



New South Wales
TREASURY

COMMERCIAL POLICY FRAMEWORK
STATE OWNED CORPORATION
INDEMNITY POLICY

Office of Financial Management

Policy &
Guidelines Paper

Preface

The *State Owned Corporation Indemnity Policy* is a component of the NSW Government's Commercial Policy Framework.

The Framework aims to replicate within Government businesses the disciplines and incentives that lead private sector businesses towards efficient commercial practices.

The purpose behind the *State Owned Corporation Indemnity Policy* is to ensure greater consistency and transparency in the granting of Shareholder approval to requests by State Owned Corporations to indemnify their 'officers'.

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Secretary
NSW Treasury
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Executive Summary

The *State Owned Corporation Act 1989* (NSW) permits statutory State Owned Corporations (SOCs) to indemnify their officers against certain liabilities incurred in the course of employment. Indemnities cannot be issued by the SOC without Shareholder approval.

The *State Owned Corporation Indemnity Policy* has been designed to ensure greater consistency and transparency in the process of granting Shareholder approval to requests by SOCs to indemnify their officers. It has been designed to:

- ensure that ‘officers’ who genuinely require indemnity are protected;
- ensure that requests for Shareholder approval are evaluated consistently, in accordance with a common criteria;
- account for differences in the managerial structures of SOCs; and
- replicate private sector practice as far as possible.

1. BACKGROUND

The *State Owned Corporations Act 1989* (NSW) (SOC Act) provides the legislative basis for statutory SOCs to indemnify their officers against certain liabilities incurred in the course of their employment. However, SOCs are not permitted to issue an indemnity prior to obtaining approval from the Voting Shareholders.

The indemnity is made legally enforceable through a *Pro Forma Deed of Indemnity* between the SOC and the officer. The SOC Act defines an ‘officer’ as:

- a Director of a SOC;
- the Chief Executive Officer (CEO) of a SOC; or
- another person who is concerned, or takes part, in the management of a SOC¹.

The types of liability an ‘officer’ can be covered against under the Deed of Indemnity include:

- civil liability but only if such liability is or was incurred by the Indemnified Party in his or her capacity as an officer acting in good faith²;
- costs and expenses incurred by the Indemnified Party in defending proceedings, whether civil or criminal, in which judgement is, or was given in favour of the Indemnified Party, or in which the Indemnified Party was acquitted; or
- costs and expenses in connection with any application in relation to a proceeding in which a court grants or granted relief to the Indemnified Party.

1.1 POLICY OBJECTIVES

The purpose of this policy is to ensure greater consistency and transparency in the process of granting Shareholder approval to requests by SOCs to indemnify their officers. This policy has been designed to:

- ensure that ‘officers’ who genuinely require indemnity are protected;
- ensure requests for Shareholder approval are evaluated consistently, in accordance with common criteria;
- be flexible enough to account for differences in the managerial structure of individual SOCs and other relevant agencies; and
- replicate practice in the private sector as far as possible.

¹ *State Owned Corporations Act 1989* (NSW), Schedule 10, clause 5(6).

² *Ibid.*, Schedule 10, clause 5(3)

2. PROCESS

Indemnification occurs through the execution of a *Pro Forma Deed of Indemnity* (the Deed) between the SOC or other relevant agency and the officer. The extent of protection provided under the Deed cannot be altered through negotiation between the parties. Shareholder approval will not be provided if a Deed is altered. A copy of the Deed is contained in Schedule 1.

A SOC can enter into a Deed of Indemnity with an ‘officer’ of the SOC. The SOC Act defines an officer as:

- a Director of a SOC;
- the Chief Executive Officer of a SOC; and
- a person who is concerned or takes part in the management of a SOC.

2.1 THE PROCESS OF GRANTING SHAREHOLDER APPROVAL

Step One: SOC or relevant agency to provide information about the applicant other than the CEO and Directors

Before Shareholder approval is granted to a request by a SOC to indemnify an officer, a SOC is required to submit the following information to Treasury:

- the name, position, role and responsibilities of the applicant;
- where the applicant is located on the organisational chart;
- a brief explanation of how the applicant’s responsibilities are affected by the risk of personal liability, including an identification of recent developments or occurrences (if any) where the indemnity could be or could have been used by the officer;
- evidence of insurance (if any) and an explanation of whether such a policy covers the applicant against the types of liability covered in the Deed of Indemnity; and
- if the applicant is concerned or takes part in the management of a SOC (i.e. an officer), information on whether the applicant reports directly to the CEO;
- if the officer provides professional advice to the board or the executive upon which the organisation relies and
- any other information that Treasury considers relevant.

SOCs should provide this information in the form set out in Schedule 2.

Step Two: Treasury to consider indemnity request and recommend Shareholder approval

Following the provision of the above information to Treasury, Treasury will recommend to the Voting Shareholders as to whether approval should be granted.

In relation to requests to indemnify a director or the CEO of a SOC, Shareholder approval will be refused in only the most exceptional of circumstances.

2.2 SHAREHOLDER APPROVAL FOR OFFICERS WHO ARE CONCERNED OR TAKE PART IN THE MANAGEMENT OF A SOC

In relation to indemnity requests for applicants who are concerned or take part in the management of a SOC, Shareholder approval will only be recommended once the relevant Treasury analyst is satisfied that the applicant satisfies the definition of ‘officer’.

In forming a view on this point, the Treasury analyst 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 affect significantly the SOC’s financial standing; or
- is a person in accordance with whose instructions or wishes the directors of the SOC are accustomed to act.

As a general rule, the definition of ‘officer’ will cover senior managers and managers who report directly to the CEO. It may also, depending on the circumstances, cover other positions within the SOC. It does not, however, cover general employees.

All employees of a SOC cannot be indemnified because:

- the SOC Act provides for the granting of indemnities to ‘officers’ only (i.e., directors, the CEO or someone who is concerned, or takes part in the management of a SOC);
- indemnifying all employees is at variance with current commercial practice;
- In some instances vicarious liability may operate to protect an employee from personal liability; and
- Shareholder approval is required on a case-by-case basis, and this would impose a considerable administrative burden on the Shareholders, the SOC and Treasury.

If Treasury determines that the applicant cannot be categorised as someone who is concerned or takes part in the management of a SOC, Shareholder approval will not be granted.

Internal Treasury Guidelines have been formulated to help Treasury analysts determine whether or not Shareholder approval should be recommended in these circumstances.

3. DISCLOSURE IN THE ANNUAL REPORT

In order to increase transparency in the process of granting indemnities and to reduce the possibility of a SOC indemnifying an employee that is not an officer of a SOC or is an officer of a SOC but which would not ordinarily be indemnified in the private sector, SOCs are required to disclose indemnity details in the Director’s report section of the SOCs Annual Report.

4. RECOMMENDING SHAREHOLDER APPROVAL

Guidelines have been formulated to help Treasury analysts determine whether Shareholder approval should be granted to SOCs to indemnify 'officers' who are concerned or take part in the management of a SOC.

The Guidelines are for internal use only and are not authorised for release outside Treasury.

FURTHER INFORMATION

General inquiries concerning this document should be directed to:

Commercial Policy Section
NSW Treasury
Telephone: (02) 9228 4095
Internet: www.treasury.nsw.gov.au

SCHEDULE 1 – DEED OF INDEMNITY

DEED OF INDEMNITY

DEED dated 200x between:

A. [name of SOC] a statutory SOC 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.

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, 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, the Corporation indemnifies and will keep indemnified the Indemnified Party against any liability for costs and expenses incurred by the Indemnified Party:

- (a) 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
- (b) 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 is 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 left at the registered address of the addressee, or sent by prepaid ordinary post (airmail if posted to or from a place outside Australia) to the address of the addressee or sent by facsimile to the facsimile number of the addressee which is specified in this clause or if the addressee notifies another address or facsimile number then to that address or facsimile number.

The registered address and facsimile number of the Corporation is:

Address:

Facsimile:

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 letter or facsimile is taken to be received:

- (a) in the case of a posted letter, on the third (seventh, if posted to or from a place outside Australia) day after posting; and
- (b) in the case of facsimile, on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient.

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

SCHEDULE 2 – INFORMATION FORM

Before a SOC provides an indemnity to its officers, SOCs must complete this form and lodge it with NSW Treasury.

1. Name of applicant.	
2. Position of Applicant in the State Owned Corporation (e.g. Director, CEO or Officer).	
3. Briefly describe the roles and responsibilities of the applicant (e.g. Non-Executive Director, Chief Financial Officer, member of Audit Committee).	
4. Briefly describe how the applicant's responsibilities are affected by the risk of personal liability.	
5. Have there been any recent developments or occurrences where applicant could use or could have used the indemnity?	
6. Where is the applicant located on the organisational chart? (Please attach a copy of the organisational chart)*.	
7. Does the applicant report directly to the CEO?*	
8. Does D & O Insurance cover the applicant? (Please attach a copy of the relevant D & O insurance policy)	
9. Does pre-existing D & O Insurance cover the applicant against the types of liability covered in the Deed of Indemnity?	

* Not applicable where the applicant is a CEO or Director of a SOC.

REFERENCES

Corporations Act 2001 (Cth).

Employees Liability Act 1991 (NSW).

E Kyrou, 'Deeds of Indemnity, Access and Insurance: An Overview of the Practicalities', in *Australian Company Secretary*, December 1997, 475-478.

P Redmond, *Company and Securities Law: Commentary and Materials*, Third Edition, LBC Information Services, Sydney, 2000.

State Owned Corporation Act 1989 (NSW).