



# Legal Duties and Liabilities

A Guide for Commonwealth  
Board Members

July 2015

MinterEllison





## Contents

1. Introduction .....	3
1.1 About this guide .....	3
1.2 Key concepts.....	4
2. Duties .....	6
2.1 General duties .....	7
2.2 Fiduciary duties at general law .....	12
2.3 Additional duties of accountable authorities of corporate Commonwealth entities.....	12
2.4 Specific PGPA Act requirements .....	14
2.5 Other sources of potential liability .....	18
3. Managing exposure .....	19
4. Checklist.....	25
5. Contacts .....	27



# 1. Introduction

## 1.1 About this guide

Board members of Commonwealth statutory authorities and Commonwealth controlled companies are subject to a range of duties.

Appointees and prospective appointees to such positions should be aware of their legal obligations.

This guide covers legal duties and liabilities of Commonwealth board members, focusing on the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**), *Public Governance, Performance and Accountability Rule 2014* (Cth) (**PGPA Rule**) and *Corporations Act 2001* (Cth) (**Corporations Act**). It does not consider the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), or any requirements that may be imposed by a statutory authority's enabling legislation or a company's constitution.


This guide should be of particular interest to those serving or considering serving on boards of Commonwealth statutory authorities and Commonwealth controlled companies (ie corporate Commonwealth entities and Commonwealth companies under the PGPA Act). It does not address the position of non-corporate Commonwealth entities or advisory boards under the PGPA Act.

This guide includes:

- an outline of the key duties of Commonwealth board members, the sources of those duties and the possible liabilities for breach;
- an explanation of the key measures for board members to manage their potential exposure to personal liability; and
- a checklist of issues to assist those considering joining a Commonwealth board.

This guide is current as at 1 July 2015.

## 1.2 Key concepts

Corporate Commonwealth entity	Commonwealth company	 Corporate Commonwealth entities and Commonwealth companies are listed in the flipchart issued by the Department of Finance, available from <a href="http://www.finance.gov.au/resource-management/governance/#flipchart">http://www.finance.gov.au/resource-management/governance/#flipchart</a>
<b>Entity</b>  A corporate Commonwealth entity is a body corporate that is: <ul style="list-style-type: none"><li>■ established by a law of the Commonwealth; or</li><li>■ established under a law of the Commonwealth (other than a Commonwealth company) and prescribed by an Act or rules made under the PGPA Act to be a Commonwealth entity.<sup>1</sup></li></ul> However, there are a small number of bodies corporate established by a law of the Commonwealth which, under their enabling legislation, are treated for the purposes of the PGPA regime as non-corporate Commonwealth entities rather than corporate Commonwealth entities. The High Court and the Future Fund Board of Guardians are not Commonwealth entities. <sup>2</sup>  Commonwealth companies are not corporate Commonwealth entities.	 A Commonwealth company is a Corporations Act company that the Commonwealth controls (other than a subsidiary of a Commonwealth company, corporate Commonwealth entity or Future Fund Board of Guardians). <sup>3</sup>  The Commonwealth will be taken to control a company only if it: <ul style="list-style-type: none"><li>■ controls the composition of the board (the Commonwealth will be taken to do so if the Commonwealth can appoint or remove all, or the majority, of the directors<sup>4</sup>);</li><li>■ is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting; or</li><li>■ holds more than one half of the issued share capital (excluding any part that carries no right to participate beyond a specified amount in a distribution of either profits or capital).<sup>5</sup></li></ul> Corporate Commonwealth entities are not Commonwealth companies.  A wholly-owned Commonwealth company is a Commonwealth company other than one where any of the shares are beneficially owned by a person other than the Commonwealth. <sup>6</sup>	
<b>Legislation</b> <ul style="list-style-type: none"><li>■ Enabling legislation of relevant entity</li><li>■ PGPA Act</li></ul>	<ul style="list-style-type: none"><li>■ Corporations Act</li><li>■ PGPA Act</li></ul>	

<sup>1</sup> Sections 10 and 11 PGPA Act and section 7A PGPA Rule

<sup>2</sup> Section 10(2) PGPA Act

<sup>3</sup> Section 89(1) PGPA Act

<sup>4</sup> Section 89(3) PGPA Act

<sup>5</sup> Section 89(2) PGPA Act

<sup>6</sup> Section 90 PGPA Act



## 1.2 Key concepts cont'd

Corporate Commonwealth entity	Commonwealth company	
<p><b>People</b></p> <p>Governance arrangements for a corporate Commonwealth entity will be established by its enabling legislation.</p> <p>The PGPA Act uses the term 'accountable authority' to refer to the head of a Commonwealth entity. For corporate Commonwealth entities, the <b>accountable authority</b> is (unless otherwise prescribed):</p> <ul style="list-style-type: none"> <li>■ if the entity has a board, council or other governing body – that board, council or governing body; or</li> <li>■ otherwise – all of the members of the entity.<sup>7</sup></li> </ul> <p>An <b>official</b> of a corporate Commonwealth entity is a person who is in, or forms part of, the entity. This includes:</p> <ul style="list-style-type: none"> <li>■ members of the accountable authority of the entity;</li> <li>■ officers, employees and members of the entity; and</li> <li>■ persons prescribed to be officials of the entity.</li> </ul> <p>However, the following are not officials:</p> <ul style="list-style-type: none"> <li>■ Ministers;</li> <li>■ judges;</li> <li>■ consultants or independent contractors of the entity (unless prescribed); and</li> <li>■ persons prescribed not to be an official of the entity.<sup>8</sup></li> </ul>	<p>A Commonwealth company has a board of <b>directors</b>.</p> <p>An <b>officer</b> of a company includes:</p> <ul style="list-style-type: none"> <li>■ a director or secretary of the company; and</li> <li>■ a person: <ul style="list-style-type: none"> <li>— who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the company;</li> <li>— who has the capacity to affect significantly the company's financial standing; or</li> <li>— in accordance with whose instructions or wishes the directors of the company are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or the person's business relationship with the directors or the company).</li> </ul> </li> </ul> <p>The definition of officer also includes receivers, administrators and liquidators, among others.<sup>10</sup></p>	<div data-bbox="1809 400 1865 456"></div> <p><b>GBE</b></p> <p>A corporate Commonwealth entity or Commonwealth company may be prescribed by rules under the PGPA Act as a <b>government business enterprise</b> or <b>GBE</b>.<sup>9</sup> As at the date of this guide, the PGPA Rule prescribes 2 corporate Commonwealth entities and 4 Commonwealth companies as GBEs.</p> <p>Some PGPA Act requirements apply differently to GBEs.</p> <p>Additional guidelines apply to GBEs. As at the date of this report, <a href="#">Resource Management Guide 126 – Commonwealth Government Business Enterprise Governance and Oversight Guidelines</a> (June 2015) applies to GBEs that are Commonwealth entities or wholly-owned Commonwealth companies.</p>

<sup>7</sup> Sections 8 and 12 PGPA Act

<sup>9</sup> Section 8 PGPA Act and section 5 PGPA Rule

<sup>8</sup> Section 13 PGPA Act

<sup>10</sup> Section 9 Corporations Act



# 2. Duties

This part outlines key duties and liabilities of Commonwealth board members.

Board members of Commonwealth companies are subject to directors' duties under the Corporations Act. The PGPA Act imposes similar duties on board members of corporate Commonwealth entities. These statutory duties are compared in section 2.1, while section 2.2 discusses similar non-statutory duties.

Board members of corporate Commonwealth entities are subject to a number of additional high-level duties under the PGPA Act, which do not apply to board members of Commonwealth companies. These are set out in section 2.3.

In addition to these general duties, the PGPA Act and Corporations Act place a series of specific obligations on Commonwealth board members in relation to matters such as reporting, accounts and audit. Section 2.4 compares the position for corporate Commonwealth entities and Commonwealth companies.

A number of other potential sources of personal liability for Commonwealth board members are discussed in section 2.5.





### 2.1 General duties

This section sets out the key general duties of Commonwealth board members.

Corporate Commonwealth entity	Commonwealth company
<p><b>Application</b></p> <p>Duties apply to all officials of corporate Commonwealth entities. This includes board members (as members of the accountable authority), as well as officers and employees.</p> <p><b>Duty of care and diligence</b></p> <p>Officials must exercise their powers, perform their functions and discharge their duties with the degree of care and diligence that a reasonable person would exercise if the person were an official of a Commonwealth entity in the Commonwealth entity's circumstances and occupied the position held by, and had the same responsibilities within the Commonwealth entity as, the official.<sup>11</sup></p> <p>Rules under the PGPA Act may prescribe circumstances in which the duty of care and diligence is taken to be met. However, as at the date of this guide, there is no rule in place.</p> <p>There is no equivalent to the 'business judgement rule' (see next column).</p>	<p>Duties apply to directors and officers of Commonwealth companies. Some duties also apply to employees (as indicated below).</p> <p>Directors and other officers must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if the person were a director or officer of a company in the company's circumstances and occupied the office held by, and had the same responsibilities within the company as, the director or officer.<sup>12</sup></p> <p>This duty is subject to the <b>business judgment rule</b>.<sup>13</sup> The essence of the rule is that a director or officer of a company will be taken to have met the duty of care and diligence, both under the legislation and at general law, in making a business judgment (defined as any decision to take or not take action in respect of a matter relevant to the business operations of the company) if the director or officer:</p> <ul style="list-style-type: none"> <li>■ made the judgment in good faith for a proper purpose;</li> <li>■ did not have a material personal interest in the subject matter of the judgment;</li> <li>■ informed themselves about the subject matter of the judgment to the extent they reasonably believed to be appropriate; and</li> <li>■ rationally believed that the judgment was in the best interests of the company.</li> </ul> <p>The director's or officer's belief that a business judgment is in the best interests of the company is a rational one unless the belief is one that no reasonable person in the director's or officer's position would hold.</p> <p>The protection provided by the business judgment rule only applies in relation to the duty of care and diligence, not to any other duty.</p>

<sup>11</sup> Section 25 PGPA Act

<sup>12</sup> Section 180(1) Corporations Act

<sup>13</sup> Section 180(2) Corporations Act



### 2.1 General duties cont'd

Corporate Commonwealth entity	Commonwealth company
<p><b>Duty of good faith and proper purpose</b></p> <p>Officials must exercise their powers, perform their functions and discharge their duties honestly, in good faith and for a proper purpose.<sup>14</sup></p> <p>The PGPA Act duty to act in good faith does not refer to 'in the best interests of the Commonwealth entity'. This is consistent to an extent with some of the additional duties imposed on accountable authorities referred to below which, for example, require accountable authorities to consider the effects of decisions on public resources generally. However, board members should be aware that fiduciary duties owed to the entity continue to apply (see section 2.2 below).</p>	<p>Directors and other officers must exercise their powers and discharge their duties in good faith in the best interests of the company and for a proper purpose.<sup>15</sup></p> <p>There have been many cases on the meaning of the term 'in the best interests of the company'. Subject to special duties owed to creditors prior to insolvency, the duty to act in good faith is owed to the company itself.</p> <p>This duty presents unique issues in company groups where directors may feel that they must act in the interests of their appointer or in the interests of a particular shareholder. Where the company is a wholly-owned Commonwealth company, issues arise as to when the board can have regard to the interests of the Commonwealth as shareholder. The issue is more profound where the company is owned by both government and industry.</p>
<p><b>Duty in relation to use of position</b></p> <p>Officials must not improperly use their position to gain or seek to gain a benefit or advantage for themselves or another person, or to cause or seek to cause detriment to the corporate Commonwealth entity, the Commonwealth or another person.<sup>16</sup> Accordingly, this duty is broader in relation to corporate Commonwealth entities than Commonwealth companies (see next column).</p>	<p>Directors, officers and employees of a company must not improperly use their position to gain an advantage for themselves or for another person, or to cause detriment to the company.<sup>17</sup></p>
<p><b>Duty in relation to use of information</b></p> <p>Officials must not improperly use information obtained by virtue of their position to gain or seek to gain a benefit or advantage for themselves or another person, or to cause or seek to cause detriment to the Commonwealth entity, the Commonwealth or another person.<sup>18</sup> Accordingly, this duty is broader in relation to corporate Commonwealth entities than Commonwealth companies (see next column).</p>	<p>Directors, officers and employees of a company must not improperly use information obtained by virtue of their position to gain an advantage for themselves or for another person, or to cause detriment to the company.<sup>19</sup></p>

<sup>14</sup> Section 26 PGPA Act

<sup>15</sup> Section 181 Corporations Act

<sup>16</sup> Section 27 PGPA Act

<sup>17</sup> Section 182 Corporations Act

<sup>18</sup> Section 28 PGPA Act

<sup>19</sup> Section 183 Corporations Act

### 2.1 General duties cont'd

Corporate Commonwealth entity	Commonwealth company
<p><b>Duty in relation to personal interests</b></p> <p><b>Disclosure</b></p> <p>An official of a corporate Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose details of the interest.<sup>20</sup> For members of accountable authorities, the interest must be disclosed orally or in writing to each other member of the accountable authority at a meeting of the members of the accountable authority.<sup>21</sup> A number of types of interest are specifically excluded.<sup>22</sup></p> <p>The term 'material personal interest' is not defined in the PGPA Act or PGPA Rule. The PGPA Act does not require that an interest be financial to be considered a material personal interest.</p> <p>This requirement does not limit any statutory or general law rule about conflicts of interest.<sup>23</sup> Additional requirements relating to conflicts of interests may appear in enabling legislation (for example, an obligation to disclose interests to the Minister). Board members should be aware that fiduciary duties continue to apply, and may separately require disclosure and management of conflicts of interest which do not relate to material personal interests (see section 2.2 below).</p> <p><b>Voting</b></p> <p>Generally, if a member of an accountable authority has a material personal interest in a matter which is being considered at a meeting of the members of the accountable authority, the member must not be present or vote.</p> <p>The members of the accountable authority who do not have a material personal interest may decide that the interested member may be present and/or vote. In certain circumstances, the responsible Minister may declare that the interested member may be present and/or vote.<sup>24</sup></p> <p>However, board members should be aware that fiduciary duties owed to the entity continue to apply (see section 2.2 below).</p>	<p><b>Disclosure</b></p> <p>Directors must give notice to the other directors of material personal interests that relate to the affairs of the company. Notice can be given at a directors' meeting or by standing notice.<sup>25</sup> A number of types of interest are specifically excluded.</p> <p>The term 'material personal interest' is not defined in the Corporations Act. The Corporations Act does not require that an interest be financial to be considered a material personal interest.</p> <p>This requirement has effect in addition to any general law rule or provision in a company's constitution about conflicts of interest.<sup>26</sup> Board members should be aware that fiduciary duties continue to apply, and may separately require disclosure and management of conflicts of interest which do not relate to material personal interests (see section 2.2 below).</p> <p><b>Voting</b></p> <p>For proprietary companies, the issue of whether or not the director may vote on the matter is usually regulated by the company constitution, and this frequently allows a director to vote provided that notice of the interest has been given (as does the corresponding 'replaceable rule' in section 194 of the Corporations Act).</p> <p>For public companies (which include companies limited by guarantee), a director with a material personal interest in a matter that is being considered at a directors' meeting must not be present or vote, subject to specified exceptions. The Corporations Act does not allow the company constitution to relax this restriction, although the board may follow a process on a case by case basis to approve the director's participation.<sup>27</sup></p> <p>However, directors should be aware that fiduciary duties owed to the company continue to apply (see section 2.2 below).</p>

<sup>20</sup> Section 29 PGPA Act

<sup>23</sup> Section 31 PGPA Act

<sup>26</sup> Section 193 Corporations Act

<sup>21</sup> Section 14 PGPA Rule

<sup>24</sup> Section 15 PGPA Rule

<sup>27</sup> Section 195 Corporations Act

<sup>22</sup> Section 12 PGPA Rule

<sup>25</sup> Sections 191 and 192 Corporations Act



### 2.1 General duties cont'd

Corporate Commonwealth entity	Commonwealth company
<p><b>Sanctions</b></p> <p>There is no civil penalty or criminal liability for a breach of these statutory duties under the PGPA Act.</p> <p>Depending on the severity of the breach, criminal sanctions may apply, for example, under the <i>Crimes Act 1914</i> (Cth).</p> <p>The appointment of a member of an accountable authority of a corporate Commonwealth entity may be terminated if the member contravenes one of these duties.<sup>28</sup></p> <p>These statutory duties are based on similar fiduciary duties which continue to apply (see section 2.2 below). Other remedies (including compensation) are available where there is a breach of a fiduciary duty.</p> <p>Where a board member is also an employee of the corporate Commonwealth entity or the Commonwealth, employment related sanctions may apply.</p> <p>Enabling legislation may provide other sanctions (for example, in relation to conflicts of interest or secrecy provisions).</p>	<p>There are potential civil penalties under the Corporations Act for breach of the following duties:</p> <ul style="list-style-type: none"> <li>■ duty of care and diligence;</li> <li>■ duty of good faith;</li> <li>■ duty in relation to use of position; and</li> <li>■ duty in relation to use of information.<sup>29</sup></li> </ul> <p>Civil penalties include fines, orders to pay compensation for damage suffered by the company, and disqualification from managing corporations.</p> <p>There is potential criminal liability for breach of the following duties:</p> <ul style="list-style-type: none"> <li>■ duty of good faith (if there is recklessness or intentional dishonesty);</li> <li>■ duty in relation to use of position (if there is dishonesty and intention or recklessness); and</li> <li>■ duty in relation to use of information (if there is dishonesty and intention or recklessness).<sup>30</sup></li> </ul> <p>The penalty specified is 2,000 penalty units (\$340,000) or imprisonment for 5 years, or both.</p> <p>A breach by a company director of the duty to disclose material personal interests is a criminal offence of strict liability, with a penalty of \$1,700 or imprisonment for 3 months or both.</p> <p>A breach by a public company director of the restriction on being present or voting is a criminal offence of strict liability, with a penalty of \$850.<sup>31</sup></p> <p>The statutory duties are based on similar fiduciary duties which continue to apply (see section 2.2 below). Other remedies (including compensation) are available where there is a breach of a fiduciary duty.</p> <p>Where a board member is also an employee of the Commonwealth company or the Commonwealth, employment related sanctions may apply.</p>

<sup>28</sup> Section 30 PGPA Act

<sup>29</sup> Section 1317E Corporations Act

<sup>30</sup> Section 184 Corporations Act

<sup>31</sup> Schedule 3 Corporations Act

### 2.1 General duties cont'd

Corporate Commonwealth entity	Commonwealth company
<p><b>Reliance on expert advice</b></p> <p>The PGPA Act does not contain an equivalent provision to the Corporations Act provision regarding when members of an accountable authority may reasonably rely on expert advice (see next column).</p>	<p>For the purposes of determining whether a director has performed one of these duties under the Corporations Act or an equivalent general law duty, there is a rebuttable presumption that a director's reliance on information or professional or expert advice is reasonable in certain circumstances.<sup>32</sup> A director's reliance on information or advice is taken to be reasonable, unless the contrary is proved, if it was given or prepared by:</p> <ul style="list-style-type: none"> <li>■ an employee of the company the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;</li> <li>■ a professional adviser or expert in relation to matters the director believes on reasonable grounds to be within the person's professional or expert competence;</li> <li>■ another director or officer in relation to matters within the director's or officer's authority; or</li> <li>■ a committee of directors on which the director did not serve in relation to matters within the committee's authority,</li> </ul> <p>and the reliance on it was made in good faith after making an independent assessment of the information or advice, having regard to the director's knowledge of the company and the complexity of the structure and operations of the company.</p>
<p><b>Delegation</b></p> <p>Enabling legislation may permit the accountable authority to delegate powers.</p> <p>The PGPA Act does not contain an equivalent provision to the Corporations Act provision regarding the effect of delegation on liability (see next column).</p>	<p>The Corporations Act authorises the directors of a company to delegate any of their powers to a committee of directors, a director, an employee of the company or any other person, subject to any restrictions in the constitution of the company.<sup>33</sup> However, a director will continue to be responsible for the exercise of the power by the delegate unless:</p> <ul style="list-style-type: none"> <li>■ the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors by the Corporations Act and the company's constitution; and</li> <li>■ the director believed on reasonable grounds, in good faith and after making proper inquiry if the circumstances indicated the need for inquiry that the delegate was reliable and competent in relation to the power delegated.<sup>34</sup></li> </ul>



#### Further information

[Resource Management Guide 203 – General duties of officials](#) issued by the Department of Finance.

[Public Sector Governance: Strengthening performance through good governance](#) issued by the Australian National Audit Office.

<sup>32</sup> Section 189 Corporations Act    <sup>33</sup> Section 198D Corporations Act    <sup>34</sup> Section 190 Corporations Act



### 2.2 Fiduciary duties at general law

The general duties in the PGPA Act and Corporations Act are based on similar, but not identical, non-statutory duties applicable to directors of companies, referred to as fiduciary duties.

These duties continue to apply to directors of Commonwealth companies.<sup>35</sup> Similar duties are likely to apply to board members of corporate Commonwealth entities, subject to the circumstances and enabling legislation.

These duties are owed to the entity and, at a high level, include the following:

- duty to act in good faith in the best interests of the entity;
- duty to act for a proper purpose;
- duty to avoid conflicts of interest;
- duty not to improperly use entity property, information and opportunities;
- duty of reasonable care and diligence; and
- duties in relation to retaining and exercising discretions.

Legal action can be taken against a person for both breach of a statutory duty and breach of the corresponding fiduciary duty.<sup>36</sup> An action for breach of a fiduciary duty may be taken in certain circumstances as both the duty and the available remedies may be wider than under the statutory provisions. For example, the following remedies may be available for a breach of fiduciary duty:

- injunction and declaration;
- damages and compensation;
- account of profits;
- rescission of contracts; and
- proprietary remedies.

### 2.3 Additional duties of accountable authorities of corporate Commonwealth entities

In addition to the general duties discussed above, the PGPA Act applies specific duties to accountable authorities of corporate Commonwealth entities. The duties discussed in this part do not apply to directors of Commonwealth companies.

#### Corporate Commonwealth entity

##### Proper use and management of resources

The accountable authority of a corporate Commonwealth entity must govern the entity in a way that promotes the proper use and management of public resources for which the accountable authority is responsible.<sup>37</sup>

In this context, proper means 'efficient, effective, economical and ethical'.<sup>38</sup>

Public resources means:

- relevant money: money standing to the credit of any bank account of the Commonwealth or a corporate Commonwealth entity or money that is held by the Commonwealth or a corporate Commonwealth entity;
- relevant property: property (other than relevant money) that is owned or held by the Commonwealth or a corporate Commonwealth entity, or any other thing prescribed by rules under the PGPA Act; and
- appropriations.<sup>39</sup>

The accountable authority must also take into account the effect of its decisions on public resources generally.<sup>40</sup>

##### Achieve entity purposes

The accountable authority of a corporate Commonwealth entity must govern the entity in a way that promotes the achievement of the purposes of the entity.<sup>41</sup> 'Purposes' is defined to include the objectives, functions or role of the entity.<sup>42</sup> The purposes of a corporate Commonwealth entity will generally be set out in enabling legislation and should also be identified in its corporate plan.

##### Financial sustainability

The accountable authority of a corporate Commonwealth entity must govern the entity in a way that promotes the financial sustainability of the entity.<sup>43</sup> This recognises the importance of medium to long term planning and budgeting.<sup>44</sup>

<sup>35</sup> Section 185 Corporations Act

<sup>38</sup> Section 8 PGPA Act

<sup>41</sup> Section 15(1)(b) PGPA Act

<sup>44</sup> Replacement explanatory memorandum to the *Public Governance, Performance and Accountability Bill 2013* (Cth), paragraph 135

<sup>36</sup> Section 31 PGPA Act

<sup>39</sup> Section 8 PGPA Act

<sup>42</sup> Section 8 PGPA Act

<sup>37</sup> Section 15(1)(a) PGPA Act

<sup>40</sup> Section 15(2) PGPA Act

<sup>43</sup> Section 15(1)(c) PGPA Act

### 2.3 Additional duties of accountable authorities of corporate Commonwealth entities cont'd

#### Corporate Commonwealth entity

##### Risk management and internal control systems

The accountable authority of a corporate Commonwealth entity must establish and maintain an appropriate system of risk oversight and management and an appropriate system of internal control.<sup>45</sup> This includes implementing measures directed at ensuring officials comply with the **finance law** (ie the PGPA Act, rules and other instruments made under it, and Appropriation Acts).

The accountable authority must take all reasonable measures to prevent, detect and deal with fraud relating to the entity, including taking a number of specified actions such as implementing a fraud control plan.<sup>46</sup>

##### Encourage cooperation

The accountable authority of a corporate Commonwealth entity must encourage officials of the entity to cooperate with others to achieve common objectives, where practicable.<sup>47</sup> This duty does not force cooperation, but aims to encourage it where appropriate.<sup>48</sup> 'Others' is to be interpreted broadly to include other Commonwealth entities, States and Territories and the private and not-for-profit sectors.<sup>49</sup>

##### Imposing requirements on others

The accountable authority of a corporate Commonwealth entity must, when imposing requirements on others in relation to the use or management of public resources, take into account the risks associated with that use or management and the effects of imposing those requirements.<sup>50</sup> For example, when procuring goods or services or making grants. This duty is intended to ensure that the compliance, reporting and other obligations imposed on others in relation to the use or management of public resources takes into account the risks associated with that use or management.<sup>51</sup>

##### Sanctions

There is no civil penalty or criminal liability for a breach of these duties under the PGPA Act.

Enabling legislation may provide for action to be taken for breach (eg enabling legislation may permit termination of appointment in some circumstances).

A breach of one of these duties may also involve a breach of the general duties discussed above (such as the duty of care and diligence), which may attract liability.

Where a board member is also an employee of the corporate Commonwealth entity or the Commonwealth, employment related sanctions may apply.



#### Further information

[Resource Management Guide 200 – General duties of accountable authorities](#) issued by the Department of Finance.

<sup>45</sup> Section 16 PGPA Act

<sup>46</sup> Section 10 PGPA Rule

<sup>47</sup> Section 17 PGPA Act

<sup>48</sup> Replacement explanatory memorandum to the *Public Governance, Performance and Accountability Bill 2013* (Cth), paragraphs 66 and 146

<sup>49</sup> Replacement explanatory memorandum to the *Public Governance, Performance and Accountability Bill 2013* (Cth), paragraph 145

<sup>50</sup> Section 18 PGPA Act

<sup>51</sup> Replacement explanatory memorandum to the *Public Governance, Performance and Accountability Bill 2013* (Cth), paragraph 148



## 2.4 Specific PGPA Act requirements

In addition to the duties discussed above, the PGPA Act and PGPA Rule place a series of specific obligations on board members, including those set out in the following table. The table lists responsibilities applying to board members, and does not include those applying to the entity or officials generally. A number of the sections listed in the table are subject to delayed application or other transitional arrangements.<sup>52</sup>

Corporate Commonwealth entity		Commonwealth company	
Section	Accountable authority's obligation	Section	Director's obligation
<b>Keep Ministers informed</b>			
19	<p>Keep the responsible Minister informed of the activities of the entity and any subsidiaries. Give the responsible Minister or the Finance Minister any reports, documents and information in relation to those activities as that Minister requires. Notify the responsible Minister as soon as practicable after the accountable authority makes a significant decision in relation to the entity or any subsidiary. Give the responsible Minister reasonable notice if the accountable authority becomes aware of any significant issue that may affect the entity or any subsidiary. Notify the responsible Minister as soon as practicable after the accountable authority becomes aware of any significant issue that has affected the entity or any subsidiary.</p> <p>This duty is subject to enabling legislation and any Commonwealth law that prohibits disclosure of particular information (eg secrecy provisions).</p> <p>Rules under the PGPA Act may prescribe matters to be taken into account in deciding whether a decision or issue is significant. However, as at the date of this guide, there are no rules on this topic. <a href="#">Resource Management Guide 200 – General duties of accountable authorities</a> indicates that whether a decision or issue is significant depends on:</p> <ul style="list-style-type: none"> <li>■ materiality (ie the importance of the decision or issue relative to the entity's size and functions);</li> <li>■ the risks involved (ie whether the decision or issue is likely to be politically sensitive, whether there would be contingent liabilities and whether the decision or issue might affect the financial sustainability of the entity or others); and</li> <li>■ the novelty of the decision or issue for the entity (ie whether the entity has previous experience with the decision or issue).</li> </ul>	91	<p>Equivalent obligation applies to directors of wholly-owned Commonwealth companies.</p> <p>However, there is no reference to enabling legislation and laws prohibiting disclosure.</p>

<sup>52</sup> See the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* (Cth)

## 2.4 Specific PGPA Act requirements cont'd

Corporate Commonwealth entity		Commonwealth company	
Section	Accountable authority's obligation	Section	Director's obligation
<b>Government policy order</b>			
22	If the Finance Minister makes a government policy order that applies to the corporate Commonwealth entity, ensure the government policy order is complied with in relation to the entity and, so far as practicable, any subsidiary.	93	Equivalent obligation applies to directors of wholly-owned Commonwealth companies.
<b>Corporate plan</b>			
35 16E (PGPA Rule)	Within the first two months of each reporting period (in most circumstances the <b>reporting period</b> is the financial year), prepare a corporate plan (however described) for the corporate Commonwealth entity (covering any subsidiaries), give it to the responsible Minister and the Finance Minister and publish it, in accordance with the rules under the PGPA Act. If varying the plan, comply with the requirements in the rules under the PGPA Act.	95 27A (PGPA Rule)	Equivalent obligation applies to directors of Commonwealth companies.
<b>Budget estimates</b>			
36	Prepare budget estimates covering the corporate Commonwealth entity's activities for each reporting period (and any other periods directed by the Finance Minister) and give them to the Finance Secretary.	96	Equivalent obligation applies to directors of wholly-owned Commonwealth companies.
<b>Performance records</b>			
37	Cause records to be kept that properly record and explain the corporate Commonwealth entity's performance in achieving its purposes in accordance with the rules under the PGPA Act and to enable the preparation of annual performance statements.		
<b>Performance assessment</b>			
38 16F (PGPA Rule)	Measure and assess the performance of the entity in achieving its purposes, in accordance with the rules under the PGPA Act (which provide for measurement and assessment in accordance with the method set out in the entity's corporate plan).		



## 2.4 Specific PGPA Act requirements cont'd

Corporate Commonwealth entity		Commonwealth company	
Section	Accountable authority's obligation	Section	Director's obligation
<b>Annual performance statements</b>			
39 16F (PGPA Rule)	Prepare annual performance statements for the corporate Commonwealth entity as soon as practicable after the end of each reporting period in accordance with the rules under the PGPA Act. Include a copy in the entity's annual report.		Different types of information are required in annual reports for different types of company. In particular, the report for a company limited by guarantee must state how the company's principal activities assisted in achieving its objectives, and how the entity measures its performance. See sections 292 and 298 to 300B of the Corporations Act.
<b>Accounts and records</b>			
41	Cause accounts and records to be kept that properly record and explain the corporate Commonwealth entity's transactions and financial position in accordance with the rules under the PGPA Act and to enable the preparation and audit of annual financial statements.		Similar requirements apply to companies under the Corporations Act. <sup>53</sup>
<b>Financial statements</b>			
42 Financial reporting rule <sup>54</sup>	Prepare annual financial statements for the corporate Commonwealth entity as soon as practicable after the end of each reporting period in accordance with the accounting standards and rules under the PGPA Act. Give the statements to the Auditor-General as soon as practicable after they are prepared. State whether the statements comply with certain requirements. If a GBE, state whether, in the accountable authority's opinion, there are reasonable grounds to believe that the entity will be able to pay its debts as and when they fall due.	97	The Corporations Act requires some types of company to prepare financial reports. <sup>55</sup> However, all Commonwealth companies are required to prepare financial reports (see discussion below regarding annual reporting requirement for Commonwealth companies under section 97 of the PGPA Act).  If the auditor's report required by the Corporations Act is not prepared by the Auditor-General, a report by the Auditor-General on the financial statements is also required.
<b>Audit of subsidiaries</b>			
44	Ensure any subsidiary's financial statements for a reporting period are audited (generally by the Auditor-General). Give a copy of the financial statements and auditor's report to the responsible Minister.	99	Equivalent obligation applies to directors of Commonwealth companies.

<sup>53</sup> Sections 286 and 344 Corporations Act    <sup>54</sup> Public Governance, Performance and Accountability (Financial Reporting) Rule 2015 (Cth)    <sup>55</sup> Sections 292 to 297 and 301 Corporations Act

## 2.4 Specific PGPA Act requirements cont'd

Corporate Commonwealth entity		Commonwealth company	
Section	Accountable authority's obligation	Section	Director's obligation
<b>Audit committee</b>			
45 17 (PGPA Rule)	Ensure that the corporate Commonwealth entity has an audit committee in accordance with the rules under the PGPA Act. Determine the functions of the audit committee by written charter.	92 28 (PGPA Rule)	Equivalent obligation applies to directors of wholly-owned Commonwealth companies.
<b>Annual report</b>			
46 7AB (Transitional Rule <sup>56</sup> )	After the end of each reporting period, prepare an annual report and give it to the responsible Minister in accordance with the rules under the PGPA Act.	97 7AC Transitional Rule	Give the responsible Minister a copy of the company's financial report, directors' report and auditor's report required under the Corporations Act (or which would be required if the company were a public company). For wholly-owned Commonwealth companies, provide any additional information or report required by the rules under the PGPA Act.
<b>Subsidiaries</b>			
86	Ensure as far as practicable that none of the corporate Commonwealth entity's subsidiaries does anything that the entity does not itself have power to do.		

**Further information**

[Resource Management Guidance](#) issued by the Department of Finance.

<sup>56</sup> Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Rule 2014 (Cth)

### 2.5 Other sources of potential liability

Breaches of any of the duties listed above are by no means the only sources of potential personal liability for Commonwealth board members. Other sources of potential personal liability include those set out below.

#### Liability for breach of enabling legislation

A board member of a corporate Commonwealth entity may be liable for breaches of the entity's enabling legislation. For example, enabling legislation of some entities includes secrecy provisions with criminal offences.

#### Liability for breach of Corporations Act

Directors of Commonwealth companies can be personally liable for breaches of other provisions of the Corporations Act, including in some cases for breach of obligations of the company as well as for breach of obligations imposed directly on directors, for example in relation to:

- insolvent trading by the company; and
- statements in, or omissions from, a prospectus.

#### Liability for breach of other legislation

Board members can be personally liable for failing to ensure that the corporate vehicles they manage comply with statute law. Legislation may impose secondary liability on a board member where the corporation has contravened the legislation. As such, the liability may be strict. If the corporation is liable, the board member is automatically deemed liable as well. The onus is then placed on the board member to make out one of the statutory defences (if available) to avoid liability.

In many cases, the liability can attach to a broad range of persons, including chief executive officers, executive officers, directors, public officers, body corporate managers, secretaries and other officers.

Examples of Commonwealth legislation imposing liability on directors include:

- the Australian Consumer Law (eg offences relating to unfair practices and product safety and product information);
- work health and safety legislation;
- environmental laws; and
- taxation laws.

Minter Ellison's Protecting your Position series of publications provides an overview of Commonwealth, State and Territory legislation imposing personal liability on company directors and officers for the actions of their companies. Protecting your Position is available from our website, <http://www.minterellison.com/RG/PYP/>.

#### Liability in tort

Board members will be personally liable for torts they commit when carrying out their responsibilities as a board member, for example:

- negligent acts or omissions; and
- defamatory comments.



# 3. Managing exposure

Indemnities, insurance and access to documents are key measures for board members to manage their potential exposure to personal liability. This part sets out a summary of the legal position regarding availability of indemnities, insurance and access for board members of corporate Commonwealth entities and Commonwealth companies.

This part does not include consideration of general risk management and compliance measures used to assist in limiting potential legal liability by reducing the likelihood of a liability arising in the first place. Nor does this part specifically address personal liabilities that may arise under legislation, or specific legislative provisions other than the Corporations Act or the PGPA Act which may void indemnities.<sup>57</sup>

<sup>57</sup> For example, section 230 of Schedule 2 to the *Competition and Consumer Act 2010* (Cth)

## 3. Managing exposure cont'd

Corporate Commonwealth entity	Commonwealth company
<p><b>Indemnity from the entity</b></p> <p>The PGPA Act permits the rules to prescribe requirements relating to the granting of indemnities by corporate Commonwealth entities.<sup>58</sup> However, as at the date of this guide, there is no rule addressing the issue.</p> <p>If proposing to indemnify board members, corporate Commonwealth entities should consider the limitations on indemnities of directors which apply to Commonwealth companies, as they generally represent accepted corporate practice.</p> <p>If a corporate Commonwealth entity proposes to indemnify a board member, legal advice should be sought in relation to the effect of the PGPA Act and associated transitional legislation, enabling legislation and fiduciary duties.</p>	<p><b>Prohibition on exemption from liability to company</b></p> <p>The Corporations Act prohibits a company (and a related body corporate) from exempting a person (whether directly or through an interposed entity) from a liability to the company incurred as a director or officer of the company.<sup>59</sup></p> <p><b>Indemnities against liabilities to company and third parties</b></p> <p>A company (and a related body corporate) is prohibited from indemnifying a person (whether by agreement or by making a payment, and whether directly or through an interposed entity) against any of the following liabilities (other than legal costs) incurred as a director or officer of the company:</p> <ul style="list-style-type: none"><li>■ a liability owed to the company itself (or a related body corporate);</li><li>■ a liability for a pecuniary penalty or a compensation order; or</li><li>■ a liability owed to a third party (ie someone other than the company or a related body corporate) that did not arise out of conduct in good faith.<sup>60</sup></li></ul> <p>Accordingly, a company may indemnify its directors and officers against liabilities to third parties other than those falling within the last two points above.</p>

<sup>58</sup> Section 61 PGPA Act

<sup>59</sup> Section 199A(1) Corporations Act

<sup>60</sup> Section 199A(2) Corporations Act

## 3. Managing exposure cont'd

Corporate Commonwealth entity	Commonwealth company
Indemnity from the entity <i>(continued...)</i>	<p><b>Indemnity against legal costs</b></p> <p>A company (and a related body corporate) is prohibited from indemnifying a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against legal costs incurred in defending an action for a liability incurred as a director or officer of the company if the costs are incurred:</p> <ul style="list-style-type: none"><li>■ in defending or resisting proceedings where the director or officer is found to have a liability for which the director or officer could not be indemnified under the restriction discussed above;</li><li>■ in defending or resisting criminal proceedings in which the director or officer is found guilty;</li><li>■ in defending or resisting proceedings brought by ASIC or a liquidator for a court order if the grounds for making the order are found by the court to have been established; or</li><li>■ in connection with proceedings for relief to the director or officer under the Corporations Act in which the court denies the relief.<sup>61</sup></li></ul> <p>Accordingly, a company may indemnify its directors and other officers against legal costs incurred in their capacity as director or officer other than those prohibited as described above. For example, a company may indemnify its directors against costs incurred in defending civil or criminal proceedings where the director or officer is found not liable or not guilty.</p> <p><b>Void indemnities</b></p> <p>Anything that purports to indemnify a director or other officer of a company against a liability, or exempt the director or other officer from a liability, is void to the extent that it contravenes these requirements.<sup>62</sup></p> <p><b>Company constitution</b></p> <p>It is not uncommon for a company constitution to contain a form of indemnity for its directors and other officers, to the extent allowed by the Corporations Act.</p>

<sup>61</sup> Section 199A(3) Corporations Act

<sup>62</sup> Section 199C(2) Corporations Act



## 3. Managing exposure cont'd

### Corporate Commonwealth entity

### Commonwealth company

#### Deeds of indemnity

It is common practice for company directors to enter a deed of indemnity with the company. An advantage to board members in entering a deed of indemnity is to create a personal contractual right to indemnification (regardless of the constitution).

In the case of indemnities against legal costs, the legal ability of the entity to provide the indemnity cannot be determined until the conclusion of the proceedings. A benefit to a board member of obtaining a deed of indemnity is that the deed may make provision for a form of contingent protection. For example, it may allow the entity to fund the member's legal proceedings by making a loan, which is repayable in the event that the member is found liable or guilty.

#### Indemnities and assistance provided by the Commonwealth

Consideration may be given to whether it would be appropriate in particular circumstances to seek an indemnity from the Commonwealth.

Note that the Finance Minister's delegation of the power under section 60 of the PGPA Act to grant indemnities on behalf of the Commonwealth does not extend to indemnities that would expressly meet the costs of civil or criminal penalties.<sup>63</sup>

The Attorney-General's *Legal Services Directions 2005* (Cth) contain the Commonwealth's policy for handling requests for assistance in relation to legal proceedings by a Commonwealth employee or former employee. In relation to Commonwealth employees who are board members of corporate Commonwealth entities and Commonwealth companies, the *Legal Services Directions 2005* (Cth) provide that expenditure to assist a Commonwealth employee in respect of activities the employee undertakes for a corporate Commonwealth entity or Commonwealth company (in particular, by being on the board) is to be approved only to the extent that the employee is not indemnified or insured by the entity or company.<sup>64</sup>

<sup>63</sup> *Public Governance, Performance and Accountability (Finance Minister to Accountable Authorities of Non-Corporate Commonwealth Entities) Delegation 2014*

<sup>64</sup> Paragraph 3 of Appendix E to the *Legal Services Directions 2005* (Cth)

## 3. Managing exposure cont'd

Corporate Commonwealth entity	Commonwealth company
<p><b>Insurance</b></p> <p>A corporate Commonwealth entity must not insure an official of the entity (ie including members of the accountable authority) against a liability (other than one for legal costs) arising out of:</p> <ul style="list-style-type: none"> <li>■ conduct involving a wilful breach of duty in relation to the entity; or</li> <li>■ breach of the statutory duties in relation to use of position and information.<sup>65</sup></li> </ul> <p>Anything that purports to insure a person against a liability is void to the extent that it contravenes this prohibition.<sup>66</sup></p>	<p>A company (and a related body corporate) is prohibited from paying or agreeing to pay (whether directly or through an interposed entity) premiums for insurance policies covering liability of its directors and other officers arising out of:</p> <ul style="list-style-type: none"> <li>■ conduct involving a wilful breach of duty in relation to the company; or</li> <li>■ breach of the statutory duties in relation to use of position and information.<sup>67</sup></li> </ul> <p>Anything that purports to insure a director or other officer against a liability is void to the extent that it contravenes this prohibition.<sup>68</sup></p>
<p><b>D&amp;O insurance</b></p> <p>Subject to the above restrictions, entities may pay the premiums for insurance to cover all other liabilities of directors and officers, although there are limitations regarding the liabilities for which insurers are willing to provide insurance (either at all or at a premium acceptable to most insured). The insurance policy can also cover the costs of defending legal proceedings, regardless of the outcome of the proceedings.</p> <p>Board members should ensure that directors and officers insurance (<b>D&amp;O insurance</b>) (or equivalent cover) is obtained for them and should carefully consider the scope of the cover. It is usual for corporate Commonwealth entities and Commonwealth companies to effect and maintain D&amp;O insurance for their directors, subject to the restrictions described above. In the case of a company, a provision that allows the company take out D&amp;O insurance may be set out in its constitution.</p> <p>Corporate Commonwealth entities and Commonwealth companies that are within the General Government Sector are required to belong to Comcover, which is the government's general insurance fund, unless an exemption is granted. Comcover provides cover for all classes of general insurance (other than workers compensation). For workers compensation, corporate Commonwealth entities and some Commonwealth companies are covered by the Comcare scheme.</p> <p>As D&amp;O insurance usually only covers claims made during the term of the policy, board members often enter into a deed with the entity obliging the entity to maintain, at its expense, D&amp;O insurance for the benefit of the board member for a period (usually seven years) after they cease to hold office as a board member. Comcover may, if requested, provide coverage for members after they cease to hold office.</p> <p>The benefit to board members of a deed is that it imposes a contractual obligation on the entity to ensure that insurance is maintained for former board members to cover claims that may be made against them in relation to their term as a board member during the statute of limitations period. Former board members should ensure that the policy with extended coverage is, in fact, put in place. The deed will generally require the entity to provide evidence of the required insurance if requested by the former board member, and members should exercise this right.</p>	

<sup>65</sup> Section 62 PGPA Act and section 23(1) PGPA Rule

<sup>66</sup> Section 23(2) PGPA Rule

<sup>67</sup> Section 199B Corporations Act

<sup>68</sup> Section 199C(2) Corporations Act

### 3. Managing exposure cont'd

Corporate Commonwealth entity	Commonwealth company
<b>Access to books and records</b> <p>Board members of corporate Commonwealth entities do not have a statutory right of access to the entity's books under the PGPA Act.</p> <p>There is limited preservation of access rights granted by the <i>Commonwealth Authorities and Companies Act 1997</i> (Cth) in relation to books which were subject to those access rights before that Act was repealed.<sup>69</sup></p> <p>Access to documents of corporate Commonwealth entities may also be permitted under the <i>Freedom of Information Act 1982</i> (Cth), <i>Privacy Act 1988</i> (Cth) or enabling legislation.</p>	<p>A director may inspect the books of the company at all reasonable times for the purposes of legal proceedings:</p> <ul style="list-style-type: none"><li>■ to which the director is a party;</li><li>■ that the director proposes in good faith to bring; or</li><li>■ that the director has reason to believe will be brought against the director.<sup>70</sup></li></ul> <p>The right applies while the person is a director and for 7 years afterwards.</p>
<p>A corporate Commonwealth entity or Commonwealth company may enter a deed with a board member which specifies access rights.</p> <p>Benefits to the board member of a deed include providing a contractual right of access, permitting access for investigative or regulatory proceedings, addressing privilege issues in relation to legal advice and requiring the company to keep copies of board papers for a particular period.</p>	

<sup>69</sup> Sections 20 and 27L of the *Commonwealth Authorities and Companies Act 1997* (Cth) and items 7 and 12 of Schedule 3 to the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* (Cth)

<sup>70</sup> Sections 198F and 290 Corporations Act



# 4. Checklist

There are many issues a prospective board member should consider before accepting a position on a board. These will include the financial standing, business operations, culture, senior leadership and work health and safety matters, as well as whether the prospective board member has the skills and experience to contribute to the board.

This part contains a checklist of some issues to assist those considering serving on the board of a corporate Commonwealth entity or Commonwealth company from a governance perspective. The checklist focuses on some of the key governance issues. It is not exhaustive and prospective board members should consider undertaking more comprehensive due diligence before accepting an appointment (including in respect of financial standing, culture, work health and safety and operational matters).

As a board member, you should be aware of:

## Appointment

- ☐ The criteria for the appointment (if any)
- ☐ The skills required for the appointment (eg the appropriate level of accounting knowledge)
- ☐ How your relationship to your appointer (eg reporting expectations) fits with your duties to the entity (eg confidentiality obligations)
- ☐ The remuneration you will receive, the role of Remuneration Tribunal (if any) and whether your primary employer permits you to receive directors' fees
- ☐ The grounds for termination of your appointment

### 4. Checklist cont'd

#### Entity

- ☐ The role of the entity. Functions and powers of corporate Commonwealth entities are set out in enabling legislation. A Commonwealth company's objectives may be set out in the company constitution or corporate plan
- ☐ Any limitations on the entity's activities or powers (eg some Commonwealth entities are subject to restrictions on borrowing or giving security)
- ☐ If a Commonwealth company, whether the entity is a wholly-owned Commonwealth company
- ☐ Whether the entity is a GBE
- ☐ Any subsidiaries, and their purpose, operations and relationship to the entity
- ☐ The key legislation that applies to the entity, and the systems the entity has in place to ensure compliance, including:
  - enabling legislation for corporate Commonwealth entities or Corporations Act for Commonwealth companies
  - legislation that applies to Commonwealth entities and companies generally such as the PGPA Act, *Commonwealth Procurement Rules* and *Public Interest Disclosure Act 2013* (Cth)
  - legislation that applies to the entity's activities such as work health and safety, environmental, competition and taxation legislation
- ☐ The key government policies that apply to the entity, for example government policy orders and competitive neutrality policy
- ☐ The entity's community service obligations (if any)

#### Finance

- ☐ The entity's pricing framework (eg Ministerial pricing directives, price surveillance by Australian Competition and Consumer Commission, Australian Government Cost Recovery Guidelines)

- ☐ The entity's budget and reporting processes
- ☐ Stakeholder financial expectations (eg dividends/ shareholder levies)

#### Board's role

- ☐ Key governance documents including Board charter, code of conduct, corporate plan, other Board strategies, delegations and authorisations
- ☐ The entity's formal policies and procedures
- ☐ The role of any Board committees
- ☐ How the executive reports and makes recommendations to the Board

#### Minister

- ☐ The role of the Minister (or Ministers) in relation to the entity and the Board
- ☐ The arrangements for liaison with the Minister and portfolio Department
- ☐ Any Ministerial directions with which the Board or the entity must comply
- ☐ Whether Ministerial approval is required for entity actions (eg entry into high value contracts)

#### Conflicts of interest

- ☐ Possible areas of conflict of interest
- ☐ The requirements regarding disclosure of material personal interests and conflicts of interest
- ☐ The requirements in relation to receipt of Board papers, presence at Board meetings and voting at Board meetings where a conflict arises

#### Liability

- ☐ Whether you are entitled to or should request indemnity from the entity
- ☐ Whether you are entitled to or should request indemnity from your appointer
- ☐ Whether the entity holds directors and officers insurance and the scope of the coverage
- ☐ Whether you have a right of access to entity records

#### Risk management

- ☐ The entity's risk management and reporting procedures
- ☐ The entity's fraud control arrangements
- ☐ Whether the entity is adequately insured against relevant risks

#### Audit

- ☐ Whether an audit committee has been established as required and whether its functions are appropriate
- ☐ The entity's internal audit arrangements
- ☐ The role of the Auditor-General in relation to the entity

#### Reporting

- ☐ Reporting requirements applying to the entity, including public reports (eg annual reports) and reports to Parliament, Minister, portfolio Department, Finance Minister, shareholders and/or Australian Stock Exchange
- ☐ Reporting requirements for any subsidiaries



# 5. Contacts



**Neal Parkinson**  
Partner  
Canberra  
**T** +61 2 6225 3243  
**M** +61 418 491 314



**Michael Brennan**  
Office Managing Partner  
Canberra  
**T** +61 2 6225 3043  
**M** +61 421 613 409



**Amanda Story**  
Partner  
Canberra  
**T** +61 2 6225 3756  
**M** +61 423 439 659



**David Moore**  
Special Counsel  
Canberra  
**T** +61 2 6225 3044  
**M** +61 412 961 343




**Mellissa Lai**  
Senior Associate  
Canberra  
**T** +61 2 6225 3287  
**M** +61 404 073 478



**Carolina Dorman**  
Senior Associate  
Canberra  
**T** +61 2 6225 3068  
**M** +61 448 383 452





■ This publication is not intended to be comprehensive or a substitute for legal advice. Professional advice should be sought before applying the information to particular circumstances. While care has been taken in the preparation of this publication, no liability is accepted for any errors it may contain. Your Minter Ellison advisor can update you with the most current information.

MinterEllison

