

Differences between public sector and private sector boards

Guidance Note for boards and other governing bodies of public sector agencies.

Guidance on how public sector boards are different from those in the private sector, and the issues needing extra deliberation and action.

The 'public interest' overrides form and function

This guidance applies regardless of the legal form or constitution of the agency and whether its functions are service delivery, asset management, regulatory, issue resolution, advisory or assurance.

Each type of function involves serving 'the public interest' and elements of:

- acknowledging or addressing government policy
- engaging with public sector stakeholders
- satisfying public accountability requirements, and
- meeting higher integrity standards.

Public agencies within the DELWP portfolio

DELWP Ministers and officials oversee and support a wide array of public agencies including:

- Water Corporations
- Land Management Boards and Committees such as Parks Victoria, Zoos Victoria, Royal Botanic Gardens, and Alpine Resort Management Boards
- Catchment Management Authorities
- Waste and Resource Recovery Groups
- major agencies such as the Environment Protection Authority, Energy Safe Victoria, Victorian Building Authority, Victorian Planning Authority and the Victorian Environmental Water Holder
- Advisory committees such as Birrarung Council, Geelong Authority and Metropolitan Partnerships

This document is relevant to all of them.

What is the public interest?

In broad terms, the 'public interest' is the interest of the public and society. It includes the interest of the public in good governance, transparency, accountability and good public policy outcomes.

Key public sector governance issues

Governance of public agencies generally involves all good governance imperatives faced by private sector corporations, for which an experienced private sector director should be well equipped.

However:

- public agency governance also involves other concerns that are specific to the public sector, and
- generic governance standards applied in public sector circumstances often require different judgments and actions.

Key issues that are specific to public sector governance are:

- Mission and strategy derive from, and can be limited by, the agency's enabling legislation (or equivalent constituent document).
- Functions have to be performed in the public interest, and generally consistent with Victorian Government policy.
- Subject to applicable legislation, boards may be subject to Ministerial direction and should generally take into account Ministers' views.
- Boards collectively and directors individually must act in accordance with public sector values and subject to the *VPSC Code of Conduct for Directors of Victorian Public Entities*.
- Boards should give priority to retaining public trust and confidence.
- Public agencies should act ethically and as model citizens.

Differences between public sector and private sector boards

- Public agencies have different financial management regimes that include different accounting standards, generally public procurement processes, government approval to borrow, and usually government regulation of remuneration levels.
- Public agencies are subject to an extensive accountability regime that includes:
 - Additional transparency and reporting
 - Tighter data protection laws and public records obligations
 - Freedom of Information (FOI) disclosure obligations
 - A comprehensive whistleblower ('protected disclosure') regime
 - Possible scrutiny by the Ombudsman, Parliamentary Committees and the Independent Broad-based Anti-corruption Commission
- Performance audits by the Auditor-General
- Possible judicial review of decisions on 'administrative law' grounds.
- Directors can lack indemnity where they act not under direction and knowing that the action is invalid (this is where they commit 'misfeasance in public office').

By contrast, private sector corporations are established to serve the interests of their shareholders. Their shareholders' interests are private interests, usually economic, and do not always equate to the public interest.

If applicable laws are complied with, they can (and generally do) act pragmatically to advance those private interests as a corporate priority. They are subject to governmental scrutiny only in relation to compliance with law.

Public equivalents of private sector drivers

Directors of corporations in the private sector face duties, governance standards, performance expectations and related circumstances that are generally well understood. Those drivers apply to public sector directors also, but more is required.

Here is how the public sector extends and challenges them.

Private sector	Public sector
Duties (sections 180-183 and 191, Corporations Act)	
Duty of care and diligence	Protection from the 'business judgement rule' (for those agencies that are corporations) would require an understanding of much of the additional material in this document.
Duty to act honestly, in good faith and for a proper purpose	Public agency directors must also act ethically. A lack of good faith can expose public agency directors to additional liability for 'malfeasance in public office'.
Duty to not misuse position	This extends to not acting against the public interest or impairing public trust.
Duty to not misuse information	This is a strict obligation but allows 'protected disclosures'.
Duty to disclose interests	A wide view of conflicts of interests applies and the scope for conflict is considerable.
Governance standards	
Limited shareholder consultation	The Westminster system of government expects that the Minister and Department is consulted or informed about major issues and, where possible, caretaker conventions are observed. Constituent legislation may give a Ministerial power of direction.
External reporting to is to shareholders, mostly prescribed forms of reporting	Reporting goes beyond a (longer) list of prescribed reports, and encompasses the ongoing demands of Ministers, Departmental relationship managers, Parliamentary Committees, the Ombudsman, the Auditor-General, IBAC and even the courts (since persons aggrieved may be able to seek judicial review of decisions). Public agencies can be required to give reasons for decisions.
Self-imposed requirements for ethical conduct, if any	In addition to the VPSC <i>Code of Conduct for Directors of Victorian Public Entities</i> , there are many published codes of practice that should be respected.

Differences between public sector and private sector boards

Private sector	Public sector
Board seeks to manage director behaviour	Bad boardroom behaviour can have legal consequences and lead to loss of office.
Extensive delegation with strong reliance on CEO	Supervision of just the CEO is not enough; a public agency board needs to be concerned with the system of sub-delegation and internal governance.
Outsourcing driven by rational economics	Responsibility does not end with outsourcing, a public agency must be concerned with 'the means' as well as 'the ends'.
Concern for own-brand protection	Many public agencies use and generate intellectual property that is vested in the State, rather than the agency.
External audit of financial reports	The Auditor-General can undertake performance audits, not just financial audits.
Indemnification of directors	Indemnification is sometimes a matter of convention, rather than law, and might be lost by knowingly acting invalidly or in breach of an obligation.
Performance expectations	
Stewardship	Assets are public assets, and public agency directors are also stewards of the public interest in so far as it is affected by actions and inactions of their agency.
Strategic leadership	Public agencies cannot fully set their own strategy, which is limited and influenced by constituent and other legislation and government policy.
Risk management	Wide views of risks to be managed and the consequences of risks are needed, at times extending to inter-agency and whole of government risks.
Financial management	Legislation administered by the Department of Treasury and Finance can impose limits on borrowing, guarantees, procurement methods and accounting procedures. Different accounting standards apply.
Make decisions consistent with a good understanding of relevant market forces	A public agency's role may have some element of divergence from market outcomes – possibly to modify them or fill a gap.
Make decisions that produce higher rate of return	Public agencies might need to trade off higher rates of return for achievement of other legitimate and relevant social, environmental and economic objectives.
Networking	While networks are good for public entity directors' understanding, favours are not allowed.

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Some examples of how a public sector directorship is different

The following examples are hypothetical. The explanations deliberately involve the use of acronyms and terms that are not defined, because persons accepting appointment to public agencies should know what they mean.

Example 1: Mount Dandenong Alpine Resort Board

The MDARB works closely with various service providers. The CEO rightly considers that developing good and trusted relations with them serves the best interests of MDARB.

A valued supplier of arborist services asks if he can have free accommodation for his family at a MDARB lodge and the CEO agrees. In return, the supplier undertakes some arborist work at the CEO's home.

A staff member reports this (by a lawful protected disclosure) to IBAC who conduct an investigation. The CEO is found to have engaged in 'corrupt conduct', which is reported to the Minister who then dismisses the members of the board and the CEO.

Example 2: Long Coast Coastal Management Committee

Wayne is the dominating chair of the LCCMC who is often abusive and bullying to other committee members and who sometimes makes 'executive decisions' although there is no formal delegation of power from the committee to him.

Other committee members have protested about his 'executive decisions' that they say have brought the committee into disrepute. He makes a unilateral decision to forcibly evict the local Mayor from the land managed by the committee.

Other committee members report his course of conduct to the VPSC who investigates him for 'misconduct'. In the course of the investigation Wayne resigns, embarrassed, when he realises he has no peer support. He also learns that he may not be indemnified if the Mayor brought legal proceedings against him.

Example 3: Park Search and Rescue Accreditation Agency

Bruce chairs the accreditation committee of the PSRAA. The committee, on behalf of the Agency, decides that it will not accredit rescue personnel who have previously contravened national park rules.

Zoe is an experienced bushwalker who meets the statutory criteria for accreditation and has the requisite skills and fitness. Her application for accreditation is refused.

She seeks reasons and (under the *Administrative Law Act 1978*) the agency is obliged to give them in writing. Zoe then seeks 'judicial review' of the refusal of her application in the Supreme Court, which involves Bruce needing to give evidence first by affidavit and then be subjected to examination in the witness box.

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