities. They may also be required to provide advice to the minister on policy issues facing the authority.

Review of Legislation

4.45 The *Public Sector Management Act* 1994, the *Financial Management Act* 1996 and, in some cases, individual authorities' enabling legislation set out the legislative responsibilities of chief executive officers of statutory authorities. The Public Sector Management Act and the Financial Management Act both define a chief executive officer as the person who has responsibility for managing the affairs of an instrumentality. The Public Sector Management Act contains no other guidance on the responsibilities or functions of a CEO except that section 24 of the Act provides for CEOs to have all the powers of a departmental chief executive where the authority employs staff under the Act.

4.46 As indicated previously, Section 54 of the Financial Management Act sets out the financial responsibilities of CEOs. Sub-section 54(1) states that CEOs are responsible, under the responsible minister, for the efficient and effective financial management of their authorities. Sub-section 54(3) provides specific guidance on the detailed financial responsibilities of CEOs.

4.47 The enabling legislation of six of the statutory authorities examined by the audit provide for their chief executive officer to manage the affairs of their authority under the strategic guidance of the board. For example, in accordance with section 24 of the *Hotel School Act* 1996, the Director is required to manage the affairs of the School on a daily basis on behalf of the board and in accordance with the strategies and policies decided by and any directions given by the board.

4.48 The enabling legislation of the ACT Health and Community Care Service Board provides for the duties of its two chief executives to be determined by the board.

4.49 The enabling legislation for the Building and Construction Industry Training Fund Board provides no guidance on the responsibilities of its chief executive officer, or indeed whether it should have one. The legislation, however, gives the board the power to make its own arrangements for administrative support. In these circumstances the board is able to determine the responsibilities of the CEO.

4.50 In the case of five authorities the chief executive of the administering department⁵ is effectively responsible for determining the responsibilities of the CEO or, where there is no CEO, the senior administrative officer. This situation arises because the chief executive of the administering department is required by the enabling legislation of each of the authorities concerned to create an office in the Public Service for each of the authorities. The authorities so affected are Healthpact, the Agents Board, the Canberra Public Cemeteries Trust, the Cultural Facilities Corporation and the National Exhibition Centre Trust.

4.51 The ACT Gambling and Racing Commission and the Gungahlin Development Authority both have chief executive officers created by their enabling legislation. In both cases, however, these officers are not given any statutory responsibilities in their enabling legislation.

4.52 The chief executive officer of the Legal Aid Commission is created by statute and the position is given explicit statutory responsibility for managing the affairs of the Commission. Section 17(1) of the *Legal Aid Act 1977* provides for the chief executive officer to 'be charged with the management of the operations and affairs of the Commission'.

Audit Comments

4.53 It appears that for all of the authorities addressed by the audit there is scope for inherent conflicts between the responsibilities of ministers, boards, and their CEOs. These conflicting responsibilities could give rise to unproductive tensions that may not be in the best interests for the effective operation of the authorities concerned.

4.54 The situation appears to be worst in the case of the Legal Aid

⁵ The administering department is the Department that has responsibility for an authority's enabling legislation.

Commission where ultimate responsibility for the management and operation of the affairs of the Commission has been assigned by statute to the CEO. This provides little, formal scope for the board of the commission to exercise those broader governance responsibilities that would normally be expected of a board.

4.55 The arrangements at section 17 of the Legal Aid Act were designed to provide for the Legal Aid Commission's employees, including the CEO, to grant legal aid to appropriate persons without the board playing any role in this task. This approach is important as it safeguards the government of the day from any suggestion that it can interfere in the granting of legal assistance in individual cases. This is particularly important where legally assisted persons may have interests that they perceive are contrary to the interests of the government of the day.

4.56 While the arrangements at section 17 of the Act may be appropriate to distance the government and the board from the granting of legal aid in individual cases, in its present form, it also effectively removes the board from exercising its broader governance responsibilities. This situation should be rectified.

4.57 Furthermore, the provisions of section 54 of the Financial Management Act make CEOs responsible, under the responsible minister, for the efficient and effective financial management of their authorities. This legislative provision would seem to excise boards from any role in the financial governance of their authorities on two fronts. Firstly, responsibility for financial management has been assigned by statute to CEOs. Secondly, the legislation would seem to make it clear that on these matters CEOs are directly responsible to their ministers. There is no suggestion in the legislation that boards have any role to play in these matters.

4.58 Accordingly, there would seem to be a good case for making appropriate CEOs responsible for managing the affairs of their authority under the strategic guidance of their boards. The case would seem to be persuasive for those authorities that are commercial business undertakings. The case may be less persuasive, however, for some other types of authorities.

4.59 *Suggestions for Legislative Change* – It is suggested that legislation be introduced to provide for appropriate CEOs to be responsible for managing the affairs of their authority under the strategic guidance of their boards. The legislative provisions for the relationship

between the board and the Director of the Australian International Hotel School could be used as a starting point in this regard.

4.60 In the case of those authorities that do not have CEOs, it would seem reasonable for the senior administrative officer to be in a similar position to the board as is proposed for those authorities with CEOs. Accordingly, it is also suggested that appropriate legislation be introduced to provide for the senior staff member of each appropriate authority to be responsible for managing the affairs of their authority under the strategic guidance of their boards.

4.61 *Suggestions for Better Practice* - There should be a clear identification of the responsibilities and accountabilities between boards and their CEOs. As defined in the Public Sector Management Act and the Financial Management Act, CEOs have responsibility for managing the affairs of their instrumentalities. Arrangements should be such, however, that CEOs do not have direct responsibilities to persons other than their boards for the overall management of the affairs of their authorities.

4.62 These relationships should be formally documented. As a minimum it is suggested that all boards should have performance agreements with their CEOs to this effect. A more preferable alternative, however, would be, as indicated above, to have these matters formalised in legislation.

APPOINTMENT OF CHIEF EXECUTIVE OFFICERS

4.63 The Audit reviewed the enabling legislation to identify the means by which chief executive officers are appointed. Twelve of the agencies reviewed during the audit have a position of chief executive officer, however titled, established by their enabling legislation. Four of these authorities are responsible for appointing their own CEO. These are the Kingston Foreshore Development Authority, the Legal Aid Commission, the Stadiums Authority and the University of Canberra.

4.64 The responsible minister is responsible for appointing the CEO of a further three authorities. These are the ACT Gambling and Racing Commission, the Australian International Hotel School and the Gungahlin Development Authority. The responsible minister in conjunction with the board has responsibility for appointing the two chief executives of the ACT Health and Community Care Service Board.

4.65 The Chief Executive of the administering department is responsible for creating an office of CEO in the Public Service in the case

of a further four authorities. These are the Canberra Public Cemeteries Trust, the Canberra Tourism and Events Corporation, the Cultural Facilities Corporation and the Long Service Leave Board. There is no legislative guidance on who is responsible for appointing persons to the position of CEO in these cases.

4.66 Four of the authorities reviewed do not have the position of CEO established by their enabling legislation. In three of these authorities, that is Healthpact, the Agents Board, and the National Exhibition Centre Trust all staff are employed in the Public Service. There is no legislative guidance on who is responsible for appointing such staff, including the senior staff member. The remaining authority, that is the Building and Construction Industry Training Fund Board, is responsible for appointing all of its own staff.

Audit Comments

4.67 *Suggestions for Legislative Change* - In a recent guide to better practice for public sector governing and advisory boards⁶, the New South Wales Audit Office has stated that governing boards, rather than ministers should have the power and responsibility to appoint chief executive officers. This power is considered to be necessary if boards are to be fully accountable for their actions and decisions. The NSW Audit Office proposal is considered to be better practice.

4.68 There would seem to be a good case for boards to be responsible for appointing their CEOs. The case would seem to be persuasive for those authorities that are commercial business undertakings. The case may be less persuasive, however, for some other types of authorities.

4.69 Accordingly, it is suggested that consideration be given to amending appropriate legislation to provide for appropriate authorities that have CEOs to have them appointed by their boards. It is also suggested that appropriate boards of those authorities that do not have a statutory position of CEO, but are provided with Public Service staff, should be given authority to select the person to fill the senior officer position on their staff. This arrangement might also be formalised by amending appropriate legislation.

4.70 As indicated above, the Building and Construction Industry Training Fund Board is responsible for appointing its own staff. Such arrangements would provide scope for the board to appoint its own CEO

⁶ On Board – guide to better practice for public sector governing and advisory boards. NSW Audit Office, 1998.

if it desired to do so and no variations to present arrangements would be necessary to achieve better practice in this regard. In fact the audit notes that the board has recently appointed a new Executive Director.

CONCLUSION

4.71 Boards, their chairpersons and their CEOs have important roles in the governance of statutory authorities. Their roles and responsibilities, however, are not set out in a complete or clear manner in any enabling legislation.

5 THE ROLES OF BOARD MEMBERS

INTRODUCTION

5.1 The previous chapter addressed the collective governance responsibilities of the boards of statutory authorities. This chapter addresses the individual responsibilities of members of the boards of statutory authorities.

5.2 This chapter specifically addresses:

- the general duties and responsibilities of board members;
- the responsibilities of nominee board members, including public service members; and
- the training of board members.

SIGNIFICANT FINDINGS

- *Apart from the Stadiums Authority Act, none of the legislation reviewed makes any reference to the specific responsibilities of individual board members.*
- *The particular responsibilities of board members who are nominated to boards because they have special qualifications or as representatives of stakeholder groups or as public service members, are not addressed in any of the statutory authority legislation reviewed.*
- *Most authorities advised that they conduct some form of induction training for new board members, however, almost no authorities provided their board members with any other form of professional training or development.*

GENERAL DUTIES AND RESPONSIBILITIES OF BOARD MEMBERS

Background

5.3 Boards of statutory authorities typically consist of about six external part time directors and the authority's chief executive officer. This approach builds on widely accepted governance theory that governing boards are strengthened by the appointment of non-executive members who are sufficiently large in number and have sufficient

appropriate expertise to influence management and bring the benefit of their external experience to corporate policy.

Audit Comments

5.4 The audit agrees with the current approach to the membership of boards whereby they generally consist of external members. This is considered to be a better practice approach.

5.5 Indeed the recent report of the International Federation of Accountants report on governance in the public sector⁷ states that there needs to be a clearly defined division of responsibilities at the head of public sector entities to ensure a balance of power and authority. One way of achieving such a balance is for the governing body to include a balance of executive and non-executive members, including independent non-executives, so that no individual or small group of individuals can dominate the governing bodies decision making. The governing body needs to include non-executive members of sufficient calibre and number for their views to carry significant weight in governing bodies' decisions.

5.6 The IFAC report notes that the majority of non-executive members of governing bodies need to be independent of management and free from any business or other relationship that could materially interfere with the exercise of their independent judgement. Non-executive members considered by the governing body to be independent in this regard should be identified in the annual report.

Fiduciary and Statutory Duties

5.7 Notwithstanding their part time status, non-executive members of the boards of statutory authorities have onerous individual and collective responsibilities. Their individual responsibilities are distinct from their collective responsibility when they act as a board. The individual responsibilities of board members have been most clearly articulated in the case of Corporations Law companies. It would seem reasonable to expect that members of statutory authority boards should, as a minimum, accept similar responsibilities to those of company directors.

5.8 At the very least board members must be familiar with the operations of their authority, review in sufficient detail matters put before them and contribute in a meaningful way to the deliberations of the board. In addition, board members are expected to question management, obtain explanations for things that do not seem right and bring their external

⁷ IFAC Study 13, page 30.

experience and expertise to matters that are being considered and those matters that ought to be considered by the board.

5.9 Directors of companies have extensive individual fiduciary and statutory duties in relation to the affairs of companies that they are associated with. These duties are qualitatively different from when they are acting together as a board.

5.10 Fiduciary duties mean that a director has special obligations to a corporation because he or she occupies a position of trust. General fiduciary duties of company directors include always acting in the best interests of their company and always exercising a reasonable degree of care skill and diligence. Directors also have an individual duty to act bona fide in the best interests of the company.

5.11 The duty to act bona fide includes the duties to act honestly, to make sufficient and accurate disclosures to other members and to give other members honest opinions and advice on all matters which members have under consideration. The duties also include a duty to avoid conflict of interests. This duty is discussed in chapter 6.

5.12 The key statutory duties of company directors are set out in sections 180 to 184 of the *Corporations Act 2001*. These sections complement directors' fiduciary duties.

5.13 Sections 180 to 184 of the Corporations Act requires directors to:

- exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise;
- make business judgements in good faith, for a proper purposes, without material personal interest in the subject matter after informing themselves about the subject matter;
- exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose;
- not improperly use their position to gain an advantage for themselves or someone else;
- not improperly use information to gain advantage for themselves; and
- not be reckless or be intentionally dishonest in exercising their powers and discharging their duties.

Review of Enabling Legislation

5.14 The Audit reviewed the enabling legislation of all of the statutory authorities addressed during the audit to identify whether board members' individual responsibilities were detailed in the legislation. The review disclosed that, apart from the Stadiums Authority Act, no enabling legislation contained provisions concerning the individual responsibilities of board members.

5.15 The enabling legislation of the Stadiums Authority states, at section 13 of the Act, that in the performance of his or her functions, a director must exercise the degree of honesty, care and diligence that is required to be exercised by a director of a company in relation to the affairs of a company. That is, the directors of the Stadiums Authority are required to exercise some, but not all, of the fiduciary and statutory duties of company directors referred to above.

Audit Comments

5.16 ***Compliance with Legislation*** – The Audit did not conduct a review to assess the level of compliance by individual board members with the legislated responsibilities for individual board members as, except for the Stadium Authority, there are none.

5.17 ***Suggestions for Legislative Change*** – It is suggested that relevant legislation be amended to specify the responsibilities for individual members of boards of statutory authorities. Those responsibilities would include the specific matters referred to in this section together with those related matters referred to elsewhere in this chapter and elsewhere in this report. The Corporations Act could be used as an initial guide in this matter.

5.18 ***Suggestions for Better Practice*** - Pending introduction of the legislative change referred to above, it is suggested that the boards of statutory authorities formally give consideration to adopting the individual responsibilities for board members referred to in this section.

NOMINEE BOARD MEMBERS**Background**

5.19 Territory statutory authorities undertake a wide range of regulatory and operational functions. Successive governments have held the view that such agencies are able to perform their functions more effectively if they include nominee members, that is members who either

represent or share a common interest with particular stakeholder groups in the community or who have specialist technical knowledge.

5.20 On occasions successive governments have also felt the need to nominate a public service member to the boards of some authorities. Usually a public service member is a senior staff member of the functional area of the public service responsible for providing policy advice to ministers on matters related to the functions of the relevant statutory authority. A public service member usually only retains his or her position on the board of an authority for as long as they are members of the public service and hold the relevant functional responsibilities. They are not remunerated specifically for their role as board members.

Review of Enabling Legislation

5.21 The review disclosed that for twelve of the statutory authorities reviewed, nominee board members are appointed or elected to their boards. The following are examples:

- The Building and Construction Industry Training Fund Board must include two persons to represent the interests of employers in the industry and two persons to represent the interests of employees in the industry.
- The Gungahlin Development Authority includes two members who are residents of Gungahlin and seven with expertise in different fields such as property development, retail and community facilities.
- For the University of Canberra, graduates elect one board member, members of the academic staff elect three members, the general staff elects one member and students elect two members.
- Five authorities (Healthpact, Canberra Tourism and Events Corporation, the Gungahlin Development Authority, the Kingston Foreshore Development Authority and the National Exhibition Centre Trust) have members of their boards who are designated as 'public service members'.
- The ACT Gambling and Racing Commission must include a member whom 'shall have knowledge, experience or qualifications related to providing counselling services to problem gamblers'.

5.22 The Audit reviewed the enabling legislation to identify whether it placed specific responsibilities on nominee board members. The legislation was also reviewed to identify whether relief was provided to

those members from the general responsibility to always act in the overall interests of the authority.

5.23 In no case does the enabling legislation of the statutory authorities reviewed establish what the responsibilities of nominee board members are, vis-à-vis their responsibilities as individual members to act in the interests of the Authority as a whole. Neither does the enabling legislation establish what the individual responsibilities are of nominee board members vis-à-vis their collective responsibilities as members of the boards to which they have been appointed or elected.

Review of Common Law

5.24 The Audit also reviewed common law judgements to determine whether there was any clear guidance on the responsibilities of nominee board members. The duties and obligations of nominee board members include the duty to avoid being placed in the position of conflict of interest. Beyond this point, however, the case law is inconclusive.

5.25 The duty of a member of a statutory board was squarely addressed by the New South Wales Supreme Court in *Bennetts v Board of Fire Commissioners*.⁸ In that case, Mr Justice Street observed that:

The consideration which must in board affairs govern each individual member is the advancement of the public purpose for which parliament has set up the board. A member must never lose sight of this governing consideration ... This demands constant vigilance on his part to ensure that he does not in the smallest degree compromise or surrender the integrity and independence that he must bring to bear in board affairs ... the predominating element which each individual must constantly bear in mind is the promotion of the interest of the board itself.... There is cast upon him the ordinary obligation of respecting the confidential nature of board affairs where the interests of the board itself so require ... If the members of the boards such as the present board constantly keep before them their overriding duty to the board to promote the purposes for which it exists, then they should have little difficulty in discharging honourably their public duty...

It is entirely foreign to the purpose for which this or any other board exists to contemplate a member of the board being

⁸ (1967) 87 WN (NSW) 307, pages 310 – 311.

representative of a particular group or a particular body. Once a group has elected a member he assumes office as a member of the board and becomes subject to the overriding and predominate duty to serve the interests of the board in preference, on every occasion upon which conflict might arise, to serving the interests of the group which appointed him. With this basic proposition there can be no room for compromise.

5.26 A somewhat more pragmatic approach has been taken in a number of other cases, notably in *Levin v Clark* (1962). In that case, the judge stated that in the circumstances of the case the interests of the company will have to include the interests of an outside person. He noted that:

It is of course correct to state as a general principle that directors must act in the interests of the company. There is no necessity to refer to the large body of authority which supports this as a general proposition. However, that leaves open the question in each case - what is the interest of the company? It is not uncommon for a director to be appointed to a board of directors to represent an interest outside the company - a mortgagee or other trader of a particular shareholder. It may be in the interests of the company that there be upon its board of directors one who will represent these other interests and who will be acting solely in the interests of such a third party and who may in that way be properly regarded as acting in the interests of the company as a whole.

To argue that a director particularly appointed for the purpose of representing the interests of a third party, cannot lawfully act solely in the interests of that third party, is in my view to apply a broad principle, governing the fiduciary duty of directors, to a particular situation, where the breadth of the fiduciary duty has been narrowed by agreement amongst the body of the shareholders.⁹

5.27 Furthermore in *Whitehouse v Carlton Hotel Pty Ltd* (1987), the High Court took the view that the articles of association of a corporation could vary the burden of fiduciary duties that would normally be imposed on a director.¹⁰

⁹ [1962] NSW 686, page 700

¹⁰ (1987) 5 ACLC 421, page 425

5.28 The *Levin* and *White House* cases may be limited to their particular factual situations, and there may be some doubt that the comments in those cases would, in any event, apply to board members of statutory authorities. However they do illustrate the tensions and uncertainties which can arise where there are dual loyalties, and where there is no clear statement of the duties and responsibilities of board members.

5.29 The Companies and Securities Law Review Committee has reviewed the case law on this matter and concluded that legislation was needed to clarify the duties of nominee directors.¹¹ That is, it is necessary to clarify the circumstances when directors may be guided by an extraneous loyalty, and not be in breach of their duty to the corporation.

Audit Comments

5.30 ***Compliance with Legislation*** – As there is no legislation which places specific responsibilities on the board members appointed as a result of being from groups with particular skills or expertise, from groups of stakeholders or from the public service, no review of legislative compliance was conducted.

5.31 ***Suggestions for Legislative Change*** – The absence of any legislative or conclusive case law guidance on the specific responsibilities of nominee board members, vis-à-vis their individual and collective responsibilities as members of boards is a serious matter which should be resolved. If it is not resolved there is a potential for serious and unintended conflict of interest situations to arise which could have adverse implications for the governance of those authorities that have special members on their boards. The absence of appropriate legislative guidance could also have legal implications for the individual board members concerned. This issue is particularly relevant for public service members of boards.

5.32 Commercial practice may provide some guidance on this matter. While the extent of a director's duties to a corporation has been determined by the *Corporations Act 2001* (Cwlth) and to some extent the common law, the scope of those duties may be limited in certain circumstances. To overcome the dual loyalties of nominee directors, section 187 of the *Corporations Act* provides that the director of a corporation, that is a wholly owned subsidiary of a body corporate, is

¹¹ CSLRC, *Nominee Directors and Alternate Directors*; report No. 8 (CSLRC, Melbourne, 1989, page 27.

taken to act in good faith in the best interests of the subsidiary if the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company. That is a corporation's constitution may allow directors to act pursuant to the directions of their appointors in specified matters, notwithstanding that their actions in this regard may not be in the best interests of the corporation as a whole.¹²

5.33 The usual fiduciary duties of board members of statutory authorities could also be modified in legislation. However consideration should be given to whether there are any circumstances where it would be appropriate for a nominee director of a statutory authority to act otherwise than as set out in the passage from *Bennetts v Board of Fire Commissioners*, quoted above.

5.34 The Audit is not aware of any case in respect of the statutory authorities under review where this issue has been formally addressed. As indicated previously, this is a serious matter that could potentially have wide ranging implications. Accordingly, it is suggested that consideration be given to formally clarifying this issue. One solution would be for the responsibilities for board members with special qualifications to have their special responsibilities, vis-à-vis their individual responsibilities as board members and collective responsibilities as members of boards, defined in legislation.

BOARD MEMBER TRAINING

Better Practice

5.35 It is particularly important that board members receive induction training to gain an understanding both of the public sector context in which the entity operates and of its specific operations and environment. It is also important that board members receive ongoing training to keep abreast of emerging governance and industry issues.

5.36 A recent report of the International Federation of Accountants on governance in the public sector¹³ recommended that members of the governing bodies receive appropriate induction training on the first occasion they are appointed and subsequently as necessary. In addition, the Federation suggested that individual members should be made aware of their wider responsibilities as members of governing boards. Such training would include their duty to comply with the letter and spirit of rules relating to the use of public resources, and to act in good faith and in

¹² Australian Corporation Practice, Butterworths, 2000, page 13,244

¹³ IFAC Study 13, page 32.

the best interests of the entity.

5.37 In addition, the AARF better practice guide on audit committees¹⁴ states that audit committee members need to be given the opportunity to attend technical and professional development courses. The objective of their attendance at such activities would be to help keep them up to date with legislative, accounting and other relevant issues.

5.38 The directors of Corporations Act companies are also strongly encouraged to formally acquaint themselves with their duties by participating in a formal induction program and other education programs on their responsibilities as directors. Tertiary education institutions and professional bodies offer a wide range of courses for company directors on these matters.

Review of Practices

5.39 Most authorities reviewed during the audit advised that they conduct some form of induction training for new board members. In this regard, the Audit notes that the board policies of Healthpact states, in part, that 'because poor governance costs more than learning to govern well, the board will invest in its governance capacity'.

5.40 Nine authorities advised that they have a formal induction program in place while five authorities indicated that they conduct informal induction programs for new members. A number of authorities that currently have informal induction programs advised that they are giving consideration to establishing formal programs for incoming board members.

5.41 Two authorities advised that they do not have induction programs for new members, that is the Building and Construction Industry Training Fund Board and the Gungahlin Development Authority. The Board has advised that it has only been in operation for two years and all of its original members are still serving. The Board advised the audit, however, that a formal induction program for current and new members is now under consideration.

5.42 Most authorities, which conduct either formal or informal induction training for their new board members, advised the Audit that they address a wide range of issues during their programs. A number of

¹⁴ The Auditing and Assurance Standards Board of the Australian Accounting Research Foundation, The Australian Institute of Company Directors and the Institute of Internal Auditors – Australia, *Audit committees - Best Practice Guide*, August 2001, page 12.

authorities, however, advised that their programs do not address the duties of board members or board procedures. Other authorities advised that their programs do not address the policy and administrative environment in which authorities operate, including applicable legislation and central agency guidance.

5.43 Only three authorities advised that they had sponsored their board members to attend professional courses on the duties and responsibilities of board members over the past two years. The three authorities, were the Cultural Facilities Corporation, the Long Service Leave Board and the National Exhibition Centre Trust. A number of authorities advised that they did not consider training in the duties and responsibilities of board members as being necessary because of the wide experience in either the public or private sectors of some of their members.

5.44 Similarly almost all authorities advised that they had not sponsored any of their board members to attend any other professional courses, seminars or similar activities over the last two years. During that period the ACT Gambling and Racing Commission sponsored a number of board members to attend the Australasian Casino and Gaming Regulators Conference in 1999-2000 and 2000-01 and the International Policing Conference in 2000-01. The Canberra Public Cemeteries Trust sponsored a board member to attend the Australasian Cemeteries and Crematoria Association Conference in July 2000. The Gungahlin Development Authority sponsored a board member to attend the City Edge 2 conference relating to architectural, urban design and planning issues for cities in April 2000.

Audit Comments

5.45 ***Suggestions for Better Practice*** – The effectiveness of the boards of statutory authorities could potentially be improved by increased attention to comprehensive and formal induction training. In addition, the effectiveness of individual members of boards could be enhanced if they were encouraged to attend other formal professional development activities such as courses on the responsibilities of directors and industry focused seminars on emerging issues.

5.46 It is suggested that all authorities might wish to sponsor formal induction programs for new board members. Such induction programs should include:

- the authority, its aims, objectives, operations, key policies and procedures, key personnel and current issues;
- business planning and annual reporting processes and practices;

- enabling legislation;
- public sector values and standards of probity and accountability;
- the policy and administrative environment in which the authority operates including relevant legislation and central agency guidance;
- control environment and control activities;
- organisational risks and risk management practices;
- delegation arrangements;
- budgeting, planning and performance arrangements;
- the duties of members; and
- board procedures.

5.47 As many of the matters referred to in the preceding paragraph would be common to all authorities, it may be appropriate for consideration to be given to a central agency overseeing the conduct of this aspect of induction training for all new board members. This would ensure a consistency of approach and would enable each of the subject areas to be conducted by appropriately qualified central agency staff or other experts. Such training would be supplemented by agency specific briefings.

5.48 It is also suggested that new board members of statutory authorities be encouraged to attend formal training on the duties of company directors in a public sector context. It is particularly important that board members without public sector experience become aware of public sector values and standards of probity and accountability. The successful completion of such an education program could be a condition for continued re-appointment.

5.49 Finally, it is suggested that consideration be given to encouraging board members to attend industry focused professional development activities on a selective basis. Such activities could include those Australian and international industry specific seminars and conferences that focus on emerging industry issues relevant to their authority.

CONCLUSION

5.50 This chapter raises two important matters that should be addressed promptly. That is, specifying the responsibilities of board members and clarifying the potentially conflicting responsibilities of nominee board members. If these matters are not formally addressed it is possible that some board members may not effectively discharge their responsibilities to the authorities to which they have been appointed. This could result, in

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certain circumstances, in boards and individual board members taking sub-optimal or inappropriate decisions.

6 DISCLOSURE OF PERSONAL INTERESTS

INTRODUCTION

6.1 The boards of statutory authorities are comprised of persons who individually and collectively have a responsibility to act in the interests of the authority. It is inevitable, however, that many of those persons who are entrusted with the governance responsibilities will also have a range of pecuniary and personal interests which could on occasions conflict or give the impression of conflicting with their public duty.

6.2 Nonetheless, the community has a right to expect that the members of the boards of statutory authorities will perform their duties in a fair and unbiased way. Such decisions must not be affected by self-interest or personal gain.

6.3 Conflicts of interest could arise where board members are influenced or appear to be influenced by self-interest or personal gain when performing their duties. The perception of a conflict of interest can be as damaging as an actual conflict because it may undermine confidence in the integrity of the organisation involved and its board.

6.4 In order to address the conflict of interest issue, a number of statutory and other procedures have been put in place. This chapter addresses the procedures and comments on the extent to which agencies and individuals have, in practice, managed them.

6.5 This chapter specifically addresses:

- the legislative provisions relating to disclosure of personal interests;
- policy guidance on the disclosure of personal interests; and
- disclosure of interest practice by statutory authorities.

SIGNIFICANT FINDINGS

- *The disclosure of personal interest provisions in the enabling legislation of statutory authorities is inconsistent and insufficient.*
- *Most statutory authority boards have not formally adopted the model code of conduct for the disclosure of private interests issued by the Chief Ministers' Department.*

- *The Stadiums Authority and its individual directors may not be complying with the Stadiums Authority Act in that potential conflict of interest issues are not being properly addressed.*
- *The Chairman of the Building and Construction Industry Training Fund Board disclosed an indirect conflict of interest at one meeting but did not withdraw from either the meeting or the decision making process as required by the Building and Construction Industry Training Levy Act.*
- *The Chairman of the Canberra Tourism and Events Corporation did not formally advise the responsible minister, as required by the Canberra Tourism and Events Corporation Act, that the Corporation had determined that a member of the board had disclosed a conflict of interest in a particular matter and had been excluded from determination of the matter.*

LEGISLATIVE PROVISIONS

6.6 Almost all of the statutory authorities reviewed during the Audit have disclosure of interest provisions in their enabling legislation. The enabling legislation for the Agents Board merely says that a member of the board shall withdraw from a meeting of the board when the board is dealing with a matter directly affecting the member.

6.7 The enabling legislation of seven of the statutory authorities examined during the audit states that where board members have a direct or indirect pecuniary or a personal interest in a matter they should disclose such an interest. The enabling legislation of a further six statutory authorities, however, only requires that board members disclose their pecuniary interests. The enabling legislation of another two statutory authorities does not specify the types of interests that must be disclosed and the enabling legislation of a further statutory authority requires that only direct interests be disclosed.

6.8 Thirteen of the authorities' legislation also included a requirement that the disclosure must be recorded in the minutes of the authority and the member may not participate in any deliberations by the board on the matter or take part in the decision of the board on the matter.

6.9 A number of authorities examined have additional statutory provisions associated with disclosure of interest situations. These provisions are highlighted in the following paragraphs.

6.10 In the case of the ACT Gambling and Racing Commission, a member is required to inform the Commission and the minister where he or she has or acquires an interest that could conflict with the member's proper performance of his or her functions as a member of the Commission. In these circumstances, the minister may make an acting appointment to allow the Commission to make a decision on the matter without the member concerned.

6.11 The enabling legislation of the Canberra Tourism and Events Corporation, the Cultural Facilities Corporation and the Kingston Foreshore Development Authority require that a written report be presented to the minister where a member has declared a disclosure of interest matter. The enabling legislation of Healthpact, requires that a written report be presented to the minister where a member has declared a conflict of interest and the board determines to do something other than to exclude that member from being present during any deliberations or decisions on the matter that is subject to a conflict of interest. The enabling legislation of the Stadiums Authority states that the minister may call for a report in a disclosure of interest situation and if he or she does so, he or she must table that advice in the Legislative Assembly.

6.12 The enabling legislation of the Construction Industry Long Service Leave Board and the Gungahlin Development Authority provides for the minister to terminate the membership of a member of the board where he or she fails to comply with the disclosure of interest provisions of their legislation. Finally, The enabling legislation of the Construction Industry Long Service Leave Board imposes a penalty of 20 penalty units where a member does not disclose his or her interests.

Audit Comments

6.13 ***Suggestions for Legislative Change*** - The disclosure of personal interest provisions in the enabling legislation of the 16 statutory authorities reviewed is inconsistent. The legislation reviewed includes eight different types of provisions relating to the disclosure of interests. In addition, as indicated above, one authority did not have a disclosure of interest provision in its legislation. Accordingly the Audit suggests that consideration be given to standardising the interest disclosure provisions in all statutory authorities' legislation.

6.14 The report of the Commonwealth Committee of Inquiry into Public Duty and Private Interest¹⁵ noted that non-pecuniary interests, such

¹⁵ Report of the Committee of Inquiry Concerning Public Duty and Private Interest (the Bowen Committee), Commonwealth of Australia, 1979.

as religious, family and social affiliations, could be just as influential as pecuniary interests. The Audit agrees. Accordingly, it is suggested that consideration be given to amending appropriate legislation to extend the scope of disclosure requirements to include non-pecuniary interests.

6.15 Similar matters were also raised in another report of the Auditor-General. In the report titled *Agents Board - Financial Administration of Training Program Grant*, the Auditor-General stated that he was of the opinion that the *Agents Act 1968* does not provide an adequate legislative framework for addressing conflict of interest matters¹⁶. This is because the Act's potential application to conflict of interest situations is too narrow and does not set out responsibilities for disclosure and associated record keeping requirements. In addition, the Act does not provide for any flexibility for a board member, who has disclosed a potential conflict, to participate in discussions where the board considers it to be appropriate. In that report the Auditor-General suggested that the Act should be amended to bring it into line with contemporary practice.

AVAILABLE GUIDANCE

6.16 This section identifies available departmental and international guidance on the disclosure of interests by members of statutory boards.

Departmental Guidance

6.17 The Cadbury Committee Report in the United Kingdom¹⁷ identified three fundamental principles of corporate governance as openness, integrity and accountability. Subsequently, the Nolan Committee Report in the United Kingdom¹⁸ endorsed these principles and recommended that all public sector entities should draw up codes of conduct incorporating them.

6.18 In September 1999, the Chief Minister's Department issued a document entitled '*Ethical Requirements for Appointees to ACT Government Boards and Committees: A Guide for ACT Government Agencies*'. The guide outlines the ethical obligations of board members and suggests a code of conduct for boards. The guide suggests that where boards adopt the code of conduct, board members should be invited to

¹⁶ Report No. 9 of 2001 Agents Board – Financial Administration of Training Program Grant, Auditor-General for the ACT, ACT Government, December 2001, page 3.

¹⁷ Cadbury Committee, *Report of the Committee on the Financial Aspects of Corporate Governance*, December 1992.

¹⁸ Lord Nolan and his Committee, *Third Report of the Committee on Standards in Public Life: Standards of Conduct in Local Government in England, Scotland and Wales*, July 1997.

complete a declaration that they have read and understood the code and give an assurance that they will comply with it.

6.19 The guide states that members of boards are expected to meet similar standards of probity and accountability that apply to public sector decision making. It notes, however, that appointees to boards are often chosen for their particular expertise in an area outside the public service and may not fully appreciate the different accountability requirements that apply to public sector bodies. The guide also states that an appointee to a governing board should be asked to complete a 'Declaration of Private Interests' to disclose details of their personal and financial interests. The Guide also notes that statutory requirements may also provide for a disclosure of interests on an ongoing basis.

6.20 The guide also includes a code of conduct, but leaves it to authorities to decide whether they should adopt it. The code contains a list of principles that the guide suggests should be observed by all members. Most notably the code states that 'members should avoid situations in which their private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict, with their public duty'. The code also states that where a member has a direct interest in a matter which is the subject of discussion before the board, 'the member shall absent himself or herself from the room whilst the discussion and any decision on it is being conducted'. A copy of the code of conduct is at Annex B.

Audit Comments

6.21 Only three boards have formally adopted the model code of conduct issued by the Chief Ministers' Department. That is the Gungahlin Development Authority, the Kingston Foreshore Development Authority and the National Exhibition Centre Trust. Indeed, ten authorities advised the Audit that they had not received a copy of the guide circulated by the Chief Minister's Department.

International Guidance

6.22 The International Federation of Accountants¹⁹ has recently recommended that governing bodies of public sector entities need to adopt a formal code of conduct defining the standards of behaviour to which individual governing body members of the entity are required to subscribe. The Federation also recommended that governing bodies of public sector entities need to establish appropriate mechanisms to ensure

¹⁹ IFAC Study 13, page 15.

that members of the governing body of public sector entities are not influenced by prejudice, bias or conflict of interest.

6.23 The Federation suggests that the code of conduct needs to:

- commit the entity to the highest standards of behaviour;
- be developed in a consultative manner and involve all of the entity's stakeholders to infuse the entity's culture;
- receive total commitment from the governing body and the chief executive of the entity – they need to set the example for employees to follow; and
- be sufficiently detailed so as to give a clear guide to the expected behaviour of all board members and employees.

6.24 The Federation indicates that following appointment, all governing body members need to undertake to uphold and abide by the code. Intended compliance could be a condition of appointment and continuing compliance a condition of continuation in the post.

6.25 The Federation notes that members of governing bodies may be appointed on a part-time basis. Some part-time members may have their own businesses or be members of the boards of other entities. Accordingly, the Federation suggests that concise and unambiguous guidelines and complete disclosure requirements need to be in place in such circumstances.

Audit Comments

6.26 ***Suggestions for Better Practice*** - The departmental guide is a very useful document for the guidance of board members and the staff of statutory authorities. The model code of conduct for the conduct of boards and board members and the accompanying declaration for signature by individual board members are considered to be better practice. There does not appear to be a sound reason why all statutory authorities should not formally adopt the code.

6.27 This approach would be consistent with that recommended by the International Federation of Accountants and would address those situations involving the appointment of persons from the private sector who have extensive business backgrounds but limited public sector exposure. Accordingly, it is suggested that consideration be given to making the code of conduct and declaration mandatory for all statutory authorities.

DISCLOSURE OF INTEREST PRACTICES BY THE STADIUMS AUTHORITY

6.28 Section 16 of the *Stadiums Authority Act 2000* requires directors of the Stadiums Authority to disclose any ‘direct or indirect personal or pecuniary interest’ at a meeting of the board and also requires any such disclosure to be recorded in the minutes of directors’ meetings. The minutes of the authority indicate that directors are asked if they have a conflict of interest at each meeting of the board. There were no instances in 2000-01 where the minutes record that a conflict of interest was disclosed as a result of this practice.

Audit Comments

6.29 One of the board members of the Authority is the Chief Executive Officer of a major hirer of the Stadium. In these circumstances it would be expected that there would be many occasions during a year where potential conflicts of interest could arise. Many matters considered by the board could potentially affect a major hirer of the Stadium and therefore may warrant disclosure in the minutes of meetings of the Authority.

6.30 The audit also notes that it is unlikely that conflict of interest matters could be appropriately dealt with if individual board members incorrectly assess that they do not have a conflict of interest that requires disclosure. The onus is on both individual directors and the board as a whole to ensure conflict of interest matters are appropriately addressed.

6.31 On balance, the audit considers that the Authority and individual directors may not be complying with the Act in that potential conflict of interest issues are not being properly addressed. Furthermore, the audit considers that any procedures followed by the Authority to avoid real or perceived conflicts of interest will be of little value while the composition of the board and the interests of individual directors create inherent and pervasive opportunities for such conflicts to exist. (This issue was also raised in Auditor-General’s Report 11 of 2001, *Financial Audits with Years Ending to 30 June 2001* (pages 156 to 158).

6.32 ***Suggestions for Better Practice*** – It is suggested that the composition of the board of the Authority should be reviewed and any potential conflict of interest matters be comprehensively addressed. The directors should ensure that they properly address any potential conflicts of interest on a continuing basis. If individual directors are unable to fully address potential conflicts of interest they should divest themselves of those interests or resign.

OTHER DISCLOSURE OF INTEREST PRACTICES

6.33 A review of current practice against legislative provisions and the Chief Minister's Department guidance document revealed that:

- The Agents Board, the Canberra Tourism and Events Corporation, the Legal Aid Commission and University of Canberra all have a set agenda item at board meetings where conflicts of interest can be registered for any agenda item to be discussed at that meeting.
- Evidence was noted in the minutes of the National Exhibition Centre Trust and the Australian International Hotel School that board members had disclosed conflicts of interest in respect of specific matters and withdrawn from the meetings until a decision had been made on the matters in question.
- Members of the Gungahlin Development Authority and the Kingston Foreshore Development Authority have signed declarations indicating that they will comply with a 'declaration of interests guidelines'.
- The Chairman of the Building and Construction Industry Training Fund Board disclosed an indirect conflict of interest at one meeting but did not withdraw from either the meeting or the decision making process.
- A member of the Canberra Tourism and Events Corporation excluded himself from the discussion and decision on a matter in which he advised that he had a pecuniary conflict of interest in respect of a particular matter and withdrew from the meeting and decision.
- The Chairman of the Canberra Tourism and Events Corporation did not formally advise the responsible minister that the Corporation had determined that a member of the board had disclosed a conflict of interest in a particular matter and had been excluded from determination of the matter.

Audit Comments

6.34 ***Suggestions for Better Practice*** - The practice of some statutory authorities to have a standing agenda item at board meetings where conflicts of interest may be disclosed is considered to be better practice. Accordingly, it is suggested that all boards adopt this practice.

6.35 ***Possible Non Compliance with Legislation*** – Non compliance with legislative provisions relating to disclosures of interest is a serious

matter. Non-compliance with the legislation occurs when there is a real possibility of a conflict occurring between a board member's duty to the statutory authority and either a personal interest or a duty to some third party.

6.36 Section 9 of the *Building and Construction Industry Training Levy Act* 1999 states that a member who has a 'direct or indirect personal or pecuniary interests in a matter being considered or about to be considered by the board' shall disclose the nature of the interest to the board. The enabling legislation also states that unless the board otherwise determines, the member shall not 'be present at any deliberation of the board with respect to the matter' or 'take part in any decision of the board with respect to that matter'.

6.37 As indicated above the Chairman of the Building and Construction Industry Training Fund Board disclosed an indirect interest at a meeting of the board. The board did not determine, however, that the Chairman could be present during the board's deliberations on the matter or whether the Chairman could take part in any decision on the matter. Accordingly, the Chairman should have left the meeting when the board discussed the matter in question. As this did not occur, it appears that the Chairman of the Building and Construction Industry Training Fund may have not complied with section 9 of the Act. Consideration should be given to what action, if any, should be taken over this matter. One possible action is discussed below.

6.38 In addition, to the independent chairperson, the other members of the board are two employer representatives and two employee representatives. Where the Chairman is not able to participate in the discussion or decision on a particular matter, there is a real possibility that the board may not be able to resolve the matter. That is, it is essential for an independent chairman to be present at meetings of the board to ensure that its business can be conducted.

6.39 It will always be necessary for provision to be made for a member of the board to be excluded from its deliberative processes where conflicts of interest occur. Accordingly, one way of addressing this matter would be for the board to be expanded by one additional independent person. Such a person could be appointed as deputy chairperson. Accordingly, it is suggested that consideration be given to expanding the board by the addition of one independent person who would become the board's deputy chairperson.

6.40 Sub-section 15 (5) of the *Canberra Tourism and Events*

Corporation Act 1997 requires that the Chairman of the Canberra Tourism and Events Corporation formally advise the responsible minister that the Corporation had determined that a member of the board had disclosed a conflict of interest in a particular matter and had been excluded from determination of the matter. This matter was reported on in the Auditor-General's Report No. 8 titled *Canberra Tourism and Events Corporation – Relocation to Brindabella Business Park*.

CONCLUSION

6.41 The resolution of the interface between public duty and personal interests can be a difficult and sensitive matter. This chapter has identified those statutory and other procedures that are in place to manage them and suggested a number of refinements to present arrangements.

7 MINISTERIAL DIRECTIONS

INTRODUCTION

7.1 The enabling legislation of some statutory authorities provides for their ministers to give them directions on a range of policy and administrative matters.

7.2 This chapter specifically addresses:

- the powers of ministers to give directions to statutory authorities about the performance of their functions;
- the use of ministerial powers to give directions to statutory authorities about the performance of their functions;
- the powers of ministers to give other directions to statutory authorities; and
- the use of ministerial powers to give other directions to authorities.

SIGNIFICANT FINDINGS

- *The enabling legislation of most authorities reviewed provides for the responsible minister to give them directions relating to the performance of their functions. In all cases such directions must be made public.*
- *For only one authority is the minister required to consult the Authority before giving it a direction relating to the performance of its functions.*
- *Only in a minority of cases does the legislation provide for authorities to be paid the costs of complying with ministerial directions.*
- *The enabling legislation of some statutory authorities also provides for the minister to give them directions on dividends or similar payments, the application of enabling legislation, matters to be addressed and borrowing limits. In only a few cases is the minister required to make such directions public.*

- *In some cases the minister is not required to consult with the authority before giving it such directions.*

POWERS TO GIVE DIRECTIONS TO AUTHORITIES ON THE PERFORMANCE OF THEIR FUNCTIONS

Legislative Powers

7.3 Each of the 16 statutory authorities addressed during the audit was established by a separate Act of the Legislative Assembly. The Audit reviewed each Act to identify those acts that provide for the responsible minister with the power to give directions to the statutory authority concerned on the performance of its functions. The Audit also identified any related provisions in the legislation, including the need for prior consultation with the board of the authority, compensation arrangements and public notification arrangements.

7.4 The enabling legislation of 10 authorities provides for the responsible minister to give them general directions relating to the performance of their functions. They are the ACT Gambling and Racing Commission, ACT Health and Community Care Service Board, Healthpact, Australian International Hotel School, Canberra Tourism and Events Corporation, Cultural Facilities Corporation, the Gungahlin Development Authority, Kingston Foreshore Development Authority, National Exhibition Centre Trust and the Stadiums Authority.

7.5 Sub-section 7(1) of the *Health Promotion Act 1995* states that, in respect of Healthpact, the minister may give written directions to the board in relation to the performance of its functions, either generally or in relation to a particular matter. Sub-section 7(2) states that the board shall give effect to any direction under sub-section (1). Most other enabling legislation that provides for such powers uses generally similar wording.

7.6 Sub-section 6(3) of the *Gambling and Racing Control Act 1999* states that the minister may direct the Commission by way of-

- (a) guidelines directing the way the Commission is to perform any of its functions; or
- (b) directions in writing relating to particular matters.

7.7 The wording of this sub-section may imply that guidelines by the minister directing the way the Commission is to perform any of its functions need not be in writing whereas directions made by the minister in relation to a particular matter must be in writing.

Disclosing Directions

7.8 The enabling legislation of seven of the 10 authorities referred to above provide for directions given to them to be tabled in the Legislative Assembly within a limited number of sitting days of a direction being given and to be also included in the authorities next annual report. The enabling legislation of the ACT Health and Community Care Service Board and the Stadiums Authority provides for any directions given to them to be tabled in the Legislative Assembly but make no provision for them to be included in their annual reports. The enabling legislation of the National Exhibition Centre Trust provides for any directions given to the Trust to be included in the Trust's annual report but does not provide for any such directions to be tabled in the Legislative Assembly.

Consultation Arrangements

7.9 The enabling legislation of the Stadiums Authority provides for the minister to consult with the board of the Authority before giving a direction to the Authority. Sub-section 26(2) states that before giving a direction to the Authority the minister must:

- (a) tell the authority of the intent of the proposed direction;
- (b) give the authority a reasonable opportunity to comment on the proposed direction; and
- (c) consider any comments made by the authority.

7.10 The enabling legislation of no other authority reviewed by the audit includes such a provision.

7.11 In accordance with section 28 of the *Commonwealth Authorities and Companies Act 1997* the responsible Commonwealth minister has the power to notify the directors of a Commonwealth authority of the general policies of the Commonwealth Government that apply to the authority. The Act requires that the directors of Commonwealth authorities must ensure that such policies are carried out. Before a minister advises an authority of the policies that are to apply, they must first consult with the directors of the statutory authority.

7.12 Section 28 of the Commonwealth Act states, in part, that:

- (1) The responsible minister may notify the directors of a Commonwealth authority in writing of general policies of the Commonwealth Government that are to apply to the

authority. The responsible minister must consult the directors before notifying them of the policies.

- (2) The directors must ensure that the policies are carried out in relation to the authority.

7.13 Somewhat similar but more restrictive provisions have been enacted in New South Wales. In accordance with section 20P of the *State Owned Corporations Act 1989* a minister may give a direction to the board of a statutory State Owned Corporation (SOC) in exceptional circumstances in the public interest. Prior consultation with the board is also required. In addition the minister is required to seek advice from the board on whether complying with the proposed direction would be in the best interests of the corporation.

7.14 Section 20P of the Act states, in part, that:

- (1) The portfolio minister with the approval of the Treasurer may give the board of a statutory SOC a written direction in relation to the SOC and its subsidiaries if the portfolio minister is satisfied that, because of exceptional circumstances, it is necessary to give the direction in the public interest.
- (2) The board must ensure that the direction is carried out in relation to the SOC and must, as far as practicable, ensure that the direction is complied with in relation to the subsidiaries.
- (3) Before giving a direction under this section, the portfolio minister must:
 - (a) consult with the board, and
 - (b) request the board to advise the portfolio minister whether, in its opinion, complying with the direction would not be in the best interests of the SOC or any of its subsidiaries.

Compensation Arrangements

7.15 The enabling legislation of the Canberra Tourism and Events Corporation, the Cultural Facilities Corporation, the Kingston Foreshore Development Authority and the Stadiums Authority provides for those authorities to be compensated for the costs of complying with directions given by the responsible minister. Sub-section 27(4) of the *Canberra*

Tourism and Events Corporation Act 1997 states that the Territory shall pay to the Corporation the reasonable costs of complying with a direction. Similar provisions are contained in the enabling acts of each of the other three authorities referred to above. No other authority reviewed by the Audit contains equivalent provisions.

7.16 Somewhat broader provisions apply to State Owned Corporations in New South Wales. Compensation may be payable in cases where either their costs are increased or their revenue is foregone as a result of complying with a ministerial direction. In accordance with sub-section 20P (4) of the *State Owned Corporations Act 1989*, a State Owned Corporation ‘may be reimbursed, from money advanced by the Treasurer or appropriated by Parliament for the purpose, amounts not exceeding the estimated cost of complying with such a direction, or the estimated net amount of revenue foregone through complying with such a direction, as determined by the Treasurer...’.

Audit Comments

7.17 Statutory authorities are normally established with designated objects, functions, powers and resources to enable them to undertake their roles independently of the government of the day. Notwithstanding this characteristic, the enabling legislation of most authorities provides for them to be given directions on the performance of their functions by the responsible minister. It is not unreasonable for the Legislative Assembly to provide the government of the day with such powers on behalf of the public who are the ultimate owners of all statutory authorities.

7.18 The power to give such directions, however, may have important implications for the public, individual statutory authorities and board members. This is because such directions may have an impact on the extent to which statutory authorities are able to achieve their legislated objectives and any other specific outcomes expected from the authorities.

7.19 Board members have an obligation to do what is in the best interests of the authority. This could give rise to potential conflicts between the obligations that board members have to the authority on the one hand and to the government on the other hand. For these reasons, it is important that any ministerial directions given to authorities be developed in consultation with the authority and made public in a timely manner.

7.20 Finally where ministerial directions are expected to have adverse financial implications for authorities, consideration should be given to whether they should be paid the reasonable costs of complying with such

directions.

7.21 *Suggestions for Legislative Change* - In view of the importance of ministerial power to give directions to statutory authorities, it is suggested that consideration be given to amending appropriate legislation to provide for all ministerial directions on the performance of their functions given to authorities to be in writing and to be fully disclosed to the Legislative Assembly in a timely manner and also in authorities' annual reports.

7.22 In view of the particular significance for individual authorities of such directions, it is also suggested that consideration be given to amending appropriate legislation to provide for ministers to always consult with authorities before giving them directions. For the same reason, it is also suggested that consideration be given to amending appropriate legislation to provide, in appropriate circumstances, for compensation to be paid to authorities where compliance with ministerial directions would result in a net financial disadvantage to them. Where it is decided that compensation would be inappropriate, it is suggested that the ministerial direction should indicate to the authority how it is to meet the cost of the direction.

USE OF POWERS TO GIVE DIRECTIONS TO AUTHORITIES ON THE PERFORMANCE OF THEIR FUNCTIONS

7.23 The Audit sought advice from each of the authorities that have provisions in their enabling legislation for their responsible minister to provide them with directions on the performance of their functions whether they had received any directions in the year ending 30 June 2001. The Audit was advised that no ministerial directions were provided to authorities during that period.

Audit Comments

7.24 As no ministerial directions were given to authorities during the year ending 30 June 2001, an assessment of compliance with associated legislation was not undertaken.

POWERS TO GIVE DIRECTIONS ON OTHER MATTERS

Review of Enabling Legislation

7.25 In addition to the ministerial power to give directions relating to the performance of authorities' functions referred to earlier in this chapter, the enabling legislation of a number of statutory authorities

provides for the responsible minister to give them specific directions in a range of other situations. The power to give specific directions falls into two categories. That is those powers that could have policy implications for the authorities concerned and those that are administrative in nature.

7.26 Administrative directions mainly relate to such matters as determining fees and charges and providing information to the minister. As they do not relate to the governance arrangements for statutory authorities, they fall outside the scope of this audit and are not discussed further.

7.27 The enabling legislation of seven of the statutory authorities reviewed as part of the audit provides for the responsible minister to give directions on other matters that could have policy implications for the authority concerned. These powers relate to giving directions to make payments to the Government or pay dividends, making directions about the application of enabling legislation, whether or not to address particular matters and borrowing money. These powers are discussed in the following paragraphs.

Directions on Dividends

7.28 The enabling legislation of the Gungahlin Development Authority, the Kingston Foreshore Development Authority, the National Exhibition Centre Trust and the Stadiums Authority provides for the minister to direct that they make payments or pay dividends to the Government. In the case of the first two authorities there is no requirement for the minister to consult with them before determining the amount of any such payment. By way of contrast, in the case of the latter two authorities, prior consultation with the boards of the authorities concerned is required. Only in the case of the Kingston Foreshore Development Authority are ministerial directions regarding payments or dividends required to be tabled in the Legislative Assembly or otherwise made public.

Directions on the Application of Legislation

7.29 The enabling legislation of the Gungahlin Development Authority and the Kingston Foreshore Development Authority provides for the minister to vary their development areas. In addition, the enabling legislation for the Agents Board provides for the minister to declare that a provision or provisions of the Act does not apply in relation to a person or class of persons. In none of these cases is the minister required to consult with the authorities concerned before making the declarations. In the case of the Agents Board the minister's declaration is required to be

tabled in the Legislative Assembly. In the case of the Gungahlin Development Authority and the Kingston Foreshore Development Authority the minister's direction is required to be published in the Gazette.

Directions on Addressing Particular Issues

7.30 The enabling legislation of the ACT Gambling and Racing Commission provides for the minister to require the Commission to address particular matters in monitoring, conducting or sponsoring research into the social and economic effects of gambling including the need for counselling services. The enabling legislation also empowers the minister to require the Commission to address particular matters when performing its education and counselling functions. There is no requirement in the *Gambling and Racing Control Act 1999* for any directions given by the minister pursuant to these powers to be discussed with the Commission before they are made. In addition, there is no provision in the Act for such directions to be tabled in the Legislative Assembly or otherwise made public.

Directions on Borrowing

7.31 The enabling legislation of the University of Canberra provides for the minister to determine the limits of any borrowing by the University. The *University of Canberra Act 1989* provides for the minister to consult with the University before making such a determination. There are no provisions in the Act, however, for such determinations to be tabled in the Legislative Assembly or otherwise made public.

Audit Comments

7.32 ***Suggestions for Legislative Change*** - The power for ministers to give directions to the boards of statutory authorities on key matters such as dividends, the application of enabling legislation, whether or not to address particular matters and borrowing parameters could have important implications for individual authorities and the responsibilities of boards and individual board members. In view of the importance of these powers, it is suggested that consideration be given to amending the relevant legislation to provide for all ministerial directions on such matters to be in writing and disclosed to the Legislative Assembly and also in authorities' annual reports. It is also suggested that consideration be given to amending appropriate legislation to provide for ministers to always consult with authorities before giving them such directions.

USE OF POWERS TO GIVE DIRECTIONS TO AUTHORITIES ON OTHER MATTERS

7.33 The Audit sought advice from each of the authorities that have provisions in their enabling legislation for their responsible minister to provide them with directions on other matters whether they had received any directions in the year ending 30 June 2001. The Audit was advised that no ministerial directions were provided to authorities during that period.

Audit Comments

7.34 As no ministerial directions were given to authorities during the year ending 30 June 2001, an assessment of compliance with associated legislative guidance was not undertaken.

CONCLUSION

7.35 Statutory authorities are normally established with independent governing boards to enable them to undertake their roles independently of and at arms length from the government of the day. Boards and individual board members have clear responsibilities to act in the best interests of their authorities.

7.36 Where the government of the day considers that it is necessary for it to intervene in the affairs of a statutory authority, the Legislative Assembly has provided it with the mechanism to do so. Such interventions, however, could on some occasions be at variance with the interests of the authority concerned.

7.37 Accordingly, proposed ministerial interventions should be discussed with the authorities concerned prior to being finalised. They should also be made public after finalisation. Finally where ministerial directions are expected to have financial implications for authorities, paying them the reasonable costs of complying with such directions may be appropriate.

8 BOARD APPOINTMENTS

INTRODUCTION

8.1 Most enabling Acts provide for a specified number of members to be appointed to the board of each authority and for the terms of their appointments. This chapter reports on the Audit's review of whether the legislative requirements for appointments have been followed.

8.2 This chapter specifically addresses:

- the framework in which appointments to statutory authorities are made;
- the role of the Legislative Assembly in the appointments process;
- appointment of chairpersons and deputy chairpersons;
- appointment of board members;
- board members periods of appointment;
- reappointment of board members; and
- remuneration of board members.

SIGNIFICANT FINDINGS

- *There is no central guidance on the development of selection criteria for the members of the boards of statutory authorities, selecting members of boards on the basis of merit or reviewing board memberships.*
- *All appointments to boards are determined by Cabinet and are subject to consultation with the appropriate standing committee of the Legislative Assembly.*
- *Legislated processes for the appointment of chairpersons, deputy chairpersons and members appear to have mostly been followed.*
- *During the Audit it was noted that the members of the Construction Industry Long Service Leave Board had not been formally appointed in accordance with the Long Service Leave (Building and Construction Industry) Act. This matter has now been regularised.*

- *Deputy chairpersons have not been appointed to the Canberra Tourism and Events Corporation and Healthpact as provided for in their enabling legislation.*
- *Two members of the Canberra Public Cemeteries Trust have occupied their positions since the 1960s and documentation supporting their appointment could not be located.*
- *The remuneration of part time board members varies widely with the members of some boards receiving token or no remuneration for their services.*

APPOINTMENTS FRAMEWORK

8.3 The enabling legislation of all of the statutory authorities examined as part of the audit provides for persons to be appointed to their governing boards. In most cases the responsible minister has legislative responsibility for appointing the members of the boards. In the case of the ACT Health and Community Care Service Board and the University of Canberra some members are appointed by specialist bodies or elected by specific stakeholder bodies.

8.4 The Cabinet Handbook requires that all appointments to boards and commissions be determined by Cabinet. Proposed appointments are normally brought to Cabinet by their inclusion on an appointments schedule that is developed from proposals submitted to the Chief Minister by ministers.

8.5 In accordance with the Cabinet Handbook, ministers' proposals must include:

- personal details regarding the nominee;
- details about the position to which he or she is proposed for appointment;
- the nominee's interest in the appointment and willingness to fulfil any appointment requirements such as declarations of interest;
- whether the government's policies on representation on committees by women, Aboriginal and Torres Straight Islanders and people from linguistically and culturally diverse backgrounds have been taken into account; and
- what, if any inter-agency consultation has occurred on the proposed appointment.

8.6 The selection of board nominees for recommendation to Cabinet

is made in a variety of ways. These are:

- authorities or administering departments may advertise for potential board members and recommend an appointment to the responsible minister;
- individual authorities or departments may identify prospective board members and recommend an appointment to the responsible minister;
- the responsible minister may identify prospective board members; or
- stakeholder groups may be invited to provide a list of suitable applicants where enabling legislation requires the appointment of a person from a particular group or profession.

8.7 In each case the minister is responsible for selecting prospective board members and nominating them to Cabinet for appointment. There are no formal policies on how such a selection process is to be undertaken.

Audit Comments

8.8 ***Suggestion for Better Practice*** – The selection of persons for appointment to the boards of statutory authorities is an important function. It is important to the effective functioning of authorities that the selection of board members be made on the basis of appropriate adequate experience, qualifications and personal attributes.

8.9 Desirably, each board member should add something unique and valuable to the board as a whole. Each board should collectively have a mix of the following skills, knowledge and experience:

- relevant operational and technical expertise;
- financial expertise;
- legal expertise; and
- knowledge of government and the regulatory environment.

8.10 There are, however, no central policies in place requiring that the appointment of persons to the boards of statutory authorities be made on the basis of merit. Similarly, there are no centrally mandated policies for the development of merit selection criteria for members of boards, or the selection of board members on the basis of such criteria.

8.11 The Australian Stock Exchange provides guidance to its members on matters that corporations are to take into account in making their annual governance statements. That guidance includes specifying the

main procedures that corporations have in place for devising criteria for board membership, nominating directors and reviewing board membership. That guidance also includes specifying corporations' policies on terms and conditions relating to the appointment and retirement of non-executive directors. This approach is considered to be better practice.

8.12 Accordingly, it is suggested that consideration be given to devising formal criteria for all board positions and developing formal merit selection procedures for the selection and appointment of all board members. It is also suggested that such criteria and processes be used for the selection, appointment and reappointment of all new board members. Finally it is suggested that such criteria and processes be made publicly available.

CONSULTATION WITH THE LEGISLATIVE ASSEMBLY ON APPOINTMENTS

8.13 Section 4 of the *Statutory Appointments Act* 1994, requires ministers to consult with the appropriate standing committee of the Legislative Assembly before making an appointment to a statutory office. That section also provides for an appointment not to be made until a recommendation made by the appropriate committee or until a period of 30 days has elapsed after the consultation took place. In making an appointment to a statutory office, the appropriate minister is required to have regard to any recommendation made by the appropriate committee.

8.14 As indicated above, the Cabinet Handbook requires that all appointments to boards and commissions be determined by Cabinet. Proposed appointments are normally brought to Cabinet by their inclusion on an appointments schedule that is developed from proposals submitted to the Chief Minister by ministers.

8.15 Ministers' proposals must include whether the appointment needs to be the subject of consultation with a Legislative Assembly Committee as required by the Statutory Appointments Act. Following Cabinet's consideration of proposed appointments, the Cabinet Handbook requires that they be referred to a Legislative Committee via the Speaker. The Cabinet Handbook specifies that the agency managing individual appointments must ensure that all relevant appointments meet the provisions of the Act. Each agency is required to manage a database of appointments to boards within their portfolio area.

Audit Comments

8.16 *Compliance with legislation* – The Audit reviewed correspondence between administering departments and appropriate Legislative Assembly committees to ascertain whether the Legislative Assembly was consulted prior to board members being appointed by the responsible minister. The correspondence indicates that the required consultation occurred.

8.17 *Suggestion for Better Practice* – In undertaking the above procedures the Audit noted that on two occasions some documentation regarding the consultation process could not be located. It is suggested that administering departments should ensure that all documents relating to the appointment of board members, including the consultation process, are retained and filed in a secure location.

APPOINTMENT OF CHAIRPERSONS AND DEPUTY CHAIRPERSONS

Review of Enabling Legislation

8.18 The enabling legislation of all of the statutory authorities examined as part of the audit provides for persons to be appointed to their boards as chairpersons. In all cases, except for the council of the University of Canberra, the responsible minister makes those appointments. In the case of the University of Canberra the Council of the University appoints the Chancellor.

8.19 The enabling legislation of most of the statutory authorities examined as part of the audit provides for the appointment or election of a deputy chairperson. The enabling legislation of the ACT Gambling and Racing Commission, the Building and Construction Industry Training Fund Board, the Canberra Public Cemeteries Trust, the Construction Industry Long Service Leave Board and the Legal Aid Commission do not provide for a deputy chairperson.

8.20 The responsible minister has legislative responsibility for appointing the deputy chairperson of the ACT Health and Community Care Service Board, Healthpact, Australian International Hotel School and the Gungahlin Development Authority. The deputy chairpersons of the other authorities that provide for a deputy chairperson are either elected or appointed by their boards.

8.21 The enabling legislation for the Canberra Tourism and Events Corporation provides, at section 9(2) of the Canberra Tourism and Events

Corporation Act, for the members of the corporation to elect a deputy chairperson. A member has not been elected as deputy chairman.

8.22 The enabling legislation for Healthpact provides, at section 8(2) of the Health Promotion Act, for the minister to appoint a deputy chairperson from among the members of the board. The minister has not made such an appointment. During the course of the audit the board advised that the process for making an appointment has now been commenced.

Audit Comments

8.23 ***Compliance with Legislation*** - The legislated procedures for the appointment of chairpersons and deputy chairpersons of most of the boards of the statutory authorities reviewed appear to have been followed.

8.24 Deputy chairpersons have not been appointed to the Canberra Tourism and Events Corporation and the Health Promotions Board as required in their enabling legislation.

8.25 ***Actions Necessary to Comply with Legislation*** - It is suggested, wherever they are provided for in an Authorities' enabling legislation, that Deputy Chairperson positions should be filled promptly.

APPOINTMENT OF BOARD MEMBERS

8.26 The enabling legislation of all of the statutory authorities examined as part of the audit provides for persons to be appointed to their boards as statutory office holders. The Chief Minister's Department is responsible for processing all board appointment in accordance with legislative requirements.

8.27 Documentation supporting the appointment of two trustees to the Cemeteries Trust could not be located.

Audit Comments

8.28 ***Compliance with Legislation*** - Appointments of members to almost all of the boards reviewed during the audit appear to have followed the legislated requirements.

8.29 One exception was noted during the audit. It appears that the members of the Construction Industry Long Service Leave Board had not been formally appointed. This matter was subsequently regularised and the appropriate appointments notified in the Gazette.

8.30 *Suggestions for Better Practice* - Authorities need to ensure that board members are properly appointed and that copies of the instruments of appointments, signed by the relevant minister, are filed in a secure location. Where a department processes the appointment of board members, it would be prudent for the authority concerned to follow up with the department to ensure that the correct processes for appointment of board members has not been overlooked. When appointments have been finalised, copies of the instruments of appointment should be provided to the authorities for their own records.

BOARD MEMBERS' PERIODS OF APPOINTMENT

Review of Enabling Legislation

8.31 The enabling legislation for all but one of the statutory authorities reviewed as part of the Audit provides for board members to be appointed for periods ranging from three to five years.

8.32 The Cemeteries Act does not provide specific periods of appointment for its trustees and two trustees have occupied their positions since the 1960s. The Cemeteries Trust advised the Audit, however, that all appointments since 1996 have been for periods of three years or less.

Audit Comments

8.33 *Compliance with Legislation* – The review disclosed no instances where enabling legislation in relation to board members' periods of appointment was not complied with.

8.34 *Suggestions for Legislative Change* - It is suggested that relevant legislation be amended to specify the periods of appointment of trustees of the Cemeteries Trust.

REAPPOINTMENT OF BOARD MEMBERS

Review of Enabling Legislation

8.35 The enabling legislation of most statutory authorities reviewed as part of the Audit provides that board members can be reappointed when their terms expire.

8.36 There is no provision for Canberra Public Cemeteries Trust board members to be reappointed as there is no provision in the Trust's legislation limiting the periods for which its trustees are appointed. The appointments are effectively lifetime appointments or until a trustee chooses to resign.

8.37 The enabling legislation for the Stadiums Authority and the University of Canberra does not address the matter of the reappointment of board members.

8.38 Section 48 of the *Legal Aid Act* 1977 provides for the tenure of office of the President and other commissioners of the Legal Aid Commission. Paragraph 48(1)(b) of the Act states that the commissioners are eligible for reappointment. The section, however, is silent on the matter of the eligibility of the President for reappointment.

Audit Comments

8.39 ***Compliance with Legislation*** – The review disclosed no instances where relevant legislation has not been complied with in relation to re-appointments to Statutory Authority boards. The Audit noted that reappointment of retiring board members is a common occurrence.

8.40 ***Suggestions for Legislative Change*** - Consideration be given to amending appropriate legislation to provide for the reappointment of board members where enabling legislation is silent on the matter.

REMUNERATION OF BOARD MEMBERS

8.41 The members of most boards of the statutory authorities reviewed as part of the audit are remunerated at part time rates determined by the Remuneration Tribunal under the provisions of the *Remuneration Tribunal Act* 1995. Remuneration rates vary widely. They range from an annual fee of \$31,000 for the chairperson of the ACT Health and Community Care Service Board to a daily rate of \$250 for the members of a number of authorities.

8.42 The trustees of the Canberra Public Cemeteries Trust and the members of the Council of the University of Canberra do not receive any remuneration for their membership of those boards.

Audit Comments

8.43 ***Compliance with Legislation*** – The audit did not review whether members of boards were remunerated at rates determined by the Remuneration Tribunal.

8.44 ***Suggestions for Better Practice*** - The Audit believes it is sound practice for the Remuneration Tribunal to set the rates payable to board members. It is noted, however, that some members of Territory boards receive substantial fees for their services whereas other members receive no remuneration at all.

GOVERNANCE ARRANGEMENTS OF SELECTED STATUTORY AUTHORITIES

8.45 There is little doubt that a number of honorary board members contribute generously of their time and expertise. In other cases, however, members receiving little or no remuneration for their services could only reasonably be expected to provide minimal time and expertise to the discharge of their governance responsibilities.

8.46 If the Territory expects that all of the members of all of its boards to make a substantial contribution of their time and expertise, it would seem that they should be remunerated appropriately. The Audit notes, however, that any decision to significantly increase the remuneration for the members of some boards may have consequences for the size of those boards.

8.47 Under common law principles, the extent of accountability attaching to honorary appointments is significantly less than that attaching to appointments that are remunerated. If board members are given the responsibility for governing the affairs of Territory authorities, it is suggested that the Territory would benefit from being able to hold them fully accountable for their stewardship. This can only be done if members are remunerated to an extent that is consistent with their responsibilities.

8.48 Accordingly, the Audit considers that consideration should be given to appropriately remunerating the members of all Territory boards that have corporate governance responsibilities. The level of such remuneration would be a matter for the Remuneration Tribunal, however, it is suggested that consideration be given to making a submission to the Tribunal on this matter.

CONCLUSION

8.49 Each enabling Act reviewed provides for a specified number of members, including chairpersons and deputy chairpersons, to be appointed to the board and for the period of the members' appointments. There were, however, several matters identified during the Audit as warranting attention either by individual boards or by the responsible Ministers.

9 BOARD AUDIT COMMITTEES

INTRODUCTION

9.1 An audit committee is a committee of the board of directors of a statutory authority. Where such a committee is established, it assists the board to discharge its corporate governance, financial reporting, audit and a number of other responsibilities. The term 'audit committee' is a generic term and some authorities may use different names to describe the committee of board members that undertakes the responsibilities referred to.

9.2 This chapter specifically addresses:

- the importance of audit committees;
- audit committee charters;
- audit committee responsibilities;
- the membership of audit committees; and
- audit committee procedures.

SIGNIFICANT FINDINGS

- *There is no legislative requirement for the boards of statutory authorities to establish audit committees and half of the authorities reviewed have not done so.*
- *Those audit committees that have been established have been provided with charters or terms of reference by their boards, however, no audit committee has been provided with a charter that fully complies with better practice.*
- *Extant audit committees have a varying range of responsibilities, however, no audit committee has all of those responsibilities to fully comply with better practice.*
- *The membership of the audit committees of six statutory authorities is inconsistent with better practice.*
- *Although those audit committees that have been established have been given varying procedural guidance, no audit*

committee has been given all that guidance which fully complies with better practice.

THE SIGNIFICANCE OF AUDIT COMMITTEES

9.3 Audit committees enhance the governance process of an organisation. They provide an independent forum for directors, management and auditors to deal with governance issues including financial reporting and the management of risk. The participation of non-executive directors²⁰ on audit committees enables the board to facilitate the objectivity of internal auditors and improve the effectiveness of both the internal and external audit functions. The participation of non-executive directors also provides the board with exposure to external sources of knowledge and experience that may not otherwise be available to the committee.

9.4 The Australian Accounting Research Foundation (AARF) best practice guide²¹ suggests that the main objectives of an appropriately established and effective audit committee would usually include the following matters.

- Assisting the board to discharge its responsibility to exercise due care, diligence and skill in relation to the entity's reporting of financial information, application of accounting policies, financial and risk management and compliance with applicable laws.
- Improving the credibility and objectivity of the accountability process, especially where the role of the audit committee and its membership is disclosed to the public.
- Providing a formal forum for communication between the board of directors and senior financial management.
- Improving the efficiency of the board by delegating tasks to the committee and thus allowing more time for issues to be discussed in sufficient depth.
- Improving the effectiveness of the internal and external audit functions and being a forum for improving communication between the board and its internal and external auditors.

²⁰ The terms 'non-executive director' or 'independent director' refers to those directors who hold a part-time office under the provisions of an authority's enabling legislation. They are not employees of the relevant statutory authority or otherwise members of the Public Service.

²¹ AARF Best Practice Guide, page 6.

GOVERNANCE ARRANGEMENTS OF SELECTED STATUTORY AUTHORITIES

- Providing a structured reporting line for internal audit and facilitating the maintenance of the objectivity of the internal auditor.
- Improving the quality of internal and external reporting of financial and non-financial information.
- Improving the correlation between related financial and non-financial information and reports.
- Strengthening the role and influence of non-executive directors.
- Fostering an ethical culture throughout the entity.

9.5 If the board of an authority decides not to establish an audit committee, the audit committee's responsibilities would need to be undertaken by the board as a whole. For such an arrangement to be fully effective, it would be necessary for the board to be comprised mainly of non-executive directors and be independent of management. In addition, the chairperson of the board acting as an audit committee should preferably be a different person to the board chairperson.

9.6 There is no legislative requirement in the Territory for statutory authorities to establish audit committees.

9.7 All Commonwealth statutory authorities are required to establish audit committees. Sub-section 32(1) of the *Commonwealth Authorities and Companies Act 1997* states that:

The directors of a Commonwealth authority must establish and maintain an audit committee with functions that include:

- (a) helping the authority and its directors to comply with obligations under this Act; and
- (b) providing a forum for communication between the directors, the senior managers of the authority and the internal and external auditors of the authority.

9.8 Half of the authorities reviewed during the audit advised that they either have an audit committee or are in the process of establishing one. Six authorities, that is the ACT Health and Community Care Service Board, Healthpact, the Australian International Hotel School, the Cultural Facilities Corporation, the Kingston Foreshore Development Authority and the University of Canberra have formalised and functioning audit committees. In each case those authorities provided the audit with a copy of their audit committee's charter or terms of reference.

9.9 Two authorities, that is the Canberra Tourism and Events Corporation and the Gungahlin Development Authority advised the audit that they had resolved to establish an audit committee in August 2001. The Gungahlin Development Authority advised that the board has approved the charter of its audit committee but its committee is yet to meet for the first time. CTEC advised that its audit charter is still being drafted.

9.10 The Gambling and Racing Commission advised the audit that it has not formally considered whether it should have an audit committee, however the matter has been discussed informally by members. As a small statutory authority, the Commission has taken the view that resource limitations preclude it establishing a permanent audit committee and has taken on the job itself. A similar response was received from the Building and Construction Industry Training Fund Board.

9.11 The Agents Board advised the audit that it has delegated its audit committee functions, under section 17 of the *Agents Act* 1968 to the Deputy Chair of the board who is a former ACT Auditor-General. In this capacity the Deputy Chair informally undertakes some of the functions of an audit committee. The board also intends to rely on the Department of Justice and Community and Safety's internal audit arrangements when they are finalised. Following an examination of its present arrangements, the board has advised the Audit that it now intends to establish an internal audit committee.

Audit Comments

9.12 Audit committees are very useful mechanisms for assisting boards to effectively discharge their governance and related responsibilities. They provide a useful vehicle to allow issues of key concern to the board to be considered in depth by a small committee of appropriately qualified and experienced persons. They also strengthen the role and influence of independent non-executive directors in the governance of their authorities. Accordingly, the Audit considers that the boards of all statutory authorities should, unless there are persuasive arguments to the contrary, establish audit committees with the objectives outlined in this section.

9.13 ***Suggestions for Legislative Change*** – It is suggested that consideration be given to introducing appropriate legislation to require all statutory authorities to establish and maintain an audit committee, unless the establishment of such a committee was considered by individual boards to be clearly inappropriate in their circumstances. This objective

could be achieved by including in appropriate legislation the requirement for boards to establish and maintain an audit committee unless the board formally resolved otherwise. To ensure that the importance of establishing an audit committee is kept in view, boards might be required to resolve on an annual basis whether they should establish such a committee.

9.14 *Suggestions for Better Practice* – Pending the introduction of the legislative changes referred to in this section, it is suggested that boards should formally give consideration to whether the establishment of an audit committee would be appropriate in their circumstances. If the establishment of such a committee was considered to be appropriate, its charter, responsibilities, membership and procedures could be modelled on the better practice outlined in this chapter.

AUDIT COMMITTEE CHARTERS

9.15 The International Federation of Accountants report on governance in the public sector has recommended that audit committees should be established as high level sub-committees of their boards²². The Federation's report also recommended that they should have formal terms of reference. The report also suggests that for an audit committee to be fully effective it should be independent of management. To achieve this, audit committees should have explicit authority to investigate any matter within its terms of reference, the resources it needs to do so and full access to all relevant information, including access to outside professional advice if the committee considers it necessary.

9.16 In addition, the AARF best practice guide states that audit committees should have a formal charter that is approved by the board²³. The guide states that such a charter should include:

- the committee's objectives, roles and responsibilities;
- committee membership;
- the committee's right to obtain information from employees and external parties, including auditors;
- the right to oversee and co-ordinate internal audit activities;
- procedural powers, including the rights of members to put items on the agenda; and
- the committee's obligations to report on its activities to the board.

²² IFAC Study 13, page 43.

²³ AARF Best Practice Guide, page 8.

9.17 The audit reviewed the charters of each of the authorities referred to in the preceding section that have formal approved audit committee charters, against the AARF best practice guide. The review disclosed that, in summary, no authority has a charter that fully complies with the AARF best practice guide.

9.18 Table 9.1 summarises the extent to which those audit committee charters match the AARF Guide. As the table shows all authorities included the roles and responsibilities of their audit committees in their charters and all but one provided guidance on committee membership. The adequacy of these matters is discussed in subsequent sections of this report.

9.19 The table also shows that most boards provided for their audit committees to oversee their authorities' internal audit function, provided guidance on the frequency of committee meetings and included an obligation for committees to report back to their boards on their work. No authority, however, formally provided committee members with the right to put items on the agenda of their committee. In addition, only three committees were formally provided with the right to obtain information from employees and external parties. Finally, only three authorities provided guidance on quorums for their audit committees and required that their audit committees have formal agendas for, and minutes of, their meetings.

GOVERNANCE ARRANGEMENTS OF SELECTED STATUTORY AUTHORITIES

Table 9.1 – Selected Authorities – Audit Charters									
Authority	Role	Membership	Right to Obtain Information	Right to oversee internal audit	Quorum	Frequency of Meetings	Formal Agenda and Minutes	Right of Members to Put Items on Agenda	Obligation to Report to Board
Health and Community Care Service Board	Yes	Yes	No	Yes	Yes	Yes	No ²⁴	No	No
Healthpact	Yes	No	No	Not applicable	No	Yes	No	No	No
Australian International Hotel School	Yes	Yes	No	No	No	No	No	No	No
Cultural Facilities Corporation	Yes	Yes	No	Not applicable	No	Yes	Yes	No	Yes
Gungahlin Development Authority	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Kingston Foreshore Development Authority	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
University of Canberra	Yes	Yes	Yes	Yes	No	Yes	Minutes only	No	Yes

²⁴ Notwithstanding that the Board's Audit Charter does not require the preparation of minutes, minutes are prepared as a matter of course.

Audit Comments

9.20 ***Suggestions for Better Practice*** - It is suggested that all boards review the charters they have provided to their audit committees against the better practice guidance contained in this section. In particular, boards should provide their audit committees with the power to obtain any information from employees and external sources that is necessary for the effective performance of their role. During the course of the audit a number of authorities advised that they intended to review their audit charters in the light of the better practice guidance identified by the Audit.

AUDIT COMMITTEE RESPONSIBILITIES

9.21 The International Federation of Accountants report has recommended²⁵ that audit committees should have responsibility for the independent review of the framework of control and of the external audit process. Audit committees should also have responsibility for overseeing their authority's internal audit program. The Federation includes in its report a detailed list of the functions of an audit committee²⁶.

9.22 In respect of their audit responsibilities, the IFAC report suggests that audit committees should schedule discussions with internal and external auditors at least once each year without executive members present to ensure that there are no unresolved issues of concern. In addition, internal and external auditors should bring all significant findings arising from their activities to the attention of the audit committee.

9.23 The AARF best practice guide states that audit committees need to ensure that entities' reporting and corporate governance responsibilities are addressed and that internal control and risk management systems are appropriate. The guide also includes a comprehensive statement on the responsibilities of audit committees²⁷.

9.24 In summary, and against the background of the guidance contained in both the IFAC report and the AARF guide, an audit committee's principle responsibilities may be summarised as follows.

- Review the appropriateness and adequateness of the authority's accounting policies, financial statements and related information.

²⁵ IFAC Study 13, page 43.

²⁶ IFAC Study 13, page 44.

²⁷ AARF Best Practice Guide, pages 22 to 25.

GOVERNANCE ARRANGEMENTS OF SELECTED STATUTORY AUTHORITIES

This includes recommending to the board whether the financial and non-financial statements should be signed.

- Review compliance with laws, regulations and other external requirements, such as Australian Accounting Standards.
- Review and monitor the propriety of related party transactions.
- Ensure that effective risk management and internal control systems are in place and that macro risks to the entity are reported to the board.
- Assess the effectiveness of and compliance with the authority's code of conduct.
- Manage, on behalf of the board, all aspects of the authority's relationship with the external auditor. This would include reviewing the scope of the audit, particularly identified risk areas.
- Oversight the internal audit function, including reviewing the internal auditor's mission, charter and resourcing and approving and monitoring internal audit plans.
- Monitor and critique management's responses to the findings of the authority's internal and external auditors.

9.25 The audit reviewed the documented responsibilities of the audit committees of each of the authorities referred to in the preceding section, against the summarised better practice responsibilities referred to in the preceding paragraph. In summary, although audit committees have a varying range of responsibilities, no audit committee has all those responsibilities that fully meet better practice standards.

9.26 Table 9.2 summarises the extent to which those audit committees meet better practice standards. As the table shows, all audit committees have all or some of the responsibilities associated with reviewing the appropriateness and adequacy of the authority's accounting policies, financial statements and related information. In addition, all audit committees, except that of the Cultural Facilities Commission, are responsible for reviewing internal audit findings, where appropriate, and external audit findings.

9.27 The audit committees of five of the seven statutory authorities listed are responsible for approving their authorities' internal audit programs. The remaining authorities, that is Healthpact and the Cultural Facilities Corporation, do not have an internal audit function.

GOVERNANCE ARRANGEMENTS OF SELECTED STATUTORY AUTHORITIES

Table 9.2 Selected Statutory Authorities – Audit Committee Responsibilities								
Authority	Accounting and Financial Matters	Compliance with Laws Etc	Related Party Transactions	Risk Management and Internal Control	Code of Conduct	Liaise with External Auditor	Oversight Internal Auditor	Review Audit Findings
ACT Health and Community Care Service Board	Partially	Partially	No	Yes	Partially	Yes	Yes	Yes
Healthpact	Partially	No	No	Yes	No	No, but nonetheless has done so.	Not Applicable	Yes
Australian International Hotel School	Generally, yes	Partially	Yes	Partially	No	Yes	Yes	Yes
Cultural Facilities Corporation	Yes	No	No	Yes	No	Yes	Not Applicable	Yes
Gungahlin Development Authority	Yes	Yes	No	Yes	No	Yes	Yes	Yes
Kingston Foreshore Development Authority	Yes	Yes	No	Yes	No	Yes	Yes	Yes
University of Canberra	Generally, yes	No	No	No	No	Yes	Yes	Yes

9.28 The table also shows that only the Hotel School's audit committee has responsibility for reviewing the propriety of related party transactions. In addition, only the ACT Health and Community Care Service Board's audit committee has responsibility for assessing aspects of the effectiveness of and compliance with its code of conduct. Finally the table shows that most audit committees have at least some responsibility for reviewing compliance with laws and regulations, risk management and internal control, liaison with the external auditor and oversight of the internal audit function.

Audit Comments

9.29 ***Suggestions for Better Practice*** - It is suggested that all boards review the responsibilities they have provided to their audit committees against the better practice guidance contained in this section. In particular, it is suggested that boards provide their audit committees with responsibility for reviewing the propriety of related party transactions and the effectiveness of their authority's code of conduct.

MEMBERSHIP

9.30 In its recent report on governance in the public sector, the International Federation of Accountants has recommended²⁸ that audit committees should be comprised of non-executive directors who are named in authorities annual reports. The AARF Best Practice Guide²⁹ supports this view. It states that an audit committee is a committee of the board of directors with the committee membership comprised of independent non-executive board members. Both bodies emphasise the importance of the members of audit committees being appropriately qualified and receiving appropriate training to enable them to carry out their roles effectively.

9.31 The AARF Guide suggests that authorities' CEOs may be invited to attend meetings but should not have any voting powers. The Guide also suggests that the committee should always reserve the right to meet without management in attendance. This will enable the committee to approach its tasks objectively, to maintain independence and also to be seen to be independent.

9.32 The effectiveness of audit committees will depend on them having strong chairpersons who have the confidence of the board and of the

²⁸ IFAC Study 13, page 43.

²⁹ AARF Best Practice Guide, page 12

internal and external auditors and on the quality of their non-executive members. In this regard, the AARF Best Practice Guide notes that to ensure the independence of the committee, its chairperson should not be the same person as the board's chairperson. Indeed, the chairperson of the authority is not normally a member of the audit committee.

9.33 The audit reviewed the membership of each of the audit committees of each of the authorities referred to in the preceding section, against the summarised better practice guidance referred to above. In summary, the membership of the audit committees of six statutory authorities is inconsistent with better practice standards.

9.34 As indicated above eight of the authorities reviewed during the course of the audit have or are establishing audit committees. The audit committees of Healthpact, the Gungahlin Development Authority and the University of Canberra are comprised of non-executive board members, and at least one member of each committees has business and/or accountancy qualifications or experience.

9.35 Three of the remaining agencies have the CEO and/or the executive responsible for financial matters as members of their audit committee. They are the Australian International Hotel School, the Canberra Tourism and Events Corporation and the Cultural Facilities Corporation.

9.36 The chairperson of the Canberra Tourism and Events Corporation is also a member of the Corporation's audit committee. During the course of the audit, the chairperson of the ACT Health and Community Care Service Board relinquished his role as the chairperson of the board's audit committee in favour of a non-executive board member.

Audit Comments

9.37 ***Suggestions for Better Practice*** - It is suggested that authority boards review the membership of their audit committees against the better practice guidance contained in this section. In particular, it is suggested that, boards provide for their audit committees to be comprised of non-executive members and that their chairpersons, CEOs and authority staff not be included as members of those committees. Non-executive directors of the committee should not have provided consultancy or similar services to the authority within the last two years. CEOs and relevant authority staff should, of course, attend those meetings as advisers when invited.

COMMITTEE PROCEDURES

9.38 The successful conduct of audit committee meetings will influence the ability of members to achieve the committee's objectives and thereby contribute to the overall effectiveness of the board. Only members and invited persons normally attend committee meetings.

9.39 The committee should meet at least once annually separately with both the internal and external auditors without any management staff or executives present. There may be issues of concern or interest to the committee that involve management and to be effective, the committee needs to be able to discuss these issues with auditors freely.

9.40 The AARF Best Practice Guide states³⁰ that best practice for the conduct of audit committee meetings would include the following procedures.

- There should be a regular schedule of meetings with additional meetings as necessary.
- Meetings should have a formal agenda and supporting papers. Proceedings should be minuted.
- A procedure should be established for members to put items on the agenda and for special meetings to be arranged as necessary.
- The internal and external auditors should be invited to contribute to the agenda and have a right to attend meetings.
- Meetings should proceed only when the pre-established quorum is present.

9.41 The audit reviewed the documented membership procedures of the audit committees of each of the authorities referred to in the preceding section that have approved audit committee charters, against the summarised better practice procedures referred to in the preceding paragraph. In summary, although audit committees have been given varying procedural guidance, no audit committee has been given all that guidance which would constitute better practice standards.

9.42 The audit committees of the six statutory authorities met on between two and 11 occasions during the twelve months ending June 2001. The audit committees of Healthpact and the Kingston Foreshore Development Authority met on two occasions each and the audit committee of the Cultural Facilities Corporation met on 11 occasions.

³⁰ AARF Best Practice Guide, page 18.

9.43 Formal agendas and formal minutes were prepared for five of the six functioning audit committees. The cultural Facilities Corporation's audit committee did not have formal agendas or prepare formal minutes of its meetings during the twelve months ending June 2001.

9.44 The audit committees of the Cultural Facilities Corporation, the Kingston Foreshore Development Authority and the University of Canberra met with a representative of the Auditor-General or the contract auditor that performs the external audit function on behalf of the Auditor-General during the twelve months to June 2001. The audit committees of the ACT Health and Community Care Service Board and the University of Canberra met formally with their internal audit manager during the twelve months ending June 2001.

9.45 Three of the audit committee's charters included a provision for meetings only to proceed if a quorum of members is present. That is the audit committee of the ACT Health and Community Care Service Board, the Gungahlin Development Authority and the Kingston Foreshore Development Authority. The charters of none of the audit committees reviewed by the audit explicitly gave members a right to place items on the agenda of meetings of their committee.

Audit Comments

9.46 ***Suggestions for Better Practice*** - It is suggested that authority boards review their audit committee procedures against the better practice guidance contained in this section. In particular, it is suggested that, audit committee charters be amended to explicitly give members a right to place items on the agenda of meetings of their committee.

9.47 In order for audit committees to be fully effective in effectively discharging the duties outlined in this chapter it is suggested that a meeting frequency of about once a month or about the same as that of the board as a whole may be necessary. It is suggested that boards may wish to consider giving appropriate guidance to their audit committees on this matter.

CONCLUSION

9.48 Audit committees are important mechanisms that facilitate the participation of independent or non-executive directors in authorities' governance processes. They also provide a forum where directors, management and auditors together can deal with issues relating to financial reporting obligations and the management of risk.

GOVERNANCE ARRANGEMENTS OF SELECTED STATUTORY AUTHORITIES

9.49 The content of this Chapter has shown that the importance of audit committees needs to be more fully recognised. Their structure and processes need to be enhanced so that they are able to perform an effective role in the governance of authorities' affairs.

10 MINUTES OF THE MEETINGS OF BOARDS

INTRODUCTION

10.1 A board can only fully meet its responsibilities if it meets regularly with clear agendas, board submissions and recorded decisions. Regular board meetings are, therefore, an essential aspect of good corporate governance practice.

10.2 The key proceedings at meetings of the governing bodies of statutory authorities are normally recorded in documents that are referred to as 'minutes'. The minutes of meetings may not be a complete record of all that is said at meetings. Usually minutes are a record of decisions taken or resolutions passed. The minutes would also be expected to incorporate necessary explanatory material needed to provide essential background information to assist readers to understand the context of the matters under consideration.

10.3 There are no formal rules for the detailed preparation of minutes of meetings of statutory authority boards. There are, however, generally adopted procedures for the recording of meeting minutes and the subsequent endorsement of those minutes. This chapter discusses these procedures.

10.4 This chapter specifically addresses:

- the recording of minutes; and
- confirming minutes.

SIGNIFICANT FINDINGS

- *The enabling legislation of the ACT Health and Community Care Service Board, the Long Service Leave Board and the National Exhibition Centre Trust do not require their boards to keep minutes of meetings.*
- *All authorities reviewed during the audit kept minutes of the meetings of their governing bodies.*
- *The minutes of most authorities were signed by their chairpersons to indicate that the minutes were a true and accurate record of the proceedings of their meetings.*

MINUTE KEEPING

10.5 The enabling legislation of most statutory authorities reviewed requires authorities to keep minutes. There are exceptions however.

10.6 The enabling Acts of the ACT Health and Community Care Service Board, the Long Service Leave Board and the National Exhibition Centre Trust do not require these authorities to keep minutes of meetings. Although not required by legislation the authorities mentioned keep minutes as a matter of standard practice.

Audit Comments

10.7 ***Compliance with Legislation*** – As required by legislation all authorities reviewed during the course of the Audit kept minutes of the meetings of their governing bodies.

10.8 ***Suggestions for Legislative Change*** - It is suggested consideration be given to enacting appropriate legislation to require all authorities, to keep minutes of the meetings of their governing bodies.

10.9 ***Suggestion for Better Practice*** - The Audit notes that the Corporations Act requires companies to enter minutes of meetings in minute books. Under the Corporations Act, a ‘minute book’ is widely defined to include making entries in a bound or loose-leaf book or by recording or storing the minutes of meetings by means of a mechanical, electronic or other device. In any case, the pages of the ‘minute book’ should be numbered to ensure its integrity. It is suggested that statutory authorities, if not already doing so, ensure that the form of minute book used by them is structured in such a way that its integrity is maintained and that there is no scope for the minutes of particular meetings to be mislaid.

CONFIRMATION OF MINUTES

10.10 The enabling legislation of none of the statutory authorities reviewed requires the boards to confirm the minutes of meetings or to sign the minutes as true records of their deliberations. Nevertheless the minutes of most statutory authorities reviewed were signed by their chairpersons to indicate that the minutes were a true and accurate record of the proceedings of the meetings.

10.11 The minutes of the Gambling and Racing Commission, the Building Training Fund Board and the Cemeteries Trust are confirmed at the following meeting of their governing bodies but are not signed by the

chairperson. The Gungahlin Development Authority minutes were not confirmed or signed. The Agents Board did not formally adopt its minutes for a period of 12 months leading up to the audit. Subsequently, the board adopted all of its minutes at a special meeting of the board. In addition, the board has advised the Audit that it now intends to finalise the minutes of each meeting and have them signed by the chair as an accurate record within one month.

Audit Comments

10.12 ***Compliance with Legislation*** – As stated there is no legislation that requires that minutes be confirmed. Accordingly no review of compliance with legislation was undertaken.

10.13 ***Suggestions for Legislative Change*** - The Audit notes that the Corporations Act requires companies to ensure that either the chairperson of the meeting or the chairperson of the following meeting signs the minutes of each meeting within a reasonable time after the meeting. This is sound practice. Accordingly, it is suggested that enabling legislation of statutory authorities be amended to provide for chairpersons to sign their minutes as true records of their deliberations within, say one month, after each meeting.

10.14 ***Suggestions for Better Practice*** – Pending introduction of the legislative change referred to in this section, it is suggested that boards formally give consideration to adopting the procedures referred to in this section.

CONCLUSION

10.15 The minutes of the meetings of the governing bodies of statutory authorities are important records of deliberations at the highest level of those bodies. While all authorities reviewed are currently keeping minutes of the meetings of their governing bodies, adoption of the suggestions contained in this chapter will assist in ensuring that sound and consistent practices are followed by all the Territory's statutory authorities.

11 COMMON SEALS

INTRODUCTION

11.1 A common seal is a device used by statutory authorities or other corporate entities as their ‘signature’. Affixing the authority’s seal to a document represents the authenticated expression of the mind of the authority.

11.2 All authorities normally have a common seal authorised by their enabling legislation. This chapter discusses the use of seals by statutory authorities and the means by which uses of the seals are recorded.

11.3 This chapter specifically addresses:

- the use of common seals; and
- common seal registers.

SIGNIFICANT FINDINGS

- *The enabling legislation of only six statutory authorities indicates whose authority is required before their common seal is affixed to a document.*
- *Authorities use their seals for different purposes and no authority has formally decided on the types of contracts and other documents that should be formalised by affixing their seal to them.*
- *Except for the Canberra Tourism and Events Corporation, all authorities keep a register of the use of their seal.*

USE OF COMMON SEALS

Review of Enabling Legislation

11.4 The enabling legislation of all the authorities reviewed requires authorities, except for the Stadiums Authority, to have a common seal. The Stadiums Authority Act states that the Stadium’s Authority ‘may’ have a seal.

11.5 The Gungahlin Development Authority Act, the Gambling and Racing Control Act, Health and Community Care Services Act, Health Promotion Act, University of Canberra Act and the Canberra Public

Cemeteries Regulations 1998 states that the seals of those bodies shall not be used except as authorised by their boards. The enabling legislation for the other bodies reviewed does not indicate what authority is required for the use of their seals.

11.6 The Health Promotion Act states that its board's seal may be used to delegate its powers to a member of the board or a public servant. The enabling legislation for other statutory authorities does not indicate purposes for which a seal should be used.

Use of Common Seals

11.7 Statutory authorities do not have to use their seals on all occasions they wish to evidence agreement to a documented decision. In the case of many transactions entered into by an authority it is sufficient for an Authority's senior officials to sign documents as agents of the authority.

11.8 The Audit included review of statutory authorities' use of common seals. The Audit's review shows that statutory authorities use their seals for different purposes. The Audit noted that no authority has formally decided on the types of contracts and other documents that should be formalised by affixing their seal to them.

11.9 The Long Service Leave Board only use their seal for large contracts and not all contracts. The University of Canberra affixes its seal to the degrees it awards to graduates and for some other purposes. Healthpact made very little use of their seal even though they make a large number of grants each year. The Legal Aid Commission and the Agents Board rarely used their seals.

11.10 On some occasions, entities entering into contracts with authorities may require that an authority's seal be used to evidence its agreement to proceed with a contract.

Audit Comments

11.11 ***Compliance with Legislation*** – The audit review did not disclose instances where authorities used their common seals in a manner that did not comply with enabling legislation. As described, however, there are very limited legislative requirements for statutory authorities in relation to the use of their common seals.

11.12 ***Suggestions for Legislative Change*** – It is suggested that consideration be given to amending the enabling legislation of statutory authorities to provide for their seals only to be used where such use has

been authorised by their boards.

11.13 *Suggestions for Better Practice* - Normally an Authority's seal is only used on the authority of the board or a committee of the board authorised for that purpose. This is consistent with requirements in the six enabling Acts mentioned above. It is suggested that the boards of statutory authorities formally resolve on the types of contracts and other documents that should be formalised by the affixing of a seal.

11.14 It is also usual for every document to which an authority's seal is affixed to be attested by a board member and countersigned by another board member, the chief executive officer or another person appointed by the board to countersign the document. It is suggested that all authorities should give consideration to determining what is required before their seals are used and who should sign documents on which the Authority's seal is affixed.

11.15 Under the model articles of association for Corporations Act companies, the directors of a company are required to ensure that its common seal is kept in a secure place. There is no equivalent provision for statutory authorities. It is suggested that boards of statutory authorities, if not already doing so, should ensure that their seals are kept in a secure place.

COMMON SEAL REGISTER

11.16 There are no legislative requirements for authorities to keep a register of the use of their seals. All authorities, except for two, keep a seal register. The Canberra Tourism and Events Corporation and the Cultural Facilities Corporation do not keep a register of the use of their seal.

Audit Comments

11.17 *Suggestion for Better Practice* - The use of a common seal register is sound practice as it keeps track of the authorised use of the seal and also assists in avoiding unauthorised use. It is suggested that all authorities should keep a register of the occasions on which their seal is used. The register should include reference to the board resolution which authorised the use of the seal; details of the document to which the seal was affixed; the date on which the seal was affixed and the names and signatures of the board members or other persons who signed and countersigned the relevant documents.

CONCLUSION

11.18 Common seals are important evidentiary devices used by statutory authorities. While many of the practices normally associated with the use and seals have been adopted by a number of Territory authorities, better practice has not been fully implemented in all Territory statutory authorities.

**AUTHORITIES AUDITED AND THEIR ENABLING
LEGISLATION**

Authority	Enabling Legislation
ACT Gambling and Racing Commission	Gambling and Racing Control Act 1999
ACT Health and Community Care Service Board	Health and Community Care Services Act 1996
ACT Health Promotion Board (Healthpact)	Health Promotion Act 1995
Agents Board	Agents Act 1968
Australian International Hotel School	Hotel School Act 1996
Building and Construction Industry Training Fund Board	Building and Construction Industry Training Levy Act 1999
Canberra Public Cemeteries Trust	Cemeteries Act 1933
Canberra Tourism and Events Corporation	Canberra Tourism and Events Corporation Act 1997
Construction Industry Long Service Leave Board	Long Service Leave (Building and Construction Industry) Act 1981
Cultural Facilities Corporation	Cultural Facilities Corporation Act 1997
Gungahlin Development Authority	Gungahlin Development Authority Act 1996
Kingston Foreshore Development Authority	Kingston Foreshore Development Authority Act 1999
Legal Aid Commission	Legal Aid Act 1977
National Exhibition Centre Trust	National Exhibition Centre Trust Act 1976
Stadiums Authority	Stadiums Authority Act 2000
University of Canberra	University of Canberra Act 1989

MODEL CODE OF CONDUCT FOR MEMBERS OF BOARDS

Members of the Board (*Board name*) are regarded as public office holders. As such, they have a duty to discharge duties and responsibilities entrusted to them according to the highest standards of conduct. The public has a right to expect that the public sector operates fairly, impartially and efficiently. Office holders may be required by the nature of their public office to accept restrictions on certain aspects of their private conduct. The (*Board name*) will meet expected standards if all members act in accordance with the principles set out in the code of conduct.

The following code of conduct embodies principles which should be observed by all Members.

- Members should perform their official duties honestly and impartially, uninfluenced by fear or favour.
- Members should be frank and honest in official dealings with colleagues.
- Members should avoid situations in which their private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict, with their public duty.
- Where a Member possesses, directly or indirectly, an interest which conflicts or might reasonably be thought to conflict with the Member's public duty, or improperly influence the Member's conduct in the discharge of the Member's responsibilities, the Member must disclose that interest, and where new or additional facts arise, the Member should disclose the further information.
- When the interests of a Member's immediate family are involved the Member should disclose those interests to the extent that they are known. Immediate family will ordinarily be taken to comprise only the Member's partner and dependent children, but may also include other members of their household or family when their interests are closely connected with the Member's interests.
- When a members possesses an interest which conflicts or might reasonably be thought to conflict with the duties of office and such interest is not prescribed as a qualification for that office, the Member should forthwith divest themselves of that interest; secure

GOVERNANCE ARRANGEMENTS OF SELECTED STATUTORY AUTHORITIES

their removal from the duties in question; or obtain the authorisation of the Chair of the board or committee or the minister to continue to discharge the duties.

- A Member shall not use information obtained in the course of official duties to gain direct or indirect pecuniary advantage for himself or herself or for any other person.
- A Member shall not allow the pursuit of his or her private interest to interfere with the proper discharge of their public duties.
- Where a Member has a direct interest in a matter which is the subject of discussion before the Board, the Member shall absent herself or himself from the room whilst the discussion and any decision on it is being conducted. If there is any doubt about whether a Member has a conflict that requires the Member to leave the room, the interest should be disclosed and the Chair of the Board will make a decision as to whether the Member is bound to leave the room during the discussion.
- A Member must not take any improper advantage or benefit from his or her appointment including:
 - (a) benefit for the discharge of the duties of the office, other than official benefits or complimentary tickets, programs or invitations to functions (including for example, gallery openings, first night parties and the like where the invitation and presence of the Member is public and obvious);
 - (b) any benefit, advantage or promise of future advantage whether for the Member or his or her immediate family or any business concern or trust with which they are associated or persons who are in, or seek to be in, any contractual special relations with Government (save for as above); or
 - (c) except as referred to above, accept any gift, hospitality or concessional travel offered in connection with the discharge of the duties of her or his office.
- All Members must be scrupulous in their use of public property and services and should not permit their misuse by other persons.

GOVERNANCE ARRANGEMENTS OF SELECTED STATUTORY AUTHORITIES

- All Members must strictly observe the duty of confidentiality and not disseminate any information that comes to them in their capacity as a Board Member. Also in particular, Members must not disseminate the Board's discussions and recommendations until the minister's decisions are made public.
- The Chair of the Board is normally the spokesperson for the Board, unless the Board otherwise agrees. The Chair would not normally publicly discuss recommendations to the minister which have not been accepted by the Minister, without first notifying the minister

PREVIOUS AUDIT REPORTS³¹

Reports Published in 1996

- 1. Legislative Assembly Members – Superannuation Payments/Members’ Staff – Allowances and Severance Payments**
- 2 1995 Taxi Plates Auction**
- 3 VMO Contracts**
- 4 Land Joint Ventures**
- 5 Management of Former Sheep Dip Sites**
- 6 Collection of Court Fines**
- 7 Annual Management Report For Year Ended 30 June 1996**
- 8 Australian International Hotel School**
- 9 ACT Cultural Development Funding Program**
- 10 Implementation of 1994 Housing Review**
- 11 Financial Audits with Years Ending to 30 June 1996**

Reports Published in 1997

- 1 Contracting Pool and Leisure Centres**
- 2 Road and Streetlight Maintenance**
- 3 1995-96 Territory Operating Loss**
- 4 ACT Public Hospitals - Same Day Admissions
Non Government Organisation - Audit of Potential Conflict of Interest**
- 5 Management of Leave Liabilities**
- 6 The Canberra Hospital Management’s Salaried Specialists Private Practice**
- 7 ACT Community Care - Disability Program and Community Nursing**
- 8 Salaried Specialists’ Use of Private Practice Privileges**
- 9 Fleet Leasing Arrangements**
- 10 Public Interest Disclosures - Lease Variation Charges and Corrective Services**
- 11 Annual Management Report for Year Ended 30 June 1997**
- 12 Financial Audits with Years Ending to 30 June 1997**
- 13 Management of Nursing Services**

³¹ 46 Reports were issued prior to 1996. Details can be obtained from the ACT Auditor-General’s Office or the ACT Auditor-General’s homepage: <http://www.audit.act.gov.au>.

Reports Published in 1998

- 1 Management of Preschool Education**
- 2 Lease Variation Charges - Follow-up Review**
- 3 Major IT Projects - Follow-up Review**
- 4 Annual Management Report for Year Ended 30 June 1998**
- 5 Management of Housing Assistance**
- 6 Assembly Members' Superannuation and Severance Payments to Former Members' Staffers**
- 7 Magistrates Court Bail Processes**
- 8 Territory Operating Losses and Financial Position**
- 9 Financial Audits with Years Ending To 30 June 1998**
- 10 Management of Schools Repairs and Maintenance**
- 11 Overtime Payment To A Former Legislative Assembly Member's Staffer**

Reports Published in 1999

- 1 Stamp Duty on Motor Vehicle Registrations**
- 2 The Management of Year 2000 Risks**
- 3 Annual Management Report for Year Ended 30 June 1999**
- 4 Financial Audits With Years Ending to 30 June 1999**

Reports Published in 2000

- 1 Bruce Stadium Redevelopment — Summary Report**
- 2 Bruce Stadium Redevelopment — Value for Money**
- 3 Bruce Stadium Redevelopment — Costs and Benefits**
- 4 Bruce Stadium Redevelopment — Decision to Redevelop the Stadium**
- 5 Bruce Stadium Redevelopment — Selection of the Project Manager**
- 6 Bruce Stadium Redevelopment — Financing Arrangements**
- 7 Bruce Stadium Redevelopment — Stadium Financial Model**
- 8 Bruce Stadium Redevelopment — Actual Costs and Cost Estimates**
- 9 Bruce Stadium Redevelopment — Market Research and Marketing**

- 10 Bruce Stadium Redevelopment — Stadium Hiring Agreements**
- 11 Bruce Stadium Redevelopment — Lawfulness of Expenditure**
- 12 Bruce Stadium Redevelopment — Governance and Management**
- 13 Annual Management Report for the Year Ended 30 June 2000**

Reports Published in 2001

- 1. Financial Audits with Years Ending to 30 June 2000**
- 2. Enhancing Professionalism and Accountability**
- 3. Market Research and Marketing (Second Report)**
- 4. Peer-Based Drug Support Services Tender – 1998**
- 5. The Administration of Payroll Tax**
- 6. Annual Management Report for the Year Ended 30 June 2001**
- 7. Managing Canberra Urban Parks and Open Spaces**
- 8. Canberra Tourism and Events Corporation – Relocation to Brindabella Business Park**
- 9. Agents Board – Financial Administration of Training Grant Program**
- 10. Corrective Services – Review of Certain Allegations**
- 11. Financial Audits with Years Ending to 30 June 2001**
- 12. The Freedom of Information Act**

Reports Published in 2002

- 1. Special Purpose Review of Part of the Commission of Audit Report on the State of the Territory's Finances at 31 October 2001**
- 2. Operation of the Public Access to Government Contracts Act**

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