



Treasury

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Policy and Guidelines Paper

# Directors and Officers Indemnity Policy for State Owned Corporations

## Preface

The purpose of the Directors and Officers Indemnity Policy for State Owned Corporations is to ensure that any indemnity provided by a statutory State Owned Corporation (SOC) to an officer of the business complies with the *State Owned Corporations Act 1989* (SOC Act).

This policy outlines the process whereby the Directors and the Chief Executive Officer of a SOC may be granted an indemnity for certain liabilities in accordance with the SOC Act. Voting Shareholder consideration of Director and CEO indemnities will occur at the time of appointment.

A request by the SOC Board for other officers to be granted an indemnity under the SOC Act will be subject to assessment that the officer both:

- meets the definition of an officer under the SOC Act; and
- it can be demonstrated that there is a compelling commercial reason to provide the officer with an indemnity under the SOC Act.

The *Directors and Officers Indemnity Policy for State Owned Corporation 2018* will supersede the previously issued TPP03-6.

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**Secretary**  
**NSW Treasury**

July 2018

**Treasury reference: TPP18-04**

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### Note

General inquiries concerning this document should be initially directed to your relevant Treasury Customer Relationship contact or via the Commercial Policy branch at [commercialpolicy@treasury.nsw.gov.au](mailto:commercialpolicy@treasury.nsw.gov.au).

This publication can be accessed from the Treasury's website [www.treasury.nsw.gov.au](http://www.treasury.nsw.gov.au).

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## Contents

Preface.....	i
Contents.....	ii
1 Purpose of the policy .....	1
2 Application of the policy .....	1
3 Indemnity under the SOC Act.....	1
4 Deed of Indemnity.....	2
5 Process for Voting Shareholder approval .....	2
5.1 Director of a SOC.....	2
5.2 Chief Executive Officer of a SOC.....	2
5.3 Officer of a SOC (other than a Director or CEO) .....	2
5.4 Other employees of a SOC.....	3
6 Other Insurance.....	3
7 Maintain records .....	4
7 Annual report.....	4
Appendix 1: Deed of Indemnity .....	5
Appendix 2: Officer of a SOC Request for Indemnity – other than a Director or CEO.....	11
Glossary and Acronyms.....	12

## 1 Purpose of the policy

The purpose of the policy is to ensure that any indemnity provided by statutory State Owned Corporations (SOCs) to an officer of a SOC complies with the State Owned Corporations Act 1989 (SOC Act). The Indemnity Policy seeks to:

- ensure that Officers who genuinely require an indemnity under the SOC Act are protected;
- ensure that requests for Voting Shareholder approval are evaluated consistently and transparently;
- as far as practicable, replicate the private sector practice of granting a deed of indemnity to directors and officers to enable them to manage their potential exposure to personal liability; and
- support the recruitment and retention of high quality directors and CEOs of SOCs.

## 2 Application of the policy

This policy applies to statutory SOCs.

All references to SOCs in this policy are taken to be a statutory SOC.

## 3 Indemnity under the SOC Act

Schedule 10 to the SOC Act provides the legislative basis for SOCs to indemnify their officers against certain liabilities incurred in their capacity as officers.

The SOC Act specifies that a SOC may grant an indemnity to an officer of the SOC but only with the prior approval of Voting Shareholders<sup>1</sup>. The SOC Act defines an 'officer of the SOC'<sup>2</sup> for the purposes of providing an indemnity as:

- a) a Director of a SOC, or
- b) the SOC's chief executive officer (CEO), or
- c) another person who is concerned, or takes part, in the SOC's management.

Under Schedule 10 to the SOC Act, indemnities can only be provided to named individuals. Indemnities cannot be provided to the holder of a particular management position or role in a SOC.

The types of liability an Officer can be covered against under an indemnity are specified in the SOC Act as:

- civil liability (other than a liability to the SOC or a subsidiary of the SOC) unless the liability arises out of conduct involving lack of good faith<sup>3</sup>;
- costs and expenses incurred by the Indemnified Party:
  - a) in defending proceedings, whether civil or criminal, in which judgement is given in favour of the Indemnified Party, or in which the Indemnified Party is acquitted<sup>4</sup>; or
  - b) in connection with an application in relation to a proceeding in which relief is granted to the Indemnified Party by a court<sup>5</sup>.

An indemnity by the SOC cannot cover an Officer for other types of liability.

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<sup>1</sup> *State Owned Corporations Act 1989* (NSW) sch 10 cl 5(5).

<sup>2</sup> *Ibid* sch 10 cl 5(6).

<sup>3</sup> *Ibid* sch 10 cl 5(3).

<sup>4</sup> *Ibid* sch 10 cl 5(4)(a).

<sup>5</sup> *Ibid* sch 10 cl 5(4)(b).

## 4 Deed of Indemnity

If approved by the Voting Shareholders, indemnification will be provided by the SOC through the execution of a Deed of Indemnity between the SOC and the Officer of the SOC, in the form of the Pro Forma Deed (the Deed). A copy of the Deed is contained in **Appendix 1**.

The Deed reflects the legislative requirements referred to above, and is legally enforceable. The extent of protection provided under the Deed cannot be greater than that allowed under the SOC Act. Voting Shareholder approval cannot be provided if the extent of protection provided under the proposed deed is greater than the legislative requirements referred to above.

## 5 Process for Voting Shareholder approval

### 5.1 Director of a SOC

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Treasury, on behalf of the SOC, will arrange for consideration by the Voting Shareholders of approval for a Director's indemnity at the time of the individual Director's appointment to the Board.

### 5.2 Chief Executive Officer of a SOC

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The SOC Board is to arrange for Treasury to seek Voting Shareholder approval for a CEO's indemnity. As a matter of best practice, SOCs should write to the Voting Shareholders seeking an indemnity for the CEO when the appointment has been confirmed.

The legislative framework requires a number of statutory SOCs to consult with Voting Shareholders prior to appointment of the CEO<sup>6</sup>. Accordingly, seeking approval for a CEO's indemnity should occur at the same time that the SOC consults the Voting Shareholders on the CEO appointment.

### 5.3 Officer of a SOC (other than a Director or CEO)

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The SOC Board is to arrange for Treasury to seek Voting Shareholder approval for any other Officer's indemnity.

In relation to indemnity requests for Officers (other than Directors and CEOs), these are not automatic as standard practice under this policy. Treasury expects that there will only be limited circumstances where Officers (other than Directors and CEOs) require an indemnity.

Voting Shareholder approval will only be recommended by Treasury where:

- Firstly, the applicant, as a named individual, satisfies the definition of 'officer of a SOC' under the SOC Act. That is, the officer named is a 'person who is concerned, or takes part, in the SOC's management'<sup>7</sup>; and
- Secondly, the SOC Board can demonstrate that the applicant genuinely requires an indemnity under the SOC Act.

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<sup>6</sup> *Energy Services Corporations Act 1995* (NSW) sch 2 cl 2(1); *Water NSW Act 2014* (NSW) s 9(1); *Landcom Corporation Act 2001* (NSW) s 9(1); *Forestry Act 2012* (NSW) s 7(1).

<sup>7</sup> *Ibid* sch 10 cl 5(6)(c).

In forming a view on the first point, the Voting Shareholders generally must be satisfied that the applicant:

- makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the SOC;
- has the capacity to significantly affect the SOC's financial standing; or
- provides instructions upon which the Board and/or CEO are accustomed to act in accordance with.

In forming a view on the second point, the following criteria may be relevant. That is, in respect of the applicant's role and responsibilities:

- there are certain limitations with the SOC's liability coverage<sup>8</sup> that warrant an indemnity; and
- there is a compelling commercial reason for this liability risk to reside under an indemnity.

The process for granting Voting Shareholder approval for an indemnity to an Officer (other than Directors and the CEO) is:

1	The SOC Board provides information about the applicant to Treasury. Appendix 2 sets out the information that SOCs are required to provide in order for Treasury to review these indemnity requests.
2	Treasury reviews the request to determine whether the applicant may be categorised as an 'officer of the SOC'.
3	Treasury reviews the request to assess the suitability of providing an indemnity to the Officer having regard to the existing liability coverage for the applicant and current commercial practice.
4	Where appropriate, Voting Shareholder approval will be recommended.
5	Treasury advises the SOC of the Voting Shareholders' decision.

### 5.4 Other employees of a SOC

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All employees of a SOC cannot be indemnified because the SOC Act only allows for indemnities to be granted to Officers.

Indemnifying all employees is also not in line with current commercial practice.

## 6 Other Insurance

An indemnity may be granted in accordance with the SOC Act, notwithstanding that SOC Directors and other Officers may be covered for certain liabilities under Directors and Officers (D&O) liability insurance, including self-insurance arrangements through the Treasury Managed Fund (TMF).

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<sup>8</sup> Liability coverage would include D&O insurance, self-insurance arrangements under the Treasury Managed Fund (TMF), statutory provisions and other commercial insurance arrangements.

## 7 Maintain records

The SOC is to maintain a written record of all persons that have been provided with an indemnity under the SOC Act, together with a copy of the executed Deeds. Copies of this information are to be provided to Treasury on request.

## 7 Annual report

The SOC is to include indemnity and insurance details for directors and officers in the Director's Report section of their Annual Report. This policy requirement is consistent with reporting requirements for companies under the *Corporations Act 2001*.

## Appendix 1: Deed of Indemnity

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### DEED OF INDEMNITY

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DEED dated \_\_\_\_\_ 20xx between:

- A. [name of SOC] a statutory State Owned Corporation incorporated under the [name of governing Act] of [address] (“***the Corporation***”); and
- B. [name of the relevant officer of the Corporation] (“***the Indemnified Party***”).

IT IS AGREED as follows:

#### 1. **INTERPRETATION**

1.1 The following words have the meanings in this Deed unless the contrary intention appears.

**Effective Date** means the date on which the Indemnified Party is or was appointed as an Officer.

**Officer** means as follows:

- a) a director of the Corporation or of a subsidiary of the Corporation;
- b) the chief executive officer of the Corporation or of a subsidiary of the Corporation;
- c) another person who is concerned, or takes part, in the Corporation’s management or the management of a subsidiary of the Corporation.

**Subsidiary** means a body corporate all of the issued shares in the capital of which are held by the Corporation.

1.2 Headings are for convenience only and do not affect interpretation.

1.3 The following rules of interpretation apply unless the context requires otherwise:

- a) the singular includes the plural and conversely;
- b) a gender includes all genders;
- c) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- d) a reference to a person includes a body corporate, an unincorporated body or other entity;
- e) a reference to a clause is to a clause of this Deed;
- f) a reference to any party to this Deed or any other agreement or document includes the party’s successors and permitted assigns; and
- g) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.

## 2. **INDEMNITY FOR LIABILITY**

### 2.1 **General indemnity**

To the extent permitted by law, on and from the Effective Date, the Corporation indemnifies and will keep indemnified the Indemnified Party:

- a) against any civil liability (other than a liability to the Corporation or a subsidiary of the Corporation);
- b) but only if such liability is or was incurred by the Indemnified Party in his [or her] capacity as an Officer,

unless the liability arises out of conduct involving a lack of good faith on the part of the Indemnified Party.

### 2.2 **Indemnity as regards costs**

To the extent permitted by law, on and from the Effective Date, the Corporation indemnifies and will keep indemnified the Indemnified Party against any liability for costs and expenses incurred by the Indemnified Party:

- c) in defending proceedings, whether civil or criminal, in which judgment is or was given in favour of the Indemnified Party or in which the Indemnified Party is or was acquitted; or
- d) in connection with any application in relation to a proceeding in which a court grants or granted relief to the Indemnified Party,

where such liability is or was incurred by the Indemnified Party in his [or her] capacity as an Officer.

## 3. **NOTICE OF CLAIM AGAINST INDEMNIFIED PARTY**

As soon as reasonably practicable after becoming aware of relevant circumstances, the Indemnified Party will notify the Corporation of any claim or circumstance (a “**Claim**”) which gives rise to, or could reasonably be expected to give rise to, an indemnity liability of the Corporation under this Deed. The Indemnified Party shall provide such information to the Corporation in respect of the Claim as the Corporation reasonably requests from time to time.

## 4. **DEMANDS ON THE CORPORATION**

### 4.1 **Written demand**

The Corporation will, upon written demand of the Indemnified Party in accordance with this Clause, make payment to, or on behalf of, the Indemnified Party of all amounts properly required to satisfy the Corporation’s obligations under Clause 2, subject to the provisions of this Deed.

#### **4.2 Statutory declaration**

Prior to taking any action to enforce an indemnity granted by the Corporation under Clause 2, the Indemnified Party must provide the Corporation with a statutory declaration, stating:

- a) particulars of the circumstances in respect of which a demand is being made by the Indemnified Party;
- b) the amount claimed by the Indemnified Party under the indemnity; and
- c) a list of all supporting documentary material, including but not limited to, court pleadings, judgments and memoranda of legal accounts.

### **5. ENFORCEMENT OF INDEMNITY**

#### **5.1 Indemnities survive vacation of office**

The indemnities set out in Clause 2 and the other provisions of this Deed will continue to operate despite the Indemnified Party ceasing to be an Officer.

#### **5.2 Enforcement of indemnity as to costs**

Unless otherwise permitted by law, the Indemnified Party is only entitled to enforce a right of indemnity under Clause 2.2 after judgment is given in favour of the Indemnified Party or the Indemnified Party is acquitted or the proceedings are withdrawn before judgment or after the Court grants relief to the Indemnified Party as the case may be.

#### **5.3 Conduct of legal proceedings in relation to a Claim**

An Indemnified Party wishing to enforce an indemnity granted by the Corporation under Clause 2:

- a) must be aware that, subject to any insurer exercising its right of subrogation, the Corporation may participate in and at its direction, elect to control the conduct, negotiation or defence of the Claim, including any court or other proceedings;
- b) must provide all reasonable assistance, including the execution and signing of documents, required by the Corporation in relation to the defence of the Claim if the Corporation elects to control the conduct of the defence of the Claim;
- c) must obtain the written consent of the Corporation, which must not be unreasonably withheld, prior to the making of any admissions of facts, allegations or liability concerning the Claim; and
- d) must obtain the written consent of the Corporation, which must not be unreasonably withheld, prior to any settlement.

**6. CLAW BACK**

**6.1 General clawback**

If the Corporation pays an amount to the Indemnified Party in excess of the amount actually payable by way of indemnity under Clause 2, the excess shall be repaid on demand from the Corporation.

**6.2 Clawback in event of reversal on appeal**

Where an Indemnified Party enforces an indemnity granted by the Corporation under Clause 2.2, the Indemnified Party agrees that, in the event that judgment given in favour of the Indemnified Party or in which the Indemnified Party is acquitted, or where a court has granted relief to the Indemnified Party, and that judgment, acquittal or other relief is ultimately reversed on appeal, then the Indemnified Party must repay to the Corporation on demand the amount already paid by the Corporation by way of indemnity.

**7. WAIVER AND VARIATION**

**7.1 Revocation of indemnity by the Corporation**

A provision of or a right created under this Deed may be revoked by the Corporation at any time, by written notice to the Indemnified Party, provided that such revocation does not affect the rights of the Indemnified Party for acts, matters or things done or not done prior to the date of revocation.

**7.2 Amendment and variation of the indemnity by the Corporation**

The Corporation may, at any time, amend or vary a provision of, or a right granted under this Deed, with the consent of the Indemnified Party (which must not be unreasonably withheld), provided that such amendment or variation does not affect the rights of the Indemnified Party for acts, matters or things done or not done prior to the date of amendment or variation.

**8. ASSIGNMENT**

The Indemnified Party will not assign his [or her] rights under this Deed without the prior written consent of the Corporation.

**9. SEVERABILITY**

If the whole or any part of a provision of this Deed is illegal, invalid, void or voidable, the legality or validity of the remainder of this Deed shall not be affected and the illegal, void or voidable provision(s) shall be deemed deleted from this Deed to the same extent and effect as if never incorporated in this Deed but the remainder of this Deed shall continue in full force and effect.

**10. STAMP DUTY**

The Corporation shall pay all stamp duty chargeable on this Deed.

**11. GOVERNING LAW**

The laws of New South Wales govern this Deed. The parties submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

**12. FURTHER ASSURANCES**

Each party shall take all steps, execute all documents and do everything reasonably required by the other party to give effect to any of the transactions contemplated by this Deed.

**13. NOTICES**

This Clause applies except in relation to a request by the Corporation to the Indemnified Party for information pursuant to Clause 3.

**13.1 Written notice**

A notice, approval, consent or other communication in connection with this Deed:

- a) must be in writing;
- b) must be marked for the attention of the Corporation's secretary; and
- c) must be:
  - i. left at the address of the addressee, or sent by prepaid post (airmail if posted to or from a place outside Australia) to the address of the addressee which is specified in this clause or if the addressee notifies another address to that address, or
  - ii. sent by email to the email address of the addressee which is specified in this clause, or if the addressee notifies another email address than to that email address.

The address and email address of the Corporation is:

Address:

Email:

The address and email address of the Indemnified Party is:

Address:

Email:

**13.2 Time from which notice takes effect**

A notice, approval, consent or other communication takes effect from the time it is received unless a later time is specified in it.

**13.3 Manner in which notice taken to be received**

A notice is taken to be received:

- a) it is delivered personally to the party being served;
- b) if sent by prepaid post to the address and contacts identified in clause 13.1 of this Deed, on the third business day after posting (seventh business day, if posted to or from a place outside Australia);
- c) in the case of email, the Indemnified Party has obtained an acknowledgement of receipt.

**EXECUTED** as a deed in [place where deed executed].

**EXECUTED** by )  
[the Corporation] )  
under its common seal )

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print name

\_\_\_\_\_  
Print name

\_\_\_\_\_  
Office held

\_\_\_\_\_  
Office held

**SIGNED SEALED and DELIVERED** )  
by [the Indemnified Party] )  
in the presence of: )

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Print name

## Appendix 2: Officer of a SOC Request for Indemnity – other than a Director or CEO

Treasury will submit to the Voting Shareholders for consideration requests by the SOC Board seeking approval to indemnify an Officer other than a Director or the CEO. These Officers may include senior managers and/or managers who report directly to the Board or CEO. Depending on the circumstances, it may include other positions within the SOC. It would not include general employees not involved in the SOC's management.

The application is to be supported by the following information which will assist assessment under section 5.3 of this policy.

Officer Information
Name of applicant
Position of applicant
Date of appointment to position
Does the applicant make, or participate in making, decisions that affect the whole, or a substantial part of the business of the SOC? If so, please provide details.
Does the applicant have the capacity to significantly affect the SOC's financial standing? If so, please provide details.
Does the applicant provide instructions upon which the Board and/or CEO are accustomed to act in accordance with? If so, please provide details.
Briefly describe how the applicant's role and responsibilities are affected by the risk of personal liability?
What liability coverage arrangements cover the applicant. Does the business have D&O Insurance that covers the applicant? Do these cover the applicant against the types of liability covered in the SOC Act Deed of Indemnity?
What are the limitations with the SOC's liability coverage arrangements that warrant an indemnity under the SOC Act for the applicant?
Describe the compelling commercial and/or risk reasons for this Officer to be granted an indemnity under the SOC Act.
SOC Board approval – provide details (i.e. Audit and Risk Committee consideration).

## Glossary and Acronyms

<b>Term</b>	<b>Meaning</b>
<b>Board</b>	The governing Board of the relevant State Owned Corporation as provided in the business' enabling legislation or the <i>State Owned Corporations Act 1989</i> .
<b>Indemnity</b>	A contractual agreement under which a State Owned Corporation agrees to pay for potential losses or damages caused by, or resulting from, specified conduct of an Officer of the State Owned Corporation and includes indemnity indirectly through one or more interposed entities.
<b>Officer or officer of a SOC</b>	For the purposes of providing an indemnity, an officer of a SOC can be a Director, the Chief Executive Officer or another person who is concerned, or takes part, in the management of a State Owned Corporation.
<b>State Owned Corporation (SOC)</b>	Government business distinguished by its corporatised status listed in Schedule 5 of, and subject to, the <i>State Owned Corporations Act 1989</i> .
<b>Voting Shareholders</b>	The Treasurer and another Minister nominated by the Premier as a Voting Shareholder for the relevant State Owned Corporation.