IPART
New South Wales

Independent Pricing and Regulatory Tribunal

Submission to Issues Paper on the Review of the Legislative Framework that provides for the Governance and Accountability of State Owned Corporations

Cross sector — Submission to Issues Paper
February 2014

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1 Introduction

Reforms introduced with the *State Owned Corporations Act 1989* (NSW) (SOC Act) were an important step in improving public sector efficiency and accountability in government business enterprises.[1] The SOC Act also sought to put State Owned Corporations (SOCs) under the same regulatory regime as companies in the private sector. The current framework is based on sound principles, and was a positive development from the situation at that time, but management of the SOCs in NSW has increasingly departed from these principles. There are now significant gaps between the corporatisation principles envisaged to apply and how they are being applied in practice.

The governance and accountability framework for SOCs is the key tool for ensuring that they operate as efficiently and effectively as possible. Strengthening this framework can enhance their commercial performance, and lead to improvements in the quality of services they provide (at the most efficient cost). This has important consequences, since SOCs form a significant part of the NSW economy and have a direct impact on the NSW Budget. Further, in some instances they can provide essential services to consumers in industries where there are relatively few private sector alternatives. In this context, we welcome the current review of the framework and the opportunities it provides in updating the underlying principles, and the legislation and processes in place to implement those principles.

IPART is the independent regulator that determines the maximum prices that can be charged for certain retail energy, water and transport services in New South Wales (ie, those services delivered by SOCs and privately owned corporations). We also make recommendations to Government about public utility and private sector licences, as well as monitor compliance for services provided in the water industry. This interaction with SOCs allows us to develop insights which form the basis of our recommendations. We have also drawn on findings from our 2010 review of SOC productivity.[2]

We consider there are 5 core principles that should shape improvements and reforms to the SOC Act framework:

1. Centralise the governance framework in the SOC Act.
2. Prioritise commercial objectives, and provide transparent processes for non-commercial or public interest ones.
3. Subject SOCs to best practice governance requirements and oversight.

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1 NSW Parliament, *State Owned Corporations Bill: Second Reading*, Hansard, Legislative Assembly, 2 August 1989, p 9138 (N Greiner).

2 IPART, *Review of the Productivity Performance of State Owned Corporations – Final Report*, July 2010.

4. Adopt an active shareholder role to improve SOC oversight.
5. Streamline the enabling Acts.

We expand on these principles in Chapter 3, where we address specific questions raised in the review's Issues Paper.[3]

1.1 Centralise the governance framework in the SOC Act

Since the SOC Act came into effect almost 25 years ago, there has been no comprehensive review of the governance framework (until now). During that time, layers have been added to it, resulting in the framework becoming unclear, inconsistent and overly complex.

Many of the difficulties arise from SOC governance being split between the SOC Act and related enabling Acts. This has led to differing provisions between these Acts. For example, often the board requirements in the SOC Act have been replaced by, or are different from, those in the SOC's enabling Act.

It has also led to inconsistencies in governance arrangements between SOCs, for which there is no clear rationale. Shareholding restrictions are one example. In some SOC enabling Acts, there are restrictions preventing the portfolio Minister becoming a voting shareholder. These restrictions reinforce the separation of the Government's commercial and non-commercial interests regarding the SOC. However, they are not in all SOC enabling Acts.

To improve the framework, we consider that governance provisions should be removed from the enabling Acts and centralised in the SOC Act. Provisions such as those outlining a SOC's principal objectives, Ministerial direction powers, board requirements and shareholding restrictions should be clear and consistent across all SOCs. Differences in their functions and operations (separate from their governance) could then be dealt with in the industry specific enabling Acts (discussed in section 1.5).

1.2 Prioritise commercial objectives, and provide transparent processes for non-commercial or public interest ones

The SOCs' principal objectives are currently a mix of commercial and non-commercial (ie, public policy) ones. In general, the SOC Act and related enabling Acts stipulate that these principal objectives are of equal importance.

[3] NSW Government (DPC, DFS, NSW Treasury), *Review of the Legislative Framework that provides for the Governance and Accountability of State Owned Corporations – Issues Paper*, November 2013.

This arrangement undermines the effectiveness of the governance framework in several ways. Treating commercial and non-commercial objectives as equally important:

- dilutes the focus on SOCs operating efficiently
- makes it difficult for SOCs to manage their businesses (ie, where conflicts arise between commercial and non-commercial objectives, and it is unclear how to resolve these competing priorities)
- reduces the accountability of SOCs for their performance, with performance expectations being poorly defined because the relative priority of commercial and non-commercial objectives is unclear[4].

1.2.1 Prioritise commercial objectives

We consider the SOCs should have commercial objectives that are clear and non-conflicting. This will allow them to focus on using resources more efficiently and producing goods and services in ways that add the most value, creating an environment more conducive to high productivity.

Removing non-commercial objectives from a SOC's principal objectives is consistent with the principle of competitive neutrality. Relative to potential private sector competitors, SOCs should not be advantaged or disadvantaged by virtue of their State ownership (ie, they should not have additional requirements imposed on them, or additional privileges granted to them).

Several markets in which the SOCs operate are open to private operators. All SOCs need a level playing field to compete, and should only be responsible for non-commercial (eg, social, environmental and regional development) objectives to the extent of being good 'corporate citizens', in line with the practices of reputable private sector operators. SOCs should not be required to fulfil non-commercial objectives above and beyond this threshold.

1.2.2 Provide transparent processes for non-commercial or public interest objectives

The Government should pursue non-commercial or public interest objectives through a transparent process. This includes:

- subjecting new or revised standards (or policy requirements) for SOCs to a cost-benefit analysis

4 IPART, *Review of the Productivity Performance of State Owned Corporations - Final Report*, July 2010, p 11.

- only issuing SOCs with Ministerial directions, or imposing licence conditions[5], if there are no other viable options (eg, contracting with the SOC or private operator to undertake the non-commercial activity), and
- ensuring Ministerial directions and licence conditions are explicit, publicly disclosed and entitle the SOC to be reimbursed.

The existing Ministerial direction processes need to be amended to ensure they reflect all these elements.[6]

The OECD considers it is good corporate governance for the costs of a ministerial direction to be clearly identified, disclosed and compensated for by the Budget.[7] Explicitly agreeing the costs of meeting non-commercial objectives helps ensure that these costs are subject to transparent scrutiny. This should increase the likelihood that the targeted benefits arising from the non-commercial activities outweigh the costs, and that these benefits are pursued through the least-cost options.[8]

1.3 Subject SOCs to best practice governance requirements and oversight

In order to improve their governance, the SOCs should be subject to best practice requirements. Applying the *Corporations Act 2001* (Cth) (Corporations Act) to them is an important step towards achieving this aim. For example, it clarifies the range of duties the directors owe to the SOCs. It also introduces independent oversight of the SOC governance arrangements by ASIC. Finally, it more closely aligns the SOC governance framework with the one for private sector entities, which is consistent with the principle of competitive neutrality.[9]

That said, we consider there will be a limited range of instances where it will be appropriate for the SOC governance framework to depart from the Corporations Act. For example, shareholders requiring SOC directors to:

- undertake non-commercial or public interest activities
- take steps to rectify potential insolvency situations.

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5 Requiring the SOC to undertake non-commercial or public interest activities.

6 SOCs are reimbursed for complying with Ministerial directions to undertake non-commercial activities, but not necessarily for Ministerial directions relating to the public interest or public sector policies (sections 11, 20N, 20O & 20P SOC Act).

7 OECD, *Guidelines on Corporate Governance of State-owned Enterprises*, 2005, p 20.

8 IPART, *Review of the Productivity Performance of State Owned Corporations - Final Report*, July 2010, p 14.

9 Rennie, M & Lindsay, F, *Competitive Neutrality and State-Owned Enterprises in Australia: Review of Practices and their Relevance for Other Countries*, *OECD Corporate Governance Working Papers No. 4*, 2011, p 41.

These exceptions are discussed further in Chapter 3[10], and arise because fundamental differences exist between SOCs and private sector entities. SOCs should remain vehicles for Government to pursue social programs (subject to additional rigours outlined in section 1.2.2). Further, SOCs do not face the same market disciplines as their private sector counterparts, such as the ability of shareholders to sell their shares if the SOC is not meeting its financial performance targets.

Using the company SOC model already provided for in the SOC Act is our preferred way for the Corporations Act to underpin the SOC governance framework, but also be overridden where appropriate. In this respect, company SOCs are subject to the Corporations Act, except so far as the SOC Act states otherwise. The existing statutory SOCs could be transitioned into company SOCs by amending the SOC Act.[11]

The company SOC model ensures that the SOCs' governance framework automatically remains up-to-date with the Corporations Act. In addition, it is in line with the OECD corporate governance principles, which consider that the legal form of a State-owned enterprise should be based as much as possible on corporate law.[12]

1.4 Adopt an active shareholder role to improve SOC oversight

Shareholder monitoring is a critical component of the SOC governance framework. Shareholding Ministers are responsible for steering the strategic directions of SOCs and overseeing their performance. As such, effective monitoring provides incentives for SOCs to improve their performance.

We consider that shareholding Ministers should adopt a more active shareholder role. This involves engaging in discussions with the SOCs in relation to strategic issues, such as future services and delivery mechanisms.[13] In addition, it requires them to regularly review and assess SOC performance by using the quarterly performance reports Treasury is proposing to implement under its 'active shareholder' model.[14]

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10 In particular, see sections 3.7 and 3.9.

11 Parliament would need to pass legislation to insert the names of the existing SOCs into Schedule 1 of the SOC Act (s4 SOC Act). The SOCs would also need to be registered under the Corporations Act as companies limited by shares (Part 2A.1 Corporations Act).

12 OECD, *Guidelines on Corporate Governance of State-owned Enterprises*, 2005, p 20.

13 IPART, *Review of the Productivity Performance of State Owned Corporations - Final Report*, July 2010, p 81.

14 NSW Government (DPC, DFS, NSW Treasury), *Review of the Legislative Framework that provides for the Governance and Accountability of State Owned Corporations – Issues Paper*, November 2013, pp 5-6.

Appointing the Minister for Finance & Services as a second shareholding Minister (in addition to the Treasurer) across all SOCs may also improve shareholder monitoring. This recognises that the Treasurer has many roles and responsibilities within government, and another Minister can support the Treasurer in the active shareholder role to improve SOC oversight.

Where the Minister for Finance & Services is the portfolio Minister for a SOC, a different Minister should be appointed as the second shareholding Minister. This is consistent with our view that the portfolio Minister should not be a voting shareholder of a SOC.

1.5 Streamline the enabling Acts

The enabling Acts have developed over time in an ad-hoc manner, leading them to impose inconsistent requirements on SOCs, both within the same industry and across different industries (without clear justification for these inconsistencies). Also there is now significant private sector involvement in some SOC industries.

To ensure a level playing field within an industry for both SOCs and private sector entities, the enabling Acts could be collapsed into a single industry Act containing policy-related, industry-specific requirements. For example, the enabling Acts for the public water utilities (such as Hunter Water Corporation and Sydney Water Corporation) could be consolidated in a single water industry Act that also covers private sector operators.

2 Background

In 2009, the NSW Government commissioned IPART to review the productivity of selected SOCs. These included ports corporations, water utilities, a property development corporation, electricity generators, and electricity network service providers.

Box 2.1 SOCs included in IPART's 2010 review

The SOCs included in our review were:

- the 3 port corporations: Newcastle Port Corporation, Port Kembla Port Corporation and Sydney Ports Corporation
- the 2 urban water utilities: Hunter Water Corporation and Sydney Water Corporation
- the rural water utility, State Water Corporation
- the property development corporation, Landcom
- the 3 electricity generators: Delta Electricity, Eraring Energy and Macquarie Generation
- the electricity transmission network service provider, TransGrid, and
- the 3 electricity distribution network service providers (excluding their retail arms): Country Energy, EnergyAustralia, and Integral Energy.

Note: This is a subset of the 15 SOCs operating in NSW.

IPART's Final Report sets out a number of recommendations for improving the SOCs' productivity performance. These include to:

- improve the clarity and consistency of SOCs' objectives
- review the SOCs' corporate governance arrangements to enhance and then maintain their autonomy, and ensure clear accountability for performance
- improve the effectiveness of SOCs' incentives to better drive productivity and performance improvements.[15]

We note that the Issues Paper reflects many of the governance and accountability issues that were recommended in IPART's Final Report.

3 Responses to Issues Paper questions

In addition to the general points raised above, we have provided responses to the specific questions that we are best able to answer.

15 IPART, *Review of the Productivity Performance of State Owned Corporations – Final Report*, July 2010, p 10.

3.1 Policy Framework

Issues Paper question(s):

2.1(2) Should there be an objects clause in the SOC Act to clarify the policy intent and what should be included?

Response to question 2.1(2)

It is good regulatory practice to include an objects clause in the SOC Act to clearly explain what the legislation is trying to achieve.

We support the view presented in the Issues Paper that the SOC Act is intended to improve the efficiency and accountability of government businesses for the benefit of the people of NSW, and facilitate SOCs operating under similar conditions as private sector companies.

Recommendation(s) on policy intent (Question 2.1(2))

1 There should be an objects clause in the SOC Act to explain the policy intent of the NSW Government.
   - The objects clause should specify that the policy intent is to improve the efficiency and accountability of government businesses for the benefit of the people of NSW, and facilitate SOCs operating under similar conditions as private sector companies.

3.2 Statutory review clause

Issues Paper question(s):

2.3: Would a single, consistent arrangement for periodic review of all legislation governing SOCs benefit the overall accountability and governance framework and what should be the frequency of review?

Response to question 2.3

Periodic review of all legislation is necessary, including that governing SOCs. DPC's *Guide to Better Regulation* (2009) specifies that reviews should generally be conducted after 5 years. In terms of ongoing reviews being performed periodically, there appears to be no reason why the SOC Act and relevant enabling Acts should be treated differently from other legislation in NSW.

There are already established processes in NSW for reviewing legislation. However, the frequency and the scope of legislative review needs to be balanced against providing certainty in the operating environment for SOCs.

As indicated in IPART's 2010 Final Report, review of the SOC Act and relevant enabling Acts should be undertaken to ensure that their terms remain appropriate for securing the Government's objectives.[16] Circumstances may evolve and functions of SOCs can change:

- best practice may evolve or other instruments may be implemented (eg, creation of the Energy Savings Scheme means that energy efficiency objectives are less important for electricity businesses)
- corporatisation practices must remain relevant – if relevance is not maintained, there may be potential for 'policy creep'.

It should be noted that for some SOCs, there are already periodic review processes defined in legislation for key instruments such as operating licences. For example, Sydney Water is subject to the *Sydney Water Act 1994* (NSW) and the operating licence granted under that Act. The operating licence is to be renewed (and reviewed) at least every 5 years. This means that a substantial element of Sydney Water's overall accountability and governance framework is already subject to periodic review and this may have a bearing on the frequency of the legislative review to be recommended.

Recommendation(s) on statutory review (Question 2.3)

2 SOC Act and relevant enabling Acts should be subject to review using established processes for reviewing legislation in NSW.

3 The scope of this review should reflect that for some SOCs there are already review processes defined in legislation for key instruments (eg, operating licences).

4 The review should be conducted after 5 years, reflecting the DPC's *Guide to Better Regulation*.

16 IPART, *Review of the Productivity Performance of State Owned Corporations - Final Report*, July 2010, p 68.

3.3 Objectives

Issues Paper question(s):

3.1(1): In what circumstances (if any) should the government allocate responsibility for social, environmental and regional development objectives to SOCs? If not done by SOCs how can these objectives be met?

3.1(2): Should SOCs' principal objectives be clarified, amended or repealed?

3.1(3): If kept, how can the objectives be relocated, prioritised, or better expressed to improve the commercial focus and performance of SOCs?

Response to question 3.1(1)

A SOC should not be required to fulfil objectives above and beyond what apply to reputable private sector operators. That is, SOCs should be responsible for social, environmental and regional development objectives to the extent of being good 'corporate citizens'.

This is consistent with the principle of competitive neutrality. Relative to potential private sector competitors, SOCs should not be advantaged or disadvantaged by virtue of their State ownership (ie, they should not have additional requirements imposed on them, or additional privileges granted to them).

The policy interests of the government are better pursued through other policy instruments, transparent agreements (such as Community Service Obligations (CSOs) or licence conditions), competitive processes and/or market-based mechanisms that are ownership neutral.

Recommendation(s) on objectives (Question 3.1(1))

5 SOCs should be responsible for social, environmental and regional development objectives to the extent of being a good 'corporate citizen' consistent with the private sector.

6 The objectives of the SOCs should ensure that competitive neutrality can be maintained.

7 The non-commercial objectives (or policy interests of government) are better pursued through other means that are ownership neutral.

Response to question 3.1(2)

The clarity and consistency of the SOCs' objectives could be further improved by:

- separating the SOCs' commercial objectives from public policy objectives and requirements

- subjecting any new or revised standards (or policy requirements) for the SOCs to transparent cost-benefit analysis
- clarifying what shareholders expect in relation to the SOCs' scope of business.[17]

The SOC Act should clearly define the commercial objectives of the SOCs. This is important to guide decision making by or in respect of the SOCs, and to evaluate their performance.[18] Any non-commercial (or public policy) objectives should be removed from the SOC Act.

Currently, the SOC Act provides that each of the principal objectives of a SOC is of equal importance and we consider that this should be amended in the revised Act, making the commercial objective the sole objective.

Once public policy objectives and requirements have been separated from their commercial objectives, they should be removed to other instruments and transparently prioritised to improve accountability and performance.

In addition, the activities and investments required to meet the public policy objectives and requirements of government should be explicitly agreed to and paid for based on the concept of 'beneficiary pays', where practical. A process should be developed to cost activities/investments required to meet public policy objectives and then attribute those costs to the Government or users (through prices), depending on who are the main beneficiaries.[19]

As part of clarifying SOC objectives, clarification of the scope of the SOCs' business activities is also required to specify the extent to which the Government wishes to encourage or restrict the SOCs' engagement in specific activities and/or markets.

Recommendation(s) on objectives (Question 3.1(2))

8 All non-commercial objectives should be removed from the statutory objectives in the SOC Act.

9 The SOCs' non-commercial objectives (ie, public policy objectives and requirements) should be specified in other legislation.

10 Any new or existing standards (or policy requirements) for the SOCs should be subject to transparent cost-benefit analysis.

11 Shareholders expectations in relation to the SOCs' scopes of business should be clarified.

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17 IPART, *Review of the Productivity Performance of State Owned Corporations - Final Report*, July 2010, pp 68-70.

18 Ibid.

19 IPART, *Review of the Productivity Performance of State Owned Corporations – Final Report*, July 2010, pp 70-71.

Response to question 3.1(3)

As discussed above, the public policy objectives should be removed from the SOC Act. The objectives could still be implemented transparently and, where applicable, independently of the pricing and licensing processes conducted by IPART, via:

- Option 1: A direction by the portfolio Minister under the SOC Act to undertake (or not undertake) certain activities and compensate them for this.

  OR

- Option 2: Contracting SOCs or private businesses to undertake certain activities.[20]

We consider that, removing public policy objective requirements from the SOC Act and adopting option 2, could serve to strengthen, not weaken, the delivery of such objectives and facilitate transparent assessment of the distribution of costs. Where contracting certain activities has been attempted, yet is not achievable, option 1 could then be used to direct SOCs to undertake the activities and be compensated for them.

A third option proposed in the Issues Paper is to achieve objectives by imposing licensing requirements on private and Government operators.[21] This may be an effective option, provided that the framework is strengthened to facilitate:

- the licensing requirements focusing on outcomes (rather than being overly prescriptive regarding inputs or outputs)
- a transparent assessment of the most efficient way of delivering those outcomes, and
- the costs of the requirements, and reimbursement for the SOCs, being explicitly identified.

Otherwise, we consider that this option risks being less transparent than the other options, and may preclude the most efficient way of delivering outcomes.[22] For those SOCs regulated by IPART, this could also inhibit IPART's discretion on the prudence and efficiency of costs incurred in meeting Government directed objectives.

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20 NSW Government (DPC, DFS, NSW Treasury), *Review of the Legislative Framework that provides for the Governance and Accountability of State Owned Corporations – Issues Paper*, November 2013, p 19.

21 Ibid.

22 This issue is also discussed in section 3.7 in relation to a requirement in Sydney Water's Operating Licence.

The non-commercial (or public policy) projects and activities of a SOC should be transparently prioritised by government. The provisions under the *Landcom Corporation Act 2001* (NSW) (Landcom Act), which relate to the SOC UrbanGrowth NSW (the new trading name for Landcom), provide an example of how this could be done. The Landcom Act establishes a process by which the portfolio Minister can issue priorities to the board.[23]

A similar process for prioritising projects and activities could be adopted by other SOCs. We consider that the process in the LandCom Act could be improved by also requiring the portfolio Minister to consult the shareholding Ministers on the statement of priorities prior to issuing them to the Board. This would place an emphasis on prioritising the shareholding Ministers' and portfolio Minister's interests and communicating these to UrbanGrowth NSW as the Government's agreed objectives for it. It would also make it unambiguous that UrbanGrowth NSW is chiefly accountable to its shareholding Ministers.[24]

Recommendation(s) on objectives (Question 3.1(3))

12 The public policy objectives of SOCs should be implemented transparently by contracting SOCs or private businesses to undertake certain activities (as per Option 2 of the Issues Paper), where this is possible.

13 If licensing conditions are used, the framework should be applied fully and strengthened to facilitate a transparent assessment of the most efficient way of delivering outcomes and quantifying the SOC's reimbursement.

14 The SOCs non-commercial objectives (or public policy objectives and requirements) should be transparently prioritised and contained in instruments other than the SOC Act.

3.4 Functions

Issues Paper question(s):

3.2: Should the statements of functions in the SOCs' enabling Acts be rationalised and/or updated?

Response to question 3.2

The statements of functions for SOCs should be rationalised and updated to facilitate competitive neutrality. This means that the functions should be broadened to allow SOC boards to determine how best to achieve and further the objectives of the SOC.

23 IPART, *Review of the Productivity Performance of State Owned Corporations – Final Report*, July 2010, p 73.

24 Ibid.

To this end, for some enabling Acts we have specific recommendations on rationalising and updating the statement of functions. For example, under the *Energy Services Corporations Act 1995* (NSW), the principal functions for generators currently specifies trading in carbon sequestration markets. This function should either be removed all together or broadened to capture carbon more broadly and potentially other green schemes.

Recommendation(s) on functions (Question 3.2)

15 The statements of functions for SOCs should be rationalised and updated to facilitate competitive neutrality.

16 For the *Energy Services Corporations Act 1995* (NSW), the principal functions for generators should be amended to broaden their ability to trade in carbon markets.

3.5 Corporatisation models

Issues Paper question(s):

4.1: Should the SOC Act provide for both company and statutory SOCs, or only one model?

Response to question 4.1

Consistent with the principle of competitive neutrality[25], we consider that the *Corporations Act 2001* (Cth) (Corporations Act) should apply to SOCs. This means that SOCs would be subject to the same best practice governance requirements as private sector entities, as well as independent ASIC oversight.

Our preferred option is to use the company SOC model already provided for in the SOC Act. Company SOCs are subject to the Corporations Act, except so far as the SOC Act states otherwise. The statutory SOC model would no longer be required. The existing statutory SOCs could be transitioned into company SOCs by amending the SOC Act.[26]

25 Rennie, M & Lindsay, F, *Competitive Neutrality and State-Owned Enterprises in Australia: Review of Practices and their Relevance for Other Countries, OECD Corporate Governance Working Papers No. 4*, 2011, p 41.

26 Parliament would need to pass legislation to insert the names of the existing SOCs into Schedule 1 of the SOC Act (s4 SOC Act). The SOCs would also need to be registered under the Corporations Act as companies limited by shares (Part 2A.1 Corporations Act).

The company SOC model ensures that the SOCs' governance framework automatically remains up-to-date with the Corporations Act. In addition, it is in line with the OECD corporate governance principles, which consider that the legal form of a State-owned enterprise should be based as much as possible on corporate law.[27]

If the statutory SOC model were to remain, an alternative would be for the SOC Act to replicate relevant Corporations Act obligations and apply them to the SOCs. However, we consider this option to be relatively cumbersome, as it requires the SOC Act to be updated each time there are updates to the Corporations Act.[28]

Recommendation(s) on corporatisation models (Question 4.1)

17 The *State Owned Corporations Act 1989* (NSW) should only provide for the company SOCs model.

18 The existing statutory SOCs should be transitioned into company SOCs to make them subject to the *Corporations Act 2001* (Cth).

3.6 Roles of Ministers

Issues Paper question(s):

5.1(1): What should be the respective roles and responsibilities of portfolio Ministers and shareholder Ministers?

5.1(2): What, if any, changes are needed to improve or clarify Ministerial roles and responsibilities in relation to SOCs?

Response to question 5.1

The Government should clarify the roles of the shareholding Minister and portfolio Minister as they relate to the SOCs, in particular reinforcing the separation of commercial and non-commercial (or policy) interests of the Government.

This would help to improve accountability by separately accounting for the different objectives and agreeing on the Government's priorities as they relate to SOC performance.[29]

27 OECD, *Guidelines on Corporate Governance of State-owned Enterprises*, 2005, p 20.

28 Where the SOC Act already includes obligations modelled on the Corporations Act, these obligations have not always been updated to align them with revisions to the Corporations Act. This issue is discussed in relation to directors' duties in Chapter 8 of the Issues Paper.

29 IPART, *Review of the Productivity Performance of State Owned Corporations - Final Report*, July 2010, p 77.

We consider that the portfolio Minister should not be a voting shareholder of a SOC as it blurs the respective responsibilities of the Ministers, rather than reconciling them. For example, it would be impossible to declare that the joint portfolio/shareholder Minister did not have a bias towards either interest, given the Minister's obligations to both. For SOCs that compete with other suppliers or may do so in future, questions about the partiality of the Minister as regulator and competitive neutrality would be a particular problem.[30]

There is merit in the Government appointing a second shareholding Minister other than the NSW Treasurer as a Minister responsible for state-owned businesses. It is appropriate for the Minister for Finance & Services to be the second shareholder Minister given the financial nature of the functions required by the shareholder role. This also acknowledges that the NSW Treasurer has many responsibilities and roles within government.

Currently there are 3 SOCs for which the NSW Treasurer and Minister for Finance & Services are not already the shareholding Ministers. These are:

- Sydney Water Corporation (shareholding Ministers are: NSW Treasurer and NSW Premier)
- Hunter Water Corporation (shareholding Ministers are: NSW Treasurer and NSW Premier)
- Superannuation Administration Corporation (Pillar) (shareholding Ministers are: NSW Treasurer and NSW Deputy Premier).

For these SOCs, the Minister for Finance & Services is the portfolio Minister. The enabling Acts for the 2 water corporations preclude the nomination of the portfolio Minister (of the corporation) as a voting shareholder.[31]

We consider that voting shareholder arrangements should be standardised for all SOCs and specified in the SOC Act. If there is a conflict between the shareholder and portfolio responsibilities, then the SOC Act should explain the process for appointing another shareholder Minister.

Recommendation(s) on roles of Ministers (Question 5.1(1))

19 There should be a clear separation of the roles of shareholding Minister and portfolio Minister for the SOCs.

20 The portfolio Minister of a SOC should not be a shareholding Minister.

21 The NSW Treasurer should continue to undertake the role of the shareholder Minister for all SOCs, with the Minister for Finance & Services to be the second Shareholder Minister. If there is a conflict between the portfolio and shareholder responsibilities for either Minister, then another shareholder Minister should be appointed.

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30 Ibid.

31 *Sydney Water Act 1994* (NSW), section 6 and *Hunter Water Act 1991* (NSW), section 4C.

22 These arrangements should be standardised and specified in the SOC Act rather than in the enabling Acts.

3.7 Ministerial directions and approvals

Issues Paper question(s):

5.4(1): Should existing provisions be amended to better define, expand and/or limit Ministerial directions/approvals?

5.4(2): Are there any alternatives to Ministerial directions powers that should be explored?

5.4(3): What, if any, changes should be made to transparency, consultation, reimbursement and approvals processes associated with Ministerial directions?

Response to question 5.4

Under the current SOC Act, directions from a Minister can include instructions to conduct non-commercial or public interest activities, or to ensure that government policy is carried out by the SOC. The scope of these direction powers appears to be sufficient.[32],[33]

We consider the following reforms would strengthen the Ministerial directions process:

- centralise direction powers in the SOC Act to ensure they are consistent across SOCs
- ensure Ministerial directions are explicit, publicly disclosed and entitle the SOC to be reimbursed[34]
- prohibit Community Service Obligations (CSOs) being imposed on SOCs outside of the directions process.

[32] Ministerial directions for public interest activities or government policies only apply to statutory SOCs. If the company SOC model is adopted (see section 3.5), the SOC Act would need amending to apply these 2 additional types of directions to company SOCs.

[33] There may be merit in including an additional Ministerial direction in the event of suspected insolvency for the company SOC model. This is discussed in section 3.9.

[34] SOCs are reimbursed for complying with Ministerial directions to undertake non-commercial activities, but not necessarily for Ministerial directions relating to the public interest or public sector policies (sections 11, 20N, 20O & 20P SOC Act).

If a SOC incurs additional costs in complying with a Ministerial direction, it should be entitled to reimbursement from the Budget. However, the public interest and government policy directions do not currently entitle SOCs to reimbursement. Explicitly agreeing the costs of meeting CSO-type objectives is important as it helps to ensure that these costs are subject to transparent scrutiny. Further, it increases the likelihood that the targeted benefits arising from the CSO-type activities outweigh the costs.[35]

The transparency of the Ministerial direction process is undermined if additional CSO-type requirements are imposed on SOCs in other ways, which do not have the same rigours around reimbursement. For example, Sydney Water is required to roll-out one of the Government's social programs – the Priority Sewerage Program – under its Operating Licence. Sydney Water has noted that it is reimbursed for only a very small proportion of the total cost of complying with this licence requirement and providing sewerage services to the areas nominated by this program.[36]

Recommendation(s) on Ministerial directions and approvals (Question 5.4)

23 There should be a transparent and consistently defined process for Ministerial directions across all SOCs.

24 Ministerial directions should be explicit, publicly disclosed and require the SOC to be reimbursed.

25 CSOs should not be imposed on SOCs outside of the Ministerial directions process.

3.8 Reporting and auditing

Issues Paper question(s):

6.2(1): What changes, if any, are required to improve SOC accountability and optimise the quality, relevance and timeliness of reporting?

35 IPART, *Review of the Productivity Performance of State Owned Corporations – Final Report*, July 2010, p 14.

36 Sydney Water is reimbursed $6,000 per lot, compared to the planned cost of $65,000 per lot. The estimated cost of the program up to 2014-15 is $212 million (Sydney Water, *Statement of Corporate Intent 2012-13*, September 2012, p 6).

Response to question 6.2(1)

In performing the shareholder monitoring function as part of its shareholder advisory role, NSW Treasury should focus on:

- assessing the SOCs' commercial opportunities and risks
- understanding the environments in which SOCs operate
- protecting and enhancing SOCs' value to the shareholders
- monitoring and assessing the SOCs' performance against both short and longer-term commercial and public policy objectives
- establishing ownership objectives for individual SOCs and the SOCs as a group
- developing ownership policy advice for shareholding Ministers
- ensuring the alignment of objectives between the Government, SOC and SOC managers through appropriate incentives
- establishing well-structured and transparent board nomination and performance assessment processes, and participating in the nomination and assessment of all SOC boards.[37]

This would require the systematic collection of data on the SOCs' outputs and inputs and effort to improve the specification and measurement of these indicators. With more refined data over time, this will help SOC management and the Government agree on what should be produced and how, set practical performance targets, and consider the impact of policy requirements and standards on outcomes, costs and performance.[38]

To ensure that incentives are consistent and aligned with overall governance frameworks, we recommend that NSW Treasury consult with IPART and other relevant regulators in incorporating productivity and benchmarking analyses into the oversight regimes for the SOCs that IPART regulates.[39]

Recommendation(s) on reporting and auditing (Question 6.2(1))

26 NSW Treasury should consult with IPART and other relevant regulators in incorporating productivity and benchmarking analyses into the oversight regimes for the SOCs that IPART regulates.

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37 IPART, *Review of the Productivity Performance of State Owned Corporations – Final Report*, July 2010, p 81.

38 IPART, *Review of the Productivity Performance of State Owned Corporations – Final Report*, July 2010, p 82.

39 Ibid.

3.9 Shareholder's ability to rectify poor performance

Issues Paper question(s):

6.4(3): What additional measures, if any, should be available to voting shareholders to take action when they believe there is a serious risk of insolvency?

Response to question 6.4(3)

Applying the Corporations Act to SOCs - as recommended in section 3.5 - increases the sanctions available for poor commercial performance. For example, ASIC may take action against the directors if the SOC is trading while insolvent.

That said, the rights of shareholders to address solvency concerns under the Corporations Act are relatively limited when compared to the position of secured creditors. For example, the latter are able to appoint receivers to a company to manage its affairs while the insolvency situation is being resolved.

Creditors are not a strong presence in SOC business activities. This lessens the likelihood of such Corporation Act remedies being used against SOCs. Further, SOCs do not face the same market disciplines as their private sector counterparts, such as the ability of shareholders to sell their shares if the SOC is not meeting its financial performance targets. Therefore, additional measures should be available to shareholders to respond to a SOC's potential insolvency.

This may be effectively achieved by introducing a new Ministerial direction power into the SOC Act for company SOCs. The shareholding Ministers could direct the SOC to take actions to prevent it from incurring further debts, or to ensure it is able to pay debts as they become due.[40] A similar direction power exists in NSW for statutory SOCs and in Queensland for Government Owned Corporations (GOCs).[41]

In Queensland, the trigger for the Ministerial direction is board notification. That is, the board is required to notify the shareholding Ministers if it suspects the GOC may become insolvent. The SOC Act could be amended to impose the same type of obligation on company SOC boards.

[40] This direction is different from those referred to in section 3.7, which relate to requiring the SOC to undertake non-commercial or public interest activities on the Government's behalf (where an entitlement to reimbursement is appropriate).

[41] SOC Act, clause 12 of Schedule 10; *Government Owned Corporations Act 1993* (QLD) section 116.

As an alternative, the trigger for a suspected insolvency direction could arise if the SOC does not meet the financial performance targets in Treasury's quarterly reports. This is consistent with the active shareholder model. It puts the onus on the shareholding Ministers to actively monitor the SOCs' commercial performance.

Recommendation(s) on shareholder's ability to rectify poor performance (Question 6.4(3))

27 Amend the SOC Act to allow the shareholding Minister to issue a direction where a company SOC is at serious risk of insolvency.

3.10 Appointment and removal of directors

Issues Paper question(s):

7.1(1): Should there be consistency in the legislative provisions for the appointment and removal of directors to SOC boards, and should these provisions be solely in the SOC Act?

7.1(2): Should voting shareholders alone appoint and remove directors?

Response to question 7.1

Currently there is wide variation in the board appointment processes and associated accountability arrangements across SOCs.[42] There is strong merit in establishing and adhering to a transparent and consistent approach to ensure that the right balance and mix of skills is secured. The provisions for the boards should be standardised and consolidated in the SOC Act for easy reference.

In 2013, the NSW Government published *Appointment Standards* for boards and committees in the NSW public sector.[43] These standards address some aspects of policy requirements relating to the tenure of directors. However, the standards are implemented in the context of different legislative requirements for the SOCs. We consider that there is benefit in strengthening these guidelines by standardising key requirements in the SOC Act.

42 IPART, *Review of the Productivity Performance of State Owned Corporations*, July 2010, p 78.

43 NSW Public Service Commission, *Appointment Standards – Boards and Committees in the NSW Public Sector*, July 2013.

To ensure clear lines of accountability for performance of SOC boards and greater transparency, the following legislative provisions should be considered:

- Directors are appointed by the shareholding Ministers in consultation with the chair of the board, which is consistent with practice in the private sector. It is important that the chair has the opportunity to advise on the requirements of the organisation and that he or she has confidence in the directors on the board.
- Periodic turnover of chairs, which can help ensure rejuvenation of board leadership (there are currently no statutory limits to the length of time chairs can serve on boards).[44]
- Introducing limits to the tenure of board directors and staggering their appointment to ensure continuity and to maintain a core level of experience and knowledge of the business. For example, tenure limits could specify the maximum number of terms a director can serve, and the number of years in each term.

Recommendation(s) on appointment and removal of directors (Question 7.1)

28 There should be consistent legislative provisions in the SOC Act for the appointment and removal of directors to SOC boards. These provisions could include:

  – Directors to be appointed and removed by the shareholding Ministers in consultation with the chair of the board.

  – Statutory limits to the length of time chairs can serve on boards.

  – Statutory limits to the length of time directors can serve on boards and staggering their appointment terms.

3.11 Director's skill sets

Issues Paper question(s):

7.4(1): How should SOC legislation best ensure directors have the necessary skill sets?

Response to question 7.4(1)

The performance and mix and level of skills on SOC boards are critically important influences on the direction of these businesses. However, there do not appear to be regular reviews of the performance, composition and skill requirements of boards. Performing such reviews is an important part of the active shareholder role.

44 IPART, *Review of the Productivity Performance of State Owned Corporations*, July 2010, p 79.

The Public Service Commissioner has a function under of the *Public Sector Employment and Management Act 2002*[45] to set standards, subject to any legislative requirements, for the selection of persons for appointment as members of boards or committees of public authorities (including Government business enterprises).[46]

In 2013, the NSW Government published *Appointment Standards* for boards and committees in the NSW public sector.[47] These standards, which include a section on the skills, experience and knowledge of a board and committee, are mandatory for SOCs. We consider that given the diverse nature of the SOCs the necessary skills sets of directors should not be specified in SOC legislation.

Recommendations on directors skill sets (Question 7.4(1))

29 To ensure directors on SOC boards have the necessary skill sets, the shareholder should institute regular reviews of board performance, composition and skill requirements.

3.12 Dividend payments

Issues Paper question(s):

9.1(1): Should the dividend provisions be consistent across all SOCs, and is it appropriate that the provisions be principles based with details contained in guidelines and policies?

9.1(2): Should the voting shareholders or the Treasurer be responsible for approving a SOC's share dividend scheme? How should this approval operate?

9.1(3): Which provisions, if any, from the Corporations Act should the Government consider adopting for SOC dividends?

9.1(4): Should SOCs, through the SOC Act, be required to comply with the relevant policies and guidelines of the Government's Commercial Policy Framework?

Response to question 9.1(1)

Improving the governance framework for dividend payments involves balancing various factors. The framework should instil best practices from the private sector on SOCs, while also taking account the different market disciplines they face, as well as the impact of their dividends on the State Budget.

45 See Section 3F(1)(g).

46 NSW Public Service Commission, *Appointment Standards – Boards and Committees in the NSW Public Sector*, July 2013, p 5.

47 NSW Public Service Commission, *Appointment Standards – Boards and Committees in the NSW Public Sector*, July 2013.

As a starting point, we consider that dividend provisions should essentially be consistent across all SOCs and privately owned businesses. This is in accordance with the principle of competitive neutrality, and ensures that SOCs are not advantaged or disadvantaged relative to potential private sector competitors and amongst each other.

However, the framework needs to recognise that SOCs do not face the same market disciplines as their private sector counterparts, such as the ability of shareholders to sell their shares if the SOC is not paying dividends. Further, their dividends comprise a significant proportion of State Budget revenues, so Government requires some degree of certainty about their magnitude.

On this basis, it is appropriate that the governance framework for SOC dividends be principles based. The factors to take into account when determining dividends should be detailed in SOC dividend policies, as opposed to being rigidly fixed in the SOC Act or enabling Acts.

Additionally, the Corporations Act (particularly section 254T) should apply to these dividend policies[48], subject to voting shareholders having a reserve power to determine dividend payments[49]. This approach closely replicates the dividend arrangements for privately owned businesses, with appropriate modification to accommodate public ownership.

One key principle to include in the SOC dividend policies is that dividend payments should be set in a flexible way, to take into account the changing conditions facing the SOCs. Again, this approach is consistent with the practice generally applied in the private sector.

While the current dividend policies largely embody the principle of dividend flexibility[50], it is not always applied in practice. Examples of where the SOC policies are not responsive to the businesses' financial circumstances include:

- the target dividend payout ratio for Sydney Water and Hunter Water, which has remained unchanged at 70% of net profit after tax for several years[51]
- the policy to cap dividends for some energy SOCs at the forward estimates included by the previous Government in its Budget papers.[52]

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48 This would occur automatically if the existing SOCs adopt the company SOC model (see section 3.5).

49 This reserve power should only apply in the event of the voting shareholders failing to agree such amounts with the board. See our response to question 9.1(2).

50 See NSW Treasury, *Financial Distribution Policy for Government Businesses TPP09-06 (Distribution Policy)*, November 2009, pp 5-6.

51 For example, see Hunter Water, *Statement of Corporate Intent 2013-14*, p 6; Sydney Water, *Statement of Corporate Intent 2012-13*, September 2012, p 4.

52 "Under the dividend cap policy, electricity sector dividends are capped in each of 2011-12, 2012-13 and 2013-14 at the total amount forecast in the 2010-11 NSW Budget. The cap is applied to the aggregate of the dividends paid in any year by the SOCs in the network (transmission and distribution) sector and the cash dividends paid in any year by the SOCs in the generation sector" (Endeavour Energy, *Statement of Corporate Intent*, 31 July 2013, p 12).

The target payout ratios have created potential financeability issues in recent IPART water pricing determinations. Such difficulties could have been avoided if the SOC dividend policies were applied more flexibly, so that they are responsive to the circumstances of the SOCs.

Recommendations on dividend payments (Question 9.1(1))

30 Provisions for dividend payments should be consistent across all SOCs and privately owned businesses.

31 These provisions should be principles-based. The factors to take into account when determining dividends should be detailed in SOC dividend policies, as opposed to being incorporated in the SOC Act or enabling Acts.

32 The SOC dividend policies should be applied more flexibly, so that they are responsive to the financial circumstances of the SOCs.

Response to question 9.1(2)

In section 3.5 of our submission, we recommend that all statutory SOCs be changed to company SOCs. The SOC Act modifies the Corporations Act's replaceable rule for declaring dividends.[53] Instead, it provides that dividends for company SOCs are to be determined by agreement between the shareholding Ministers and the board. In the event of failing to reach agreement, the shareholding Ministers can direct the board regarding dividends.[54]

This allows the shareholding Ministers to actively exercise their rights to protect their ownership and to optimise their value. It also takes into account the different market disciplines SOCs' face (ie, shareholders are unable to sell shares if SOCs do not declare dividends), as well as the impact of their dividends on the State Budget. As such, we consider these arrangements are appropriate, provided that any dividend payments are:

- flexible and responsive to the circumstances of the SOCs (see our response to question 9.1(1))
- in accordance with the safeguards in the Corporations Act (see our response to question 9.1(3)), and
- identified in a transparent manner.

Recommendations on dividend payments (Question 9.1(2))

33 Dividends should be determined by agreement between the shareholding Ministers and the SOC board. Shareholding Ministers should have a reserve power of direction in the event of failing to reach agreement.

53 *Corporations Act 2001* (Cth), section 254U.
54 *State Owned Corporations Act 1989* (NSW), section 20S.

34 Any dividend payments determined by agreement between the shareholding Ministers and the SOC board (or by shareholder direction) should be flexible and responsive to the financial circumstances of the SOCs, subject to the Corporations Act safeguards and identified in a transparent manner.

Response to question 9.1(3)

SOCs should be treated in the same way as privately-owned businesses, and be subject to the Corporations Act – see section 3.5. This enhances the SOCs' governance framework by introducing safeguards around dividend payments. Specifically, a SOC would not be able to pay a dividend unless it meets a balance sheet test[55], and the dividend payment:

- is fair and reasonable to the SOC's shareholders as a whole
- does not materially prejudice the SOC's ability to pay its creditors.[56]

We note that in Queensland, the Government Owned Corporations (GOCs) are subject to similar restrictions around dividend payments. First, the Corporations Act (including its provisions in relation to dividends) applies to the GOCs. Further, the GOC Act provides that GOCs are not permitted to pay a dividend if the amount exceeds that permitted under the Corporations Act.[57]

Recommendations on dividend payments (Question 9.1(3))

35 Any SOC dividend payments should be in accordance with the Corporations Act, particularly the safeguards in Part 2H.5.

Response to question 9.1(4)

The dividend policies of SOCs should have regard to the conditions facing the businesses and should promote active and dynamic shareholding. As outlined above in our response to question 9.1(1), how the Government's Commercial Policy Framework is applied does not always take account of the SOCs' financial circumstances. This has created some difficult issues in relation to dividends and financeability of SOCs.

55 The SOC's assets exceed its liabilities immediately before the dividend is declared, and the excess is sufficient for the payment of the dividend (section 254T(1)(a) Corporations Act).

56 *Corporations Act 2001* (Cth), section 254T.

57 *Government Owned Corporations Act 1993* (QLD), section 131.

The way the Commercial Policy Framework is applied in practice should be revised. It should promote a more flexible approach to dividend policy, one that is responsive to the SOCs' financial circumstances. At a minimum, that approach should take account of financeability issues.

Recommendations on dividend payments (Question 9.1(4))

36 The way the Commercial Policy Framework is applied in practice should be revised to promote a more flexible approach to dividend policy, one that is responsive to the SOCs' financial circumstances.

3.13 Return of capital

Issues Paper question(s):

9.2: What are the benefits and risks of introducing provisions in the SOC Act for a return of capital?

Response to question 9.2

The provisions for the return of capital for a SOC should be consistent with commercial practice. We recommend that any equity withdrawals or injections by the Government as shareholder should be identified in a transparent manner.

Recommendations on return of capital (Question 9.2)

37 Any equity withdrawals or injections by the Government as shareholder should be identified in a transparent manner.

3.14 Income tax equivalents

Issues Paper question(s):

9.3: Should the SOC Act be updated to better reflect NTER?

Response to question 9.3

We consider that the SOC Act should be updated to better reflect the National Tax Equivalent Regime (NTER). This would be consistent with competitive neutrality principles.

> To ensure competitive neutrality government businesses should operate, to the largest extent feasible, in the same tax … environment as private enterprises.[58]

The primary objective of the NTER is to promote competitive neutrality, through a uniform application of income tax laws, between the NTER entities and their privately held counterparts.[59]

Any tax equivalent payments to the Government as shareholder should be identified in a transparent manner.

The Issues Paper outlines 3 options to align the SOC Act with the State's NTER obligations. We support 2 of these options, to either:

- define a person or class of persons (eg, the Australian Taxation Office) to administer the tax equivalent section of the SOC Act, or
- provide the Treasurer with the authority to delegate the role or nominate a person or body (eg, the Australian Taxation Office) to administer the tax equivalent section of the SOC Act.

Recommendations on income tax equivalents (Question 9.3)

38 The SOC Act should be updated to better reflect the National Tax Equivalent Regime (NTER).

39 Any tax equivalent payments to the Government as shareholder should be identified in a transparent manner.

3.15 State taxation

Issues Paper question(s):

9.4: What, if any, legislative changes are required to strengthen State taxation arrangements for SOCs?

[58] OECD, *Competitive neutrality: Maintaining a Level Playing Field between Public and Private Business*, 2012, p 11.

[59] Australian Taxation Office, *The National Tax Equivalent Regime*, undated, http://law.ato.gov.au/atolaw/view.htm?DocID=NTR%2FNTER0001, accessed 31 January 2014.

Response to question 9.4

We support the suggestion made in the Issues Paper that a competitive neutrality-type principle in relation to State taxation be included in the SOC Act. This would help to ensure that competitive neutrality is maintained and that SOCs are neither disadvantaged nor advantaged. This could include streamlining and eliminating the duplication of State tax exemption provisions where appropriate.

Recommendations on state taxation (Question 9.4)

40 A competitive neutrality-type principle in relation to State taxation should be included in the SOC Act.

3.16 Government guarantee fee

Issues Paper question(s):

9.5: What changes, if any, are needed to improve the government guarantee legislative framework? For instance, enabling the Treasurer to determine the fee amount?

Response to question 9.5

The government guarantee fee is a debt neutrality adjustment that ensures that SOCs do not benefit from debt advantages due to their public ownership.[60]

It is appropriate that the Treasurer should continue to determine the government guarantee fee (with reference to current market rates of a borrower's credit rating), as it is the NSW Treasury Corporation (TCorp) that is taking on the risk of lending money to SOCs.

We recommend that a transparent process be used to calculate the government guarantee fee. This process should involve the publication of information (eg, the government guarantee fee for different credit rating levels), providing this is consistent with confidentiality arrangements for stand-alone credit ratings associated with the SOCs.

Recommendations on the government guarantee fee (Question 9.5)

41 A transparent process should be used to calculate the government guarantee fee.

60 OECD, *Competitive neutrality: Maintaining a Level Playing Field between Public and Private Business*, 2012, p 73.

3.17 Other legislation affecting commerciality and oversight

Issues Paper question(s):

10.2(2): Are there additional issues or options that should be considered in the course of this Review?

Response to question 10.2(2)

Employment policies

SOCs are currently governed by the *Fair Work Act 2009* (Cth), the *Government Sector Employment Act 2013* (NSW)[61] and the *NSW Public Sector Wages Policy 2011* (Wages Policy).

In principle, it is desirable for SOC managers to have greater flexibility to choose how they make efficiency-related savings (rather than restricting them to employee-related costs). This is particularly so if the scope for achieving employee-related savings is limited by industrial and political constraints.[62]

61 The Issues Paper notes that the *Government Sector Employment Act 2013* (NSW) does not apply to SOCs (though could be made to apply by regulation) except in relation to the removal of directors and CEOs.

62 IPART, *Review of the Productivity Performance of State Owned Corporations – Final Report*, July 2010, p 71.

It is almost uniform practice for governments to seek to improve performance by emulating private sector practices. The governance framework should facilitate SOCs to determine their own policies for wages, entitlements, outsourcing and employment conditions. This may involve the Government introducing a transition period (such as 3 years) for SOC employees to transition from public sector conditions to private sector work practices.

Provision of infrastructure and services by SOCs

As part of this review (or a subsequent review), analysis could also be conducted to assess the planning, delivery and maintenance of infrastructure and services by SOCs. This should involve establishing ways in which SOCs could improve their performance and efficiency in service provision and how this should be measured. For example, this could include assessing whether outsourcing could be utilised to improve the performance and efficiency of SOCs, particularly with regards to 'non-core' functions.

Market-testing could be used to assess whether SOCs should remain Government-owned corporations, or if a market exists that could potentially perform some (or all) of the functions of the SOC more efficiently (eg, if certain functions were outsourced). In particular, project development, contracting and procurement services, construction and maintenance activities could be reviewed. In examining whether a SOC is the appropriate vehicle to perform these functions, the degree of accountability, risk and capability required should be taken into account.

Recommendations on other legislation affecting commerciality and oversight (Question 10.2(2))

42 A transition period (eg, of 3 years) should be considered, following which wages/entitlements and working conditions for SOC employees could be negotiated in the same way that occurs in the private sector.

43 Review the planning, delivery and maintenance of infrastructure and services by SOCs and consider ways in which SOCs could improve their performance and efficiency in service provision and how this should be measured.