



Honesty and accountability for members of government boards

Table of contents

Introduction	2
Scope of this paper	2
Corporate agency or advisory body?.....	2
Definitions	4
Duties of board members.....	6
Duties applicable to both corporate agency and advisory body members.....	6
Duties applicable only to corporate agency members	7
Penalties for breach of duties	8
Removal from board.....	8
Civil liability for contravention of duties.....	8
Offences under the criminal law.....	8
Acting improperly	8
Bribery or corruption.....	9
Abuse of public office	9
Demanding or requiring benefit on basis of public office.....	9
Indemnity	10

Honesty and accountability for members of government boards

Introduction

Appointment to a government board places you in a unique position of trust. The community expects a high standard of ethical behaviour from the public sector, and to ensure that this expectation is met, public sector appointees operate under a framework of rules dealing with honesty and accountability. The framework is created by three Acts of Parliament:

- the *Public Sector (Honesty and Accountability) Act 1995*, which covers appointees' legal duties
- the *Criminal Law Consolidation Act 1935*, which covers criminal offences committed by public officers, and
- the *Public Sector Act 2009*, which covers immunity from civil liability.

Scope of this paper

The *Public Sector (Honesty and Accountability) Act 1995* defines two types of government boards—**corporate agencies** and **advisory bodies**—members of which are required to abide by the duties set out in the Act. This paper summarises those duties, as well as the relevant parts of the *Criminal Law Consolidation Act 1935* and the *Public Sector Act 2009*. The specific legislation (if any) governing your board may also contain some honesty and accountability provisions. Copies of South Australian legislation can be found at www.legislation.sa.gov.au.

The paper does not cover other types of boards, such as those subject to the *Public Corporations Act 1993*. For information on boards other than corporate agencies and advisory bodies, contact the Boards and Committees Unit (see 'further information').

Corporate agency or advisory body?

The 'definitions' section of this paper provides the legal meanings of the terms 'corporate agency member' and 'advisory body', but they can be hard to decipher if you're not familiar with legislation. If you're unsure what type of board you sit on, you can contact the Boards and Committees team (see the 'further information' section). There are also several factors you can look at to determine whether your board is a corporate agency, an advisory body, or another type of board not covered by this paper.

A **corporate agency** is a public sector agency that is established as a body corporate under an Act of the South Australian Parliament. The term 'corporate agency' covers much of the same territory as the more familiar 'statutory authority', and includes bodies such as the Environment Protection Authority, the SACE Board, the Art Gallery of SA, Infrastructure SA, the Essential Services Commission of SA, Multicultural SA, and the SA Tourism Commission. Corporate agencies are separate to government

departments, have a common seal, and are capable of suing or being sued in their own right, rather than under the auspices of the Crown. Sometimes a board itself may be a corporate agency, such as the Veterinary Surgeons Board; at other times, the corporate agency may have a governing board, such as the Board of the SA Fire and Emergency Services Commission. The majority of a corporate agency's members are appointed by the Governor or a minister.

All corporate agencies have a statement in their legislation declaring them to be a body corporate. Usually, the clause will look something like the example below, which is taken from the *Architectural Practice Act 2009*.

4—Establishment of Board

- (1) The *Architectural Practice Board of South Australia* is established.
- (2) The Board—
 - (a) is a body corporate; and
 - (b) has perpetual succession and a common seal; and
 - (c) is capable of suing and being sued in its corporate name; but and
 - (d) has all the powers of a natural person that are capable of being exercised by a body corporate; and
 - (e) has the functions and powers assigned or conferred by or under this Act.

An **advisory body** is an unincorporated body that provides advice to government. It may or may not be established by legislation, and all of its members will be appointed either by the Governor or by a minister. Examples of advisory bodies include the Defence SA Advisory Board, the Boating Facility Advisory Committee, the Premier's Council for Women, the South Australian Aboriginal Advisory Council, and the Minerals and Energy Advisory Council.

Definitions

Many of the terms used in this paper are defined by the legislation. The relevant definitions are provided below.

Advisory body is defined by section 2(1) of the *Public Sector (Honesty and Accountability) Act 1995* as meaning an unincorporated body comprised of members appointed by the Governor or a minister (whether or not under an Act) with a function of providing advice to a public sector agency.

Associate is defined by section 2(1a)(a) of the *Public Sector (Honesty and Accountability) Act 1995* as meaning:

- your spouse or domestic partner
- your relatives
- the relatives of your spouse or domestic partner
- a body corporate in which you or your associates hold shares worth at least ten percent of the value of the body corporate
- trustees of a trust of which you or your associates are beneficiaries, or
- a person declared by regulation to be an associate.

Corporate agency member is defined by section 2(1) of the *Public Sector (Honesty and Accountability) Act 1995* as meaning:

- a member of a public sector agency that is a body corporate, or
- a member of the governing body of a public sector agency that is a body corporate.

Domestic partner is defined by section 2(1) of the *Public Sector (Honesty and Accountability) Act 1995* as meaning a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not.

Public office is defined by section 237 of the *Criminal Law Consolidation Act 1935* as having a meaning corresponding with 'public officer'.

Public officer is defined by section 237 of the *Criminal Law Consolidation Act 1935* as meaning, amongst other things:

- a person appointed to public office by the Governor, or
- a member of a state instrumentality or of the governing body of a state instrumentality.

Public sector agency is defined by section 3(1) of the *Public Sector Act 2009* as meaning:

- a minister
- a chief executive of an administrative unit
- an administrative unit
- an employing authority

- any other agency or instrumentality of the Crown
- a body corporate—
 - comprised of persons, or with a governing body comprised of persons, a majority of whom are appointed by the Governor, a minister or an agency or instrumentality of the Crown, or
 - subject to control or direction by a minister.
- a person or body declared to be a public sector agency under the *Public Sector Act 2009*, or
- a subsidiary of any of the bodies or persons referred to above,

but does not include:

- a person or body declared under an Act not to be part of the Crown or not to be an agency or instrumentality of the Crown, or
- a person or body declared not to be a public sector agency under the *Public Sector Act 2009*.

Relative is defined by section 2(1) of the *Public Sector (Honesty and Accountability) Act 1995* as meaning:

- your spouse or domestic partner
- your parents, grandparents, and other remoter linear ancestors
- your children, grandchildren, and other remoter linear descendants, and
- your brothers and sisters.

Spouse is defined by section 2(1) of the *Public Sector (Honesty and Accountability) Act 1995*, which states that a person is the spouse of another if they are legally married.

State instrumentality is defined by section 237 of the *Criminal Law Consolidation Act 1935* as meaning an agency or instrumentality of the Crown or any body (whether or not incorporated) that is established by or under an Act and:

- is comprised of persons, or has a governing body comprised of persons, a majority of whom are appointed by the Governor, a minister, or an agency or instrumentality of the Crown, or
- is subject to control or direction by a minister.

Duties of board members

The duties of corporate agency members and advisory body members are set out in the *Public Sector (Honesty and Accountability) Act 1995*. Some of these duties apply to members of both advisory bodies and corporate agencies, while others apply only to members of corporate agencies.

Duties applicable to both corporate agency and advisory body members

The following duties are applicable to both corporate agency members and advisory body members.

Duty to act honestly

You are required to act honestly when you're performing your functions. Failure to do so can result in a fine of \$15 000, four years' imprisonment, or both.

Duty with respect to conflict of interest

If you or an associate has an interest in a matter being considered by your board, you must leave the room when that matter is being discussed or voted on, and cannot take part in any discussion or voting. You must also provide, in writing, full and accurate details of your interest. If you are an advisory body member, your disclosure needs to be sent to your minister; corporate agency members must send their disclosure to the board itself.

Whether or not you have a conflict of interest depends on the matter being discussed and the nature of the interest you hold. For instance, if you held a significant number of shares in a company, and your board was considering bids for a major contract, you would most likely have a conflict of interest if the awarding of the contract is likely to affect the share price or business prospects of the company. If, however, you held only a few shares, or the board was considering a less significant contract which was unlikely to affect the company's share price or business prospects, it's less likely that your interest would conflict with your duty to the board.

Neither your board nor your chair can absolve you of your duty with respect to conflict of interest. The onus is on you to ensure that you comply. Failure to comply can attract a fine of \$15 000, and can result in any contracts in regard to which you had a conflict of interest being voided. You cannot be fined if you were not aware of the interest at the time, but the burden of proof will lie on you.

However, if you are a member of an advisory board that is not created under an Act, you may request that your minister provide you with direction in regard to resolving your conflict of interest. Provided that you comply with the directions given by the minister, you are exempt from the duty with respect to conflict of interest.

If you are a corporate agency member, and you acquire an interest that could conflict with your role on your board, you must disclose full and accurate details of the interest in writing to your board. All disclosures of interest by a corporate agency member must be recorded in the minutes and reported to your minister. If the minister believes you

hold an interest that is incompatible with your role as a corporate agency member, he or she can require that you get rid of the interest or resign from the board.

Duties applicable only to corporate agency members

In addition to the duty to act honestly and to manage conflicts of interest, corporate agency members must also comply with the duties set out below.

Duty to exercise care and diligence

You are required to exercise a reasonable degree of care and diligence at all times in the performance of your functions. If you are found to be guilty of culpable negligence, you may be liable for a fine of up to \$15 000.

If you are acting in accordance with a direction from your minister, you cannot be found guilty of culpable negligence.

Duty not to be involved in unauthorised transactions

Neither you nor your associates may be directly or indirectly involved in a transaction with your agency without the approval of your minister. If you or an associate is involved in an unauthorised transaction, you may be liable for:

- if you are found to have intentionally deceived or defrauded your agency or another party, a fine of up to \$15 000, four years' imprisonment, or both, or
- in any other case, a fine of up to \$4 000.

Unauthorised transactions may also be invalidated by your agency or your minister.

A transaction is not unauthorised if it merely consists of:

- the agency providing you or your associates with services in the course of its ordinary business and on ordinary terms, or
- the employment by the agency of a person under a contract of service.

For instance, an SA Water board member would not be involved in an unauthorised transaction simply because they obtained water and sewerage services from SA Water on the usual terms. However, if they or an associate provided services to SA Water, the transaction would be unauthorised if it not been approved by the minister.

Duty not to hold unauthorised interests

Neither you nor your associates may hold a financial interest, such as shares in your agency or debentures issued by it, without the approval of the relevant minister. If you or an associate holds an unauthorised interest in your agency, you may be liable for:

- if you are found to have intentionally deceived or defrauded your agency or another party, a fine of up to \$15 000, four years' imprisonment, or both, or
- in any other case, a fine of up to \$4 000.

For example, a member of the board of the SA Government Financing Authority (SAFA) could not purchase SAFA bonds (a form of debenture) without the approval of the Minister.

Penalties for breach of duties

Apart from the fines and terms of imprisonment set out above, members of both advisory bodies and corporate agencies who breach their duties may be penalised as described below.

Removal from board

If you fail to comply with any of the duties imposed on you by the *Public Sector (Honesty and Accountability) Act 1995*, your minister has the power to remove you from your position on the board.

Civil liability for contravention of duties

If you are convicted of an offence for contravention of any of the duties under the *Public Sector (Honesty and Accountability) Act 1995* other than the duty to exercise care and diligence, the court that convicts you may, in addition to imposing a penalty, order you to pay:

- an amount equal to any profit you or another person made as a result of your contravention, and
- compensation for any loss or damage suffered as a result of your contravention.

Even if proceedings are not brought against you for a contravention of your duties, your minister may sue you for any profit derived from the contravention or for compensation for damage or loss caused by your contravention.

Offences under the criminal law

Part 7 of the *Criminal Law Consolidation Act 1935* sets out a number of criminal offences relating to current and former public officers, which includes current and former members of government boards, including both advisory bodies and corporate agencies.

Acting improperly

You are considered to act improperly if you knowingly or recklessly act contrary to 'the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers'. However, you will not be taken to have acted improperly unless your actions are considered to warrant criminal sanction.

Bribery or corruption

You may not improperly seek, accept, or agree to accept a benefit from another person as a reward or inducement for:

- an act or omission in your official capacity, or
- the exercise of power or influence you have, or purport to have, by virtue of your public office.

Engaging in bribery or corruption may render you liable to seven years' imprisonment.

Abuse of public office

You must not improperly:

- exercise power or influence you have by virtue of your public office
- refuse or fail to perform an official duty or function, or
- use information you have gained by virtue of your current or former public office,

with the intention of:

- securing a benefit for yourself or somebody else, or
- causing injury or detriment to somebody else.

If you are convicted of abuse of public office, you are liable to seven years' imprisonment.

Demanding or requiring benefit on basis of public office

You must not demand or require a benefit:

- by suggesting or implying that your demand should be complied with because you hold a public office, and
- knowing that you have no legal entitlement to the benefit.

If you are convicted of demanding a benefit on the basis of your public office, you are liable to seven years' imprisonment. However, this offence does not apply to demands you make to a proper authority in relation to your remuneration or conditions of appointment.

Indemnity

Under section 74 of the *Public Sector Act 2009*, no civil liability attaches to you for an act or omission in the exercise or purported exercise of your official powers or functions. Any action that would lie against you will instead lie against your agency (if you are a corporate agency member) or against the Crown (if you are an advisory body member). However, section 74 does not prevent your agency or the Crown from taking action against you for acts or omissions not made in good faith.

For more information:

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