

Public Administration Act

(2) Requirements in Divisions 2 and 3 of Part 5

Guidance note - for boards of DEPI agencies

This guidance note has been developed to assist all public entities and other statutory boards, committees, councils, panels, etc. in the Department of Environment and Primary Industries (DEPI) portfolio.

Overview

Most DEPI agencies (except most committees of management) are subject to the requirements in Divisions 2 and 3 of Part 5 (**Sections 79 to 90**) of the *Public Administration Act 2004 (PAA)*. This guidance note summarises those requirements.

Requirements and good practice

The requirements in Divisions 2 and 3 of Part 5 of the PAA apply to public entities that:

- are established after 1 July 2005; OR
- have had their establishing Act amended to deem that the agency is subject to these provisions (e.g. catchment management authorities and water corporations); OR
- are included in an Order made by the Governor in Council under section 75(a) of the PAA, which is published in the Government Gazette.

Even if Divisions 2 and 3 of Part 5 of the PAA are not legally binding on your agency, it is recommended that the obligations in **sections 79 to 85** (which relate to duties of board members, the need for certain board policies, etc.) be complied with. They are **good governance practice** for all DEPI agencies.

Summary of requirements

The governance requirements in Divisions 2 and 3 of Part 5 of the PAA apply to either the public entity itself; the board collectively; the chair; or individual board members (referred to in the PAA as 'directors').

A summary of these requirements is set out in **Appendix 1** of this guidance note.

'Section 81' board policies

Section 81 of the PAA is contained in Division 2 of Part 5. It requires board policies that meet certain standards to be in place on the following topics:

- [Code of conduct](#)
- [Conflict of interest](#)
- [Dispute resolution](#)
- [Gifts, benefits, and hospitality](#)
- [Meetings and decision-making](#)
- [Performance assessment](#).

Even if section 81 is not binding on your agency, it is recommended that suitable board policies be in place on these topics. Such policies are fundamental to good governance.

Model policies available from DEPI

To assist boards, DEPI has developed model policies and guidance notes on the topics listed above.

The model policies can be downloaded from the DEPI governance website **On Board** (www.depi.vic.gov.au/onboard). They are located in the support modules on those topics.

It is recommended that your board:

- (a) adopt the model policies, which can be **adapted** to take into account the **nature and functions** of your agency; or
- (b) have **equivalent** policies in place that are consistent with the **key principles** in the model policy.

If your agency's establishing Act contains specific requirements in relation to any of these topics, your board will need to adapt the relevant model policy accordingly.

Public Administration Act – (2) Requirements in Divisions 2 and 3 of Part 5

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Appendix 1 – Summary of requirements in Divisions 2 and 3 of Part 5 of the PAA	Who must comply?
<p>Directors' duties - s 79: board members (i.e. directors) must:</p> <ul style="list-style-type: none"> • Act with the required standard of care: you must act honestly; in good faith and in the best interests of the public entity; with integrity; in a financially responsible manner; with a reasonable degree of care, diligence and skills; and in compliance with the establishing Act. • Keep information confidential: as a <i>current</i> or <i>former</i> board member, you must not give anyone information that you have acquired in your role, except to the extent necessary to: <ul style="list-style-type: none"> - properly exercise your role; or - provide information you are expressly authorised, permitted, or required by law to provide. • Avoid improper use of your position: you must not use your position as a board member (or any information acquired through your position) to gain advantage for yourself or another person, or to cause detriment to the public entity. • If you stand for election to parliament or a local council, you must notify the board and must avoid using any of the public entity's resources in your campaign. 	Board member
<p>Duties of chairperson - s 80: the chair must ensure that all policies adopted by, or relevant to, the public entity or its board are provided to, or are readily accessible to, all board members.</p>	Chair
<p>Act consistently with functions and objectives - s 81(1)(a): the board must act consistently with the functions and objectives of the public entity, and in accordance with any strategic or business plans.</p>	Board
<p>Inform minister and secretary of major risks - s 81(1)(b): the board must inform both the minister and the Secretary of DEPI of all known major risks to the effective operation of the public entity, and of the risk management systems that are in place to address those risks.</p>	Board
<p>Provide information to minister - s 81(1)(c): unless prohibited by law, the board must provide the minister with any information about the public entity and its operations that he/she requests.</p>	Board
<p>Board policies that must be in place – s 81(1)(d) to (h): the board must have adequate policies in place on the following topics:</p> <ul style="list-style-type: none"> • Performance assessment / dispute resolution – s 81(1)(d): the board must have adequate procedures in place for: <ul style="list-style-type: none"> - assessing the individual performance of board members - dealing with poor performance (if any) of board members - resolving disputes between board members - assessing the collective performance of the board - <i>this last requirement has been added by recent amendments to the PAA.</i> <p>DEPI recommends that the chair's performance of his/her additional duties as chair also be assessed. ¹</p> • Code of conduct – s 81(1)(e): a code of conduct must be in place for board members. DEPI recommends that the Directors' Code of Conduct issued by the Public Sector Standards Commissioner form the basis of the board's code of conduct. • Conflict of interest – s 81(1)(f): the board must have certain processes in place for dealing with conflicts of interest (including conflicts of duty). • Gifts policy – s 81(1)(g): an adequate gifts policy must be in place for board members. • Board meetings and decision-making – s 81(1)(h): adequate procedures must be in place for the conduct of board meetings, the making of board decisions, and record keeping at meetings. <p>Model policies that are consistent with these obligations are available from www.depi.vic.gov.au/onboard.</p>	Board

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<p>Financial records - s 81(1)(i): the board must ensure that appropriate financial records are kept in relation to all money or other property under the public entity's management or control.</p>	Board
<p>Fraud prevention - s 81(1)(j): if the public entity controls public funds or assets, the board must ensure that adequate controls are in place to prevent fraud.</p>	Board
<p>Audit of financial statements - s 81(1)(k): the board must ensure that the public entity's financial statements or accounts are audited by the Auditor-General at least every 3 years. There are exceptions, for example, for 'advisory entities' and for public entities that are already required to have their financial statements audited under other legislation (e.g. the Financial Management Act). <i>For further information please contact DEPI.</i></p>	Board
<p>Loans to board members prohibited - s 82: - a public entity must not:²</p> <ul style="list-style-type: none"> • make a loan to a board member or their spouse, parent or other 'relative';³ or • provide a guarantee or security in connection with a loan made by another person to a board member or their relative. 	Public entity
<p>Subcommittees - s 83: a board may establish and dissolve sub-committees. When establishing a sub-committee, the board must define its functions and membership.⁴</p> <p>The membership of a sub-committee may include non-board members.</p> <p><i>If it is consistent to do so with the board's establishing Act, a board can delegate certain decision-making powers to sub-committee member(s) who are also board member(s). Any delegation of the board's powers must be made by legal instrument. The power to delegate cannot be delegated.</i>⁵</p>	Board
<p>Creation of a subsidiary company - s 84: if a public entity is a body corporate, it may be entitled to form subsidiaries in certain circumstances. If the public entity intends to form a subsidiary, the board must write to the responsible minister and to the Treasurer within a reasonable time before doing so, to notify them of this intention. The minister may refuse the formation of the subsidiary or impose restrictions or conditions upon it.</p>	Board
<p>Accountability to the minister - s 85 (1): the board is accountable to the minister for the exercise of its functions.</p>	Board
<p>Minister may apply for an injunction - s 86: in certain circumstances, the minister may apply to the Magistrate's Court for an injunction restraining a public entity or a board member from engaging in conduct that would be contrary to law (e.g. a breach of the PAA or its establishing Act).</p>	Public entity / board member
<p>Minister or public entity may bring certain proceedings - s 87: if a board member breaches Division 2 of Part 5 of the PAA, the minister or the public entity may bring court proceedings to recover monies from him/her in certain circumstances.</p>	Board member
<p>Power to remove or suspend - s 89: the person who has the power to appoint a board member also has the power to:</p> <ul style="list-style-type: none"> • remove the board member from office; or • suspend the board member for a period of up to one month - <p>if he/she believes that the board member is in breach of the PAA or a code of conduct (such as the Directors' Code of Conduct). <i>This is in addition to any powers in the establishing Act to remove/suspend a board member.</i></p> <p>Prior to removal from office, a board member must be provided with at least seven days' notice in writing. The notice must:</p> <ul style="list-style-type: none"> • specify the date of effect; and • inform the board member that prior to the date of effect, he/she may submit reasons as to why he/she should not be removed from office. <p>The office of a board member automatically becomes vacant if he or she:</p> <ul style="list-style-type: none"> • becomes an insolvent; or • is convicted of an indictable offence in Victoria (or an equivalent offence elsewhere). <p><i>Section 89 does not apply to public entities that are 'quasi-judicial' – see below.</i></p>	Board member
<p>Standing down a board member of a quasi-judicial entity - s 90: for quasi-judicial entities, section 90 of the PAA applies instead of section 89.</p>	Board member

Further information

On Board (www.depi.vic.gov.au/onboard), the DEPI governance website, offers information and resources on a range of key governance topics, for example:

- **Support modules** (e.g. **Public Administration Act**) with:
 - guidance notes, model policies, templates and sample documents, case studies, etc.
 - direct links to the topic on other websites (e.g. [Victorian Public Sector Commission](#) and [Victorian Ombudsman](#)).
- **DEPI guide to good governance – board members**, an overview of the role and duties of board members. (A key resource for all board members of DEPI agencies.)
- **E-alerts** from DEPI with governance news and information (e.g. new laws, best practice, new resources and significant updates to On Board). To register for e-alerts please email governance@depi.vic.gov.au.

Footnotes

1. The requirements of s 81(1)(d) of the PAA do not apply to 'Commissioner' entities. These are public entities where the governing body comprises a single member, rather than a board.
2. A limited exception applies - see section 82(2) of the PAA.
3. 'Relative' is defined in the same way as it is in section 9 of the Corporations Act 2001 (Cth) - i.e. the spouse, parent, or remoter lineal ancestor, child or remoter issue, or brother or sister of the board member.
4. It is recommended that the functions and membership of a board's subcommittee are set out in written terms of reference (or a board charter) and adopted by the board.
5. Note: all delegation powers are set out in the establishing Act. Not all agencies have the power to delegate.

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