

Due diligence for candidates for public sector boards

Public sector governance

Do you want to be a board member of a public sector entity?

Private sector individuals who are seeking to join or have been approached to join the board of a public sector entity need to be aware that public sector entities and their boards operate in a different context from the private sector.

The political environment, with its emphasis on checks and balances and systems that focus on legislatively-based notions of ethics and codes of conduct and the understanding that public sector boards have a significant corporate social responsibility role, gives rise to the need for the prospective board member to form a broad understanding and appreciation of the governance framework and accountability mechanisms applicable to their prospective entity. Specifically, they need to understand where the board sits within this framework and the roles and responsibilities of the relevant participants in the governance framework; importantly, those of the responsible Minister(s), the board and its committees where applicable, the CEO and other stakeholders.

Moreover, governance arrangements of public sector entities can be complicated and inter-related in terms of the nature of their accountabilities and the type and range of stakeholders they are accountable to and often present a complex picture. Consequences for boards that are not compliant may include criminal prosecution; civil action for damages for breach of statutory duty; damage to reputation; the appointment of an administrator; and resignation or removal.

Government boards and committees play an important strategic role in providing leadership, direction and accountability across the public sector. There are many types of government boards and committees including:

- boards of public trading enterprises
- boards of statutory authorities
- policy coordination committees
- research committees
- tribunals

- special purpose boards (for example, registration boards, appeal boards)
- public trusts
- advisory committees.

The purpose of government boards or entities can vary considerably, spanning:

- guidance and direction — ensuring corporate compliance and management accountability; endorsing and monitoring strategic plans
- regulatory — coordinating policies, plans or projects within and across portfolios
- adjudication — determining standards; monitoring and regulating practice; granting licences; investigating complaints; and making judgments
- advisory — advising and making recommendations on policies, plans and practices.

First-time board members in the public sector should understand the type of entity (statutory board; statutory authority; committee; panel or equivalent advisory) and its associated legislative, legal and administrative arrangements, as well as the functions and objectives of the board and its duties and obligations. The prospective member may even need to touch upon the basics of the process such as durations of appointment, required commitment and meeting attendance.

It should be noted that there will be an expectation that the public sector board will undertake consultation in regards to any new nominations, and the relevant government agency will undertake due diligence on any potential board candidate. These checks may include:

- details as to relevant skills and qualifications
- biographical details
- working with children checks (for appropriate entities)
- details of any other material directorships
- findings of any adverse information that may be perceived to influence the candidate's capacity to exercise independent judgment
- criminal history.

In some cases there will be no one person or authority such as a company secretary (board secretariat or administrator), or other nominated contact to provide clarification or support in the pre-induction process. It is advisable that the individual interested in a public sector board role conducts due diligence appropriate to the sector and seeks information about the specific entity and its stakeholder management.

It is therefore **good governance** for a prospective board member of a public sector entity to undertake due diligence of the entity before acceptance of the role, particularly because induction occurs after appointment. Reliance on the induction process comes after consent to act in the role and appointment. Coming to an understanding of the governance framework and accountability mechanisms operating in the public sector and where the board sits in that framework present particular challenges and therefore public sector board work may not be suitable for all individuals.

The challenges in understanding the governance framework of a public sector entity

Considerations which are relevant to anyone considering a membership of a board in the public sector lie in the areas of:

- **Regulatory framework** — it is important to understand the enabling legislation of the entity. There may also be omnibus legislation to which the entity is subject, such as the *NSW State-Owned Corporations Act*, or a specific statute for particular boards or authorities.
- **Where the board sits within the public sector** — it is usual practice for the board to be accountable and report to the relevant Minister and in some cases it is customary for the board to report to a department as the Minister's agent; however, there can be a variety of types of boards and where the board is a governing board the entity can take a variety of legal forms. This has implications for the accountability mechanisms which need to be understood. Moreover, it is important for the prospective board member to understand if the board is a decision-making board or an advisory board with no decision-making powers.
- **Accountability mechanisms** — by its nature, the role of the board and the role of the Minister may

not be documented expansively, yet the relationship is fundamental to understanding the accountability mechanisms that are in place. For example, the board may expect to make decisions, yet those decisions may need to go to the Minister for approval. There are variances in the relationships that public sector entity boards have with their Minister — all have operational autonomy to carry out their public function at arm's length from central government; however, all are accountable to their Minister(s). Some public entities have greater degrees of autonomy than others (often regulators and integrity bodies), which is usually specified in legislation. Other accountabilities are also in place through integrity and central agencies such as the Auditor-General, the Public Service Commission, the Ombudsman, anti-corruption bodies and Department of Treasury and Finance. This will vary from jurisdiction to jurisdiction.

- **Authority of stakeholders** — in the public sector various stakeholders are not just interested parties, but have significant involvement and influence, which has implications for how boards operate in this sector. The frequency, nature and level of intervention that stakeholders such as the Minister, Auditor-General, Public Service Commission, Ombudsman and others may have can prove very challenging to private sector individuals who are familiar with being primarily accountable to shareholders. It is important to understand that for many boards and committees the Minister will often have special powers to provide direction in certain circumstances.
- **Stakeholder management** — as well as managing the stakeholders with authority over the public sector entity and its board, any public sector entity board has to also take into consideration a broader group of stakeholders. These may include the public sector entity's customers and clients; the broader community; other Ministers who are responsible for government functions affected by the operations of the entity; other government departments and agencies which cooperate with the entity; the entity's business partners including companies and NGOs; and others such as local governments.
- **Appointment and removal of members** — members of public entity boards may be appointed and removed by the Minister or a higher level of authority, rather than by the board. Termination of appointments prior to the expiry of the term may be possible if certain conditions are met. Some boards have the

power to both appoint and/or remove the CEO. It is also important to note that public sector employers may have additional regulatory or policy requirements that must be complied with in relation to executive appointments and the terms and conditions of employment of those executives. This is often beyond the board's control.

- **Shifting political framework** — the impact of changes in government, including machinery of government changes, will render more complex the challenge of implementing changes in policy and interacting with different Ministers and departments.

How to conduct due diligence

It is **good governance** to seek to be as informed as possible about the governance framework and accountability mechanisms in advance of taking up a board appointment in the public sector. Being informed in this way will provide the member with the capacity to add value in their role on the board.

While large public sector entities are likely to have the equivalent of a company secretary, it may be the case that smaller public sector entities will not have a direct person who can assist a private sector individual to understand the complexities and levels of influence and involvement of stakeholders applicable to a particular board.

A checklist for individuals prior to induction should include:

- Read the annual report, which may be found on the entity's website, as a key starting point. The report will provide a level of information concerning the multiple stakeholders with influence on the entity and its board, but may not provide the level of detail/information concerning the authority of those stakeholders which is of interest to the board candidate.
- Obtain information about the objectives and functions of the organisation, generally from the entity's website. The entity's strategy, business plan, board charter and financial reports will assist in identifying the objectives and performance of the public sector entity.
- Check that there are current policies and processes in place to promote the integrity of the entity. They should cover such things as code of conduct, internal and external auditors, fraud and corruption control.

- Examine documents in relation to the finances of the agency to ensure that the agency has a stable financial position and that the financials for the previous year were not qualified by the auditors. Check the relevant Auditor-General's website for Reports to Parliament which may involve specific reference to the entity of themed 'reviews' of the sector in which the entity operates. Some boards and committees may be required to comply with Treasury's requirements, for example for audit and risk management, and therefore it is advisable to review the Auditor-General's report on these aspects as well.
- Undertake an internet search on the public sector entity as this is likely to provide information on who the CEO is and how long they have been in the position, and may also provide useful information that cannot be gleaned from more formal sources. The annual report could help with some of this.
- Search the reports of integrity bodies such as the Independent Commission Against Corruption, Ombudsman or Auditor-General as a matter of prudence to identify if there are any areas of concern that a board candidate would wish to understand in relation to that particular entity or industry sector.
- Seek to be introduced to one or more other persons on the board with whom the entity can be discussed.
- If possible, seek references from other board members to gather intelligence about the culture and function of the board, the tenure of board members and the entity itself.
- Be aware of any recent media interest in the operations of the public sector entity.

Questions for the board applicant to consider include:

- What type of board is it?
- Does the board have decision-making powers?
- Does the board advise a Minister directly?
- How may the Minister give direction to the board or committee?
- Does the board have the capacity to appoint and remove the CEO (if appropriate)?
- Does the board provide a channel for industry and/or community consultation?
- What is the enabling legislation and omnibus legislation governing the entity?

- Can the authority and intervention powers of relevant stakeholders be identified?
- What is the level of commitment required?
- How is the remuneration payable to board members established?
- What is the extent of a board member's legal liability?

It should be noted that the appointment process may take many months and once inducted it may take some time before the member can contribute effectively to the governance of the entity.