

SOUTH AUSTRALIA

**PUBLIC CORPORATIONS ACT 1993**

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## **PUBLIC CORPORATIONS ACT 1993**

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Public Corporations Act 1993 No. 36 of 1993  
[Assented to 13 May 1993]<sup>1</sup>

<sup>1</sup> Came into operation 1 September 1993: *Gaz.* 19 August 1993, p. 868.

N.B. The amendments effected to this Act by the *Statutes Amendment (Honesty and Accountability in Government) Act 2003* have not been brought into operation.

**An Act to provide for the control of public corporations; and for other purposes.**

The Parliament of South Australia enacts as follows:

**PART 1  
PRELIMINARY**

**Short title**

1. This Act may be cited as the *Public Corporations Act 1993*.

**Commencement**

2. This Act will come into operation on a day to be fixed by proclamation.

**Interpretation**

3. (1) In this Act—

"**associate**"—*see subsection (2)*;

"**beneficial interest**" in property includes a potential beneficial interest in property subject to a discretionary trust;

"**beneficiary**" includes a person who is an object of a discretionary trust;

"**board**" in relation to a public corporation, means the board of directors of the corporation (*also see section 4*);

"**council**" means a municipal or district council;

"**debenture**" has the same meaning as in the *Corporations Law*;

"**director**" in relation to a public corporation, means a person appointed as a member of the board of the corporation (*also see section 4*);

"**dividend**" means payment out of profit (whether earned in the current or a previous financial year) or payment in the nature of a return of capital;

"**executive**" in relation to a public corporation or a subsidiary of a public corporation, means an employee of the corporation or subsidiary who is concerned or takes part in the management of the corporation or subsidiary;

"**financial year**" in relation to a public corporation, means—

(a) the period of 12 months ending on 30 June in any year;

or

(b) any other period of 12 months prescribed by regulation in relation to the corporation;

"**incorporating Act**" in relation to a statutory corporation or public corporation, means the Act by or under which the corporation is established;

"**liability**" includes contingent liability;

"**Minister**" in relation to a public corporation, means the Minister to whom the administration of the corporation's incorporating Act is for the time being committed;

"**operations**" of a public corporation or any of its subsidiaries includes, for any purposes specified by regulation, any operations carried out by a specified company or entity or pursuant to a specified trust scheme, partnership, joint venture or other scheme or arrangement and declared by regulation to form part of the operations of the corporation or any of its subsidiaries for those purposes;

"**prescribed interest**" has the same meaning as in the *Corporations Law*;

"**public corporation**"—see section 5(3);

"**record**" includes—

(a) information stored or recorded by a computer or any other means;

and

(b) a computer tape or disk or any other device on or by which information is stored or recorded;

"**relative**" in relation to a person, means the spouse, parent or remoter linear ancestor, son, daughter or remoter issue or brother or sister of the person;

"**relevant interest**" has the same meaning as in the *Corporations Law*;

"**remuneration**" in relation to an office or employment, includes any benefit of pecuniary value attaching to the office or employment;

"**spouse**" includes a putative spouse (whether or not a declaration of the relationship has been made under the *Family Relationships Act 1975*);

"**statutory corporation**" means a body corporate (other than a council or university) that—

(a) is established by or under another Act;

and

(b) comprises or includes, or has a governing body that comprises or includes, a Minister or a person or body appointed by the Governor or a Minister;

"**subsidiary**" in relation to a public corporation, means—

(a) a company that is a subsidiary of the public corporation within the meaning of the *Corporations Law*;

or

4.

(b) a body corporate established as a subsidiary of the public corporation by regulation under Part 5.

(2) For the purposes of this Act, a person is an associate of another person if—

(a) the other person is a relative of the person or of the person's spouse;

(b) the other person—

(i) is a body corporate;

and

(ii) the person or a relative of the person or of the person's spouse has, or two or more such persons together have, a relevant interest or relevant interests in shares in the body corporate the nominal value of which is not less than 10 per cent of the nominal value of the issued share capital of the body corporate;

(c) the other person is a trustee of a trust of which the person, a relative of the person or of the person's spouse or a body corporate referred to in paragraph (b) is a beneficiary;

or

(d) the person is declared by the regulations to be an associate of the other person.

(3) For the purposes of this Act, in determining whether a company is a subsidiary of a public corporation, any shares held, or powers exercisable by, the corporation or any other body are not to be taken to be held or exercisable in a fiduciary capacity by reason of the fact that the corporation is an instrumentality of the Crown and holds its property on behalf of the Crown.

*Note: For definition of divisional penalties (and divisional expiation fees) see Appendix.*

#### **References to board or directors where corporation does not have separately constituted board**

4. Where a board of directors is not separately constituted as the governing body of a public corporation—

(a) a reference in this Act to a board is, in relation to that corporation, a reference to the corporation;

and

(b) a reference in this Act to a director is, in relation to that corporation, a reference to a member of the corporation.

#### **Application of Act**

5. (1) A provision of this Act applies to a statutory corporation to which the provision is declared to apply—

5.

(a) by the corporation's incorporating Act;

or

(b) by regulation.

(2) Where a provision of this Act is declared by regulation to apply to a statutory corporation, the provision prevails to the extent of any inconsistency over the provisions of the corporation's incorporating Act.

(3) A reference in a provision of this Act to a public corporation is a reference to a statutory corporation to which the provision is declared to apply in pursuance of this section.

(4) A declaration may not be made by regulation for the purposes of this section in a form such that a provision of this Act is declared to apply to more than one statutory corporation by the same regulation.

**PART 2**  
**MINISTERIAL CONTROL**

**Control and direction of public corporations**

6. (1) A public corporation—

(a) is an instrumentality of the Crown and holds its property on behalf of the Crown;

and

(b) is subject to control and direction by its Minister.

(2) A direction may not be given by the Minister under this section contrary to the provisions of another Act.

(3) The corporation may not be directed by its Minister to do anything that would be beyond its powers as provided by its incorporating Act and any other Act.

(4) A direction given by the Minister under this section must be in writing.

(5) Subject to subsection (7), where the Minister gives a direction to a public corporation under this section—

(a) the Minister must cause the direction to be published—

(i) by notice in the *Gazette* within 14 days after the direction was given;

and

(ii) by tabling the direction in both Houses of Parliament within six sitting days after its publication in the *Gazette*;

and

(b) the corporation must cause the direction to be published in its next annual report.

(6) Where the corporation is of the opinion that a direction should not be published for the reason that its publication—

(a) might detrimentally affect the corporation's commercial interests;

(b) might constitute breach of a duty of confidence;

or

(c) might prejudice an investigation of misconduct or possible misconduct,

the corporation may advise the Minister of that opinion giving the reason for the opinion.

7.

(7) Where the Minister is satisfied that a direction should not be published for a reason referred to in subsection (6), the direction need not be published by the Minister or the corporation as required by subsection (5) but—

(a) the Minister must cause a copy of the direction to be presented to the Economic and Finance Committee of the Parliament within 14 days after the direction was given;

and

(b) the corporation must cause a statement of the fact that the direction was given to be published in its next annual report.

**Provision of information and records to Minister**

7. (1) A public corporation must, at the request in writing of its Minister, furnish the Minister with such information or records in the possession or control of the corporation as the Minister may require in such manner and form as the Minister may require.

(2) Where a record in the possession or control of the corporation is furnished to the Minister under this section, the Minister may make, retain and deal with copies of the record as the Minister thinks fit.

(3) Where the corporation considers that any information or record furnished under this section contains matters that should be treated for any reason as confidential, the corporation may advise the Minister of that opinion giving the reason for the opinion, and the Minister may, subject to subsection (4), act on that advice as the Minister thinks fit.

(4) Where the Minister is satisfied on the basis of the corporation's advice under subsection (3) that the corporation owes a duty of confidence in respect of a matter, the Minister must ensure the observance of that duty in respect of the matter, but this subsection does not prevent the Minister from disclosing the matter as required in the proper performance of ministerial functions or duties.

**Minister's or Treasurer's representative may attend meetings**

8. (1) A person authorized in writing by a public corporation's Minister or the Treasurer may attend (but not participate in) any meeting of the board of the corporation and may have access to papers provided to directors for the purposes of the meeting.

(2) Where the board considers that a matter dealt with at a meeting attended by a representative of the Minister or the Treasurer should be treated for any reason as confidential, the board may advise the Minister or the Treasurer, as the case may require, of that opinion giving the reason for the opinion, and the Minister or the Treasurer may, subject to subsection (3), act on that advice as the Minister or the Treasurer thinks fit.

(3) Where the Minister or the Treasurer is satisfied on the basis of the board's advice under subsection (2) that the corporation owes a duty of confidence in respect of a matter, the Minister or the Treasurer, as the case may be, must ensure the observance of that duty in respect of the matter, but this subsection does not prevent the Minister or the Treasurer from disclosing the matter as required in the proper performance of ministerial functions or duties.

**Notification of disclosure to Minister of matter subject to duty of confidence**

**9.** Where a public corporation discloses to its Minister in pursuance of this Act a matter in respect of which the corporation owes a duty of confidence, the corporation must give notice in writing of the disclosure to the person to whom the duty is owed.

**No breach of duty to report matter to Minister**

**10.** A director of a public corporation does not commit any breach of duty by reporting a matter relating to the affairs of the corporation or a subsidiary of the corporation to the corporation's Minister.

**PART 3**  
**PERFORMANCE AND SCOPE OF CORPORATION'S OPERATIONS**

**General performance principles**

**11.** (1) A public corporation must perform its commercial operations in accordance with prudent commercial principles and use its best endeavours to achieve a level of profit consistent with its functions.

(2) A public corporation must perform its non-commercial operations (if any) in an efficient and effective manner consistent with the requirements of its charter.

(3) Where a public corporation's charter identifies any operations of the corporation as non-commercial operations, the operations are to be regarded as such for the purposes of this section.

**Corporation's charter**

**12.** (1) A charter must be prepared for a public corporation by its Minister and the Treasurer after consultation with the corporation.

(2) The charter must deal with the following matters:

(a) the nature and scope of the commercial operations to be undertaken, including—

(i) the nature and scope of any investment activities;

(ii) the nature and scope of any operations or transactions outside the State;

(iii) the nature and scope of any operations or transactions that may be undertaken by subsidiaries of the corporation, by other companies or entities associated with the corporation or pursuant to a trust scheme or a partnership or other scheme or arrangement for sharing of profits, co-operation or joint venture with another person;

(b) the nature and scope of any non-commercial operations to be undertaken and the arrangements for their costing and funding;

and

(c) all requirements of the corporation's Minister or the Treasurer as to—

(i) the corporation's obligations to report on its operations;

(ii) the form and contents of the corporation's accounts and financial statements;

(iii) any accounting, internal auditing or financial systems or practices to be established or observed by the corporation;

(iv) the setting of fees or charges, the acquisition or disposal of capital or assets or the borrowing or lending of money.

(3) The charter may—

10.

(a) limit the functions or powers of the corporation;

and

(b) deal with any other matter not specifically referred to in subsection (2).

(4) The charter may not extend the functions or powers of the corporation as provided by the corporation's incorporating Act and any other Act.

(5) The corporation's Minister and the Treasurer must, after consultation with the corporation, review the charter at the end of each financial year.

(6) The corporation's Minister and the Treasurer may, after consultation with the corporation, amend the charter at any time.

(7) The charter or any amendment to the charter comes into force and is binding on the corporation on a day specified in the charter or amendment (but without affecting any contractual obligations previously incurred by the corporation).

(8) On the charter or an amendment to the charter coming into force, the corporation's Minister must—

(a) within six sitting days, cause a copy of the charter, or the charter in its amended form, to be laid before both Houses of Parliament;

and

(b) within 14 days (unless such a copy is sooner laid before both Houses of Parliament under paragraph (a)), cause a copy of the charter, or the charter in its amended form, to be presented to the Economic and Finance Committee of the Parliament.

### **Performance statements**

**13.** (1) The corporation's Minister and the Treasurer must, when preparing the charter for a public corporation, also prepare, after consultation with the corporation, a performance statement setting the various performance targets that the corporation is to pursue in the coming financial year or other period specified in the statement and dealing with such other matters as the Minister and the Treasurer consider appropriate.

(2) The corporation's Minister and the Treasurer must, after consultation with the corporation, review the performance statement when reviewing the corporation's charter.

(3) The corporation's Minister and the Treasurer may, after consultation with the corporation, amend the performance statement at any time.

**PART 4**  
**DUTIES AND LIABILITIES OF BOARD AND DIRECTORS**

**General management duties of board**

**14.** (1) The board of a public corporation is responsible to its Minister for overseeing the operations of the corporation and its subsidiaries with the goal of—

(a) securing continuing improvements of performance;

and

(b) protecting the long term viability of the corporation and the Crown's financial interests in the corporation.

(2) Without limiting the effect of subsection (1), the board must for that purpose ensure as far as practicable—

(a) that appropriate strategic and business plans and targets are established that are consistent with the corporation's charter and performance statement;

(b) that the corporation and its subsidiaries have appropriate management structures and systems for monitoring management performance against plans and targets and that corrective action is taken when necessary;

(c) that appropriate systems and practices are established for management and financial planning and control, including systems and practices for the maintenance of accurate and comprehensive records of all transactions, assets and liabilities and physical and human resources of the corporation and its subsidiaries;

(d) that all such plans, targets, structures, systems and practices are regularly reviewed and revised as necessary to address changing circumstances and reflect best current commercial practices;

(e) that the corporation and its subsidiaries operate within the limits imposed by the corporation's incorporating Act and charter and comply with the requirements imposed by or under this or any other Act or law;

(f) that the corporation and its subsidiaries observe high standards of corporate and business ethics;

(g) that the corporation's Minister receives regular reports on the performance of the corporation and its subsidiaries and on the initiatives of the board;

(h) that the corporation's Minister is advised, as soon as practicable, of any material development that affects the financial or operating capacity of the corporation or any of its subsidiaries or gives rise to an expectation that the corporation or any of its subsidiaries may not be able to meet its debts as and when they fall due;

and

- (i) that all information furnished to the corporation's Minister by the corporation or any of its subsidiaries is accurate and comprehensive.

**Directors' duties of care, etc.**

**15.** (1) A director of a public corporation must at all times exercise a reasonable degree of care and diligence in the performance of his or her functions, and (without limiting the effect of the foregoing) for that purpose—

- (a) must take reasonable steps to inform himself or herself about the corporation and its subsidiaries, their businesses and activities and the circumstances in which they operate;
- (b) must take reasonable steps through the processes of the board to obtain sufficient information and advice about all matters to be decided by the board or pursuant to a delegation to enable him or her to make conscientious and informed decisions;

and

- (c) must exercise an active discretion with respect to all matters to be decided by the board or pursuant to a delegation.

(2) A director is not bound to give continuous attention to the affairs of the corporation but is required to exercise reasonable diligence in attendance at and preparation for board meetings.

(3) In determining the degree of care and diligence required to be exercised by a director, regard must be had to the skills, knowledge or acumen possessed by the director and to the degree of risk involved in any particular circumstances.

(4) If a director of a public corporation is culpably negligent in the performance of his or her functions, the director is guilty of an offence.

Penalty: Division 4 fine.

(5) A director is not culpably negligent for the purposes of subsection (4) unless the court is satisfied the director's conduct fell sufficiently short of the standards required under this Act of the director to warrant the imposition of a criminal sanction.

(6) A director of a public corporation does not commit any breach of duty under this section by acting in accordance with a direction or requirement of the Minister or the Treasurer under this Act.

**Directors' duties of honesty**

**16.** (1) A director of a public corporation must at all times act honestly in the performance of the functions of his or her office, whether within or outside the State.

Penalty: Division 4 fine or division 4 imprisonment, or both.

(2) A director or former director of a public corporation must not, whether within or outside the State, make improper use of information acquired by virtue of his or her position as such a director to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation or any of its subsidiaries.

Penalty: Division 4 fine or division 4 imprisonment, or both.

(3) A director of a public corporation must not, whether within or outside the State, make improper use of his or her position as a director to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation or any of its subsidiaries.

Penalty: Division 4 fine or division 4 imprisonment, or both.

### **Transactions with directors or associates of directors**

**17.** (1) Neither a director of a public corporation nor an associate of a director of a public corporation may, without the approval of the corporation's Minister, be directly or indirectly involved in a transaction with the corporation or a subsidiary of the corporation.

(2) A person will be treated as being indirectly involved in a transaction for the purposes of subsection (1)—

(a) if the person initiates, promotes or takes any part in negotiations or steps leading to the making of the transaction with a view to that person or an associate of that person gaining some financial or other benefit (whether immediately or at a time after the making of the transaction);

and

(b) despite the fact that neither that person nor an agent, nominee or trustee of that person becomes a party to the transaction.

(3) Subsection (1) does not apply—

(a) to—

(i) the receipt by the corporation or a subsidiary of the corporation of deposits of money or investments;

(ii) the provision of loans or other financial accommodation by the corporation or a subsidiary of the corporation for domestic or non-commercial purposes;

(iii) the provision of accident, health, life, property damage or income protection insurance or insurance against other risks (excluding credit or financial risks) by the corporation or a subsidiary of the corporation;

(iv) the provision of services (other than financial or insurance services) by the corporation or a subsidiary of the corporation,

in the ordinary course of its ordinary business and on ordinary commercial terms;

or

(b) to transactions of a prescribed class.

(4) If a transaction is made with a public corporation or a subsidiary of a public corporation in contravention of subsection (1), the transaction is liable to be avoided by the corporation or by the corporation's Minister.

(5) A transaction may not be avoided under subsection (4) if a person has acquired an interest in property the subject of the transaction in good faith for valuable consideration and without notice of the contravention.

(6) A director of a public corporation must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subsection (1).

Penalty: If an intention to deceive or defraud is proved—Division 4 fine or division 4 imprisonment, or both.

In any other case—Division 6 fine.

**Directors' and associates' interests in corporation or subsidiary**

**18.** (1) Neither a director of a public corporation nor an associate of a director of a public corporation may, without the approval of the corporation's Minister—

(a) have or acquire a beneficial interest in shares in, debentures of or prescribed interests made available by the corporation or any subsidiary of the corporation;

(b) have or hold or acquire (whether alone or with another person or persons) a right or option in respect of the acquisition or disposal of shares in, debentures of or prescribed interests made available by the corporation or any of its subsidiaries;

or

(c) be a party to, or entitled to a benefit under, a contract under which a person has a right to call for or make delivery of shares in, debentures of or prescribed interests made available by the corporation or any of its subsidiaries.

(2) A director of a public corporation must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subsection (1).

Penalty: If an intention to deceive or defraud is proved—Division 4 fine or division 4 imprisonment, or both.

In any other case—Division 6 fine.

**Conflict of interest**

**19.** (1) A director of a public corporation who has a direct or indirect personal or pecuniary interest in a matter decided or under consideration by the board—

(a) must, as soon as reasonably practicable, disclose to the board full and accurate details of the interest;

(b) must not take part in any discussion by the board relating to that matter;

(c) must not vote in relation to that matter;

and

(d) must be absent from the meeting room when any such discussion or voting is taking place.

Penalty: Division 4 fine.

(2) If a director makes a disclosure of interest and complies with the other requirements of subsection (1) in respect of a proposed contract—

(a) the contract is not liable to be avoided by the corporation;

and

(b) the director is not liable to account to the corporation for profits derived from the contract.

(3) If a director fails to make a disclosure of interest or fails to comply with any other requirement of subsection (1) in respect of a proposed contract, the contract is liable to be avoided by the corporation or by the corporation's Minister.

(4) A contract may not be avoided under subsection (3) if a person has acquired an interest in property the subject of the contract in good faith for valuable consideration and without notice of the contravention.

(5) Where a director of a public corporation has or acquires a personal or pecuniary interest, or is or becomes the holder of an office, such that it is reasonably foreseeable that a conflict might arise with his or her duties as a director of the corporation, the director must, as soon as reasonably practicable, disclose full and accurate details of the interest or office to the board of the corporation.

Penalty: Division 4 fine.

(6) A disclosure under this section must be recorded in the minutes of the board and reported to the corporation's Minister.

(7) If, in the opinion of the corporation's Minister, a particular interest or office of a director is of such significance that the holding of the interest or office is not consistent with the proper discharge of the duties of the director, the Minister may require the director either to divest himself or herself of the interest or office or to resign from the board (and non-compliance with the requirement constitutes misconduct and hence a ground for removal of the director from the board).

(8) Without limiting the effect of this section, a director will be taken to have an interest in a matter for the purposes of this section if an associate of the director has an interest in the matter.

(9) This section does not apply in relation to a matter in which a director has an interest while the director remains unaware that he or she has an interest in the matter, but in any proceedings against the director the burden will lie on the director to prove that he or she was not, at the material time, aware of his or her interest.

### **Removal of director**

**20.** Non-compliance by a director of a public corporation with a duty imposed by this Act constitutes a ground for removal of the director from office in accordance with the provisions of the corporation's incorporating Act.

### **Civil liability if director or former director contravenes this Part**

**21.** (1) If a person who is a director or former director of a public corporation is convicted of an offence for a contravention of this Part (other than an offence consisting of culpable negligence), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the corporation—

(a) if the court is satisfied that the person or any other person made a profit as a result of the contravention—an amount equal to the profit;

and

(b) if the court is satisfied that the corporation or a subsidiary of the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

(2) If a person who is a director or former director of a public corporation is guilty of a contravention of this Part for which a criminal penalty is fixed (other than a contravention consisting of culpable negligence), the corporation or the corporation's Minister may (whether or not proceedings have been brought for the offence) recover from the person by action in a court of competent jurisdiction—

(a) if the person or any other person made a profit as a result of the contravention—an amount equal to the profit;

and

(b) if the corporation or a subsidiary of the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

**Immunity for directors**

**22.** (1) Except as otherwise provided by this Act, a director of a public corporation incurs no civil liability for an honest act or omission in the performance or discharge, or purported performance or discharge, of functions or duties as such a director.

(2) A liability that would, but for subsection (1), lie against a director of a public corporation lies instead against the corporation.

**PART 5**  
**SUBSIDIARIES AND INDIRECT OR JOINT OPERATIONS**

**Formation, etc., of subsidiary companies**

**23.** (1) A public corporation must not, without the approval of the Treasurer—

(a) form a subsidiary company;

or

(b) acquire, or enter into any arrangement under which it will at a future time or would on the happening of some contingency hold, relevant interests in shares in a company such that the company becomes a subsidiary of the corporation.

(2) The Treasurer may, as a condition of approval under this section, or by direction, require a public corporation to take steps to include in a subsidiary company's memorandum or articles of association such provisions as the Treasurer considers appropriate—

(a) imposing limitations on the nature or scope of the company's operations;

or

(b) imposing other controls or practices,

consistent with those applicable to the corporation.

**Formation of subsidiary by regulation**

**24.** (1) The Governor may, by regulation, establish a body corporate as a subsidiary of a public corporation to which this section applies.

(2) Regulations establishing a subsidiary of a public corporation—

(a) must name the body;

(b) must constitute a board of directors as the body's governing body and provide for the appointment, term and conditions of office and removal of the directors;

(c) must provide for the procedures governing the board's proceedings;

(d) may limit the powers and functions of the body;

and

(e) may make any other provision (not inconsistent with this Act or the public corporation's incorporating Act) that is necessary or expedient for the purposes of the subsidiary.

(3) Subject to any limitations in the regulations establishing the subsidiary and any directions given by its parent corporation, the powers and functions of a subsidiary of a public corporation established by regulation under this section are the same as those of the public corporation.

(4) A subsidiary of a public corporation established by regulation under this section is an instrumentality of the Crown and holds its property on behalf of the Crown.

(5) If a regulation establishing a subsidiary of a public corporation under this section is disallowed by either House of Parliament, the assets and liabilities of the subsidiary become assets and liabilities of the public corporation.

**Dissolution of subsidiary established by regulation**

**25.** (1) The Governor may, by regulation, dissolve a subsidiary established by regulation under this Part.

(2) The regulations may—

(a) provide for the disposition of the assets and liabilities of the subsidiary;

and

(b) make any transitional or other provision that is necessary or expedient in connection with the dissolution of the subsidiary.

(3) Notwithstanding subsection (2), on the dissolution of a subsidiary under this section, the liabilities of the subsidiary become liabilities of its parent corporation subject to any provision made by regulation transferring the liabilities to the Crown or some other instrumentality of the Crown.

**Guarantee or indemnity for subsidiary subject to Treasurer's approval**

**26.** A public corporation must not, without the approval of the Treasurer, give a guarantee or provide an indemnity in respect of liabilities of a company that is a subsidiary of the corporation.

**Indirect or joint operations by public corporations**

**27.** A public corporation must not, without the approval of the Treasurer, establish a trust scheme or a partnership or other scheme or arrangement for sharing of profits or joint venture with another person or undertake any operations or transactions pursuant to such a scheme or arrangement.

**PART 6**  
**FINANCIAL AND OTHER PROVISIONS**

**Guarantee by Treasurer of corporation's liability**

28. (1) The liabilities of a public corporation are guaranteed by the Treasurer.

(2) A liability of the Treasurer arising by virtue of a guarantee under subsection (1) will be satisfied out of the Consolidated Account which is appropriated by this section to the necessary extent.

(3) The Treasurer may, from time to time, after consultation with the board of a public corporation, fix charges to be paid by the corporation in respect of the guarantee provided under this section and determine the times and manner of their payment.

**Tax and other liabilities of corporation**

29. (1) Except as otherwise determined by the Treasurer, a public corporation is liable to all such rates (other than rates that would be payable to a council), duties, taxes and imposts and has all such other liabilities and duties as would apply under the law of the State if the corporation were not an instrumentality of the Crown.

(2) Except as otherwise determined by the Treasurer, a public corporation is liable to pay to the Treasurer, for the credit of the Consolidated Account, such amounts as the Treasurer from time to time determines to be equivalent to—

(a) income tax and any other taxes or imposts that the corporation does not pay to the Commonwealth but would be liable to pay under the law of the Commonwealth if it were constituted and organized in such manner as the Treasurer determines to be appropriate for the purposes of this subsection as a public company or group of public companies carrying on the business carried on by the corporation;

and

(b) rates that the corporation would be liable to pay to a council if the corporation were not an instrumentality of the Crown.

(3) Amounts determined by the Treasurer to be payable under subsection (2) must be paid by the corporation at the times and in the manner determined by the Treasurer.

(4) This section does not affect any liability that the corporation would have apart from this section to pay rates to a council.

**Dividends**

30. (1) A public corporation must, before the end of each financial year, recommend by writing to the Treasurer, that the corporation pay a specified dividend, or not pay any dividend, for that financial year, as the corporation considers appropriate.

(2) The Treasurer may, after consultation with the corporation's Minister, by notice in writing to the corporation—

(a) approve a recommendation of the corporation under subsection (1);

or

(d) determine that a dividend specified by the Treasurer be paid, or that no dividend be paid,

as the Treasurer considers appropriate.

(3) The corporation must, if so required by the Treasurer by notice in writing to the corporation at any time during a financial year, recommend by writing to the Treasurer that a specified interim dividend or specified interim dividends be paid by the corporation for that financial year, or that no such dividend or dividends be paid by the corporation, as the corporation considers appropriate.

(4) The Treasurer may, after consultation with the corporation's Minister, by notice in writing to the corporation—

(a) approve a recommendation of the corporation under subsection (3);

or

(b) determine that an interim dividend or interim dividends specified by the Treasurer be paid, or that no interim dividend be paid,

as the Treasurer considers appropriate.

(5) Where the Treasurer approves a recommendation or determines under this section that a dividend or interim dividend or dividends be paid by the corporation, the dividend or interim dividend or dividends must be paid by the corporation to the Treasurer for the credit of the Consolidated Account in the manner and at the time or times determined by the Treasurer after consultation with the corporation.

(6) A recommendation under this section must be made by the board of the corporation and may not be made by any person or committee pursuant to a delegation.

**Internal audits and audit committee**

**31.** (1) A public corporation must, unless exempted by the Treasurer, establish and maintain effective internal auditing of its operations and the operations of its subsidiaries.

(2) A public corporation must, unless exempted by the Treasurer, establish an audit committee.

(3) The audit committee will comprise—

(a) the board of the corporation, or such members of the board, as the board may from time to time determine;

and

(b) such other person or persons as the board may from time to time appoint,

but may not include the chief executive officer of the corporation.

(4) The functions of a corporation's audit committee include—

- (a) the reviewing of annual financial statements prior to their approval by the board to ensure that the statements provide a true and fair view of the state of affairs of the corporation and its subsidiaries;
- (b) liaising with external auditors on all matters concerning the conduct and outcome of annual audits of the corporation and its subsidiaries;

and

- (c) regular reviewing of the adequacy of the accounting, internal auditing, reporting and other financial management systems and practices of the corporation and its subsidiaries.

#### **Accounts and external audit**

**32.** (1) A public corporation must cause proper accounts to be kept of its financial affairs and financial statements to be prepared in respect of each financial year.

(2) Unless exempted by the Treasurer, the corporation must include in its financial statements the financial statements of its subsidiaries on a consolidated basis.

(3) The accounts and financial statements must comply with—

- (a) the requirements of the Treasurer contained in the corporation's charter;

and

- (b) any applicable instructions of the Treasurer issued under the *Public Finance and Audit Act 1987*.

(4) The Auditor-General may at any time, and must in respect of each financial year, audit the accounts and financial statements of the corporation.

#### **Annual reports**

**33.** (1) A public corporation must, within three months after the end of each financial year, deliver to its Minister a report on the operations of the corporation and its subsidiaries during that financial year.

(2) The report must—

- (a) incorporate the audited accounts and financial statements of the corporation and each subsidiary (if any) of the corporation for the financial year;
- (b) incorporate the corporation's charter as in force for that financial year;
- (c) set out any approval or exemption given or determination made by its Minister or the Treasurer under this Act or the corporation's incorporating Act in respect of the corporation or any of its subsidiaries during that financial year or that has effect in respect of that financial year;

- (d) set out any disclosure made during that financial year by a director of the corporation or a subsidiary of the corporation of an interest in a matter decided or under consideration by the board of the corporation or subsidiary;
- (e) contain the prescribed information relating to the remuneration of executives of the corporation and executives of its subsidiaries;

and

- (f) contain any other information required by or under the provisions of this or any other Act.

(3) The Minister must cause a copy of the report to be laid before both Houses of Parliament within 12 sitting days after his or her receipt of the report.

#### **Remuneration of corporation's directors**

**34.** Except with the approval of the corporation's Minister, a director of a public corporation is not entitled to any remuneration (in addition to the remuneration determined by the Governor) for in connection with—

- (a) membership of the board of the corporation;
- (b) membership of the board of any subsidiary of the corporation;

or

- (c) any appointment made by or at the direction of the board of the corporation or any subsidiary of the corporation.

#### **Minister to be consulted as to appointment or removal of chief executive officer**

**35.** The board of a public corporation must not appoint or remove a person as chief executive officer of the corporation unless it has first consulted the corporation's Minister.

#### **Delegation**

**36.** (1) The board of a public corporation may delegate any of its powers or functions.

(2) A power or function delegated under this section may, if the instrument of delegation so provides, be further delegated.

(3) A delegation—

- (a) may be made subject to conditions and limitations specified in the instrument of delegation;

and

- (b) is revocable at will and does not derogate from the power of the delegator to act in any matter.

(4) A delegate must not act in any matter pursuant to the delegation in which the delegate has a direct or indirect pecuniary or personal interest.

Penalty: Division 4 fine.

(5) If a delegate makes a contract in contravention of subsection (4), the contract is liable to be avoided by the corporation or by the corporation's Minister.

(6) A contract may not be avoided under subsection (5) if a person has acquired an interest in property the subject of the contract in good faith for valuable consideration and without notice of the contravention.

(7) If a person is convicted of an offence for a contravention of subsection (4), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the corporation—

- (a) if the court is satisfied that the person or any other person made a profit as a result of the contravention—an amount equal to the profit;
- (b) if the court is satisfied that the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

(8) If a person is guilty of a contravention of subsection (4), the corporation or the corporation's Minister may (whether or not proceedings have been brought for the offence) recover from the person by action in a court of competent jurisdiction—

- (a) if the person or any other person made a profit as a result of the contravention—an amount equal to the profit;
- (b) if the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

(9) Without limiting the effect of subsection (4), a person will be taken to have an interest in a matter for the purposes of subsection (4) if an associate of the person has an interest in the matter.

(10) Subsection (4) does not apply in relation to a matter in which a person has an interest if the person is unaware that he or she has an interest in the matter, but, in any proceedings against the person, the burden will lie on the person to prove that he or she was not, at the material time, aware of his or her interest.

(11) A contravention of subsection (4) by a person who is a director of the corporation constitutes a ground for removal of the director from the board.

### **Transactions with executives or associates of executives**

**37.** (1) Neither an executive of a public corporation nor an associate of an executive of a public corporation may, without the approval of the corporation's Minister, be directly or indirectly involved in a transaction with the corporation or a subsidiary of the corporation.

(2) A person will be treated as being indirectly involved in a transaction for the purposes of subsection (1)—

- (a) if the person initiates, promotes or takes any part in negotiations or steps leading to the making of the transaction with a view to that person or an associate of that person gaining some financial or other benefit (whether immediately or at a time after the making of the transaction);

and

- (b) despite the fact that neither that person nor an agent, nominee or trustee of that person becomes a party to the transaction.

(3) Subsection (1) does not apply—

(a) to—

- (i) the receipt by the corporation or a subsidiary of the corporation of deposits of money or investments;
- (ii) the provision of loans or other financial accommodation by the corporation or a subsidiary of the corporation for domestic or non-commercial purposes;
- (iii) the provision of accident, health, life, property damage or income protection insurance or insurance against other risks (excluding credit or financial risks) by the corporation or a subsidiary of the corporation;
- (iv) the provision of services (other than financial or insurance services) by the corporation or a subsidiary of the corporation,

in the ordinary course of its ordinary business and on ordinary commercial terms;

- (b) to the employment of a person under a contract of service with the corporation or a subsidiary of the corporation or to a transaction that is ancillary or incidental to such employment;

or

- (c) to transactions of a prescribed class.

(4) If a transaction is made with a public corporation or a subsidiary of a public corporation in contravention of subsection (1), the transaction is liable to be avoided by the corporation or by the corporation's Minister.

(5) A transaction may not be avoided under subsection (4) if a person has acquired an interest in property the subject of the transaction in good faith for valuable consideration and without notice of the contravention.

(6) An executive of a public corporation must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subsection (1).

Penalty: If an intention to deceive or defraud is proved—Division 4 fine or division 4 imprisonment, or both.

In any other case—Division 6 fine.

(7) If a person is convicted of an offence for a contravention of subsection (6), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the corporation—

(a) if the court is satisfied that the person or any other person made a profit as a result of the contravention—an amount equal to the profit;

(b) if the court is satisfied that the corporation or a subsidiary of the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

(8) If a person is guilty of a contravention of subsection (6), the corporation or the corporation's Minister may (whether or not proceedings have been brought for the offence) recover from the person by action in a court of competent jurisdiction—

(a) if the person or any other person made a profit as a result of the contravention—an amount equal to the profit;

(b) if the corporation or a subsidiary of the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

#### **Executives' and associates' interests in corporation or subsidiary**

**38.** (1) Neither an executive of a public corporation nor an associate of an executive of a public corporation may, without the approval of the corporation's Minister—

(a) have or acquire a beneficial interest in shares in, debentures of or prescribed interests made available by the corporation or any subsidiary of the corporation;

(b) have or hold or acquire (whether alone or with another person or persons) a right or option in respect of the acquisition or disposal of shares in, debentures of or prescribed interests made available by the corporation or any of its subsidiaries;

or

(c) be a party to, or entitled to a benefit under, a contract under which a person has a right to call for or make delivery of shares in, debentures of or prescribed interests made available by the corporation or any of its subsidiaries.

(2) An executive of a public corporation must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subsection (1).

Penalty: If an intention to deceive or defraud is proved—Division 4 fine or division 4 imprisonment, or both.

In any other case—Division 6 fine.

(3) If a person is convicted of an offence for a contravention of subsection (2), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the corporation—

(a) if the court is satisfied that the person or any other person made a profit as a result of the contravention—an amount equal to the profit;

(b) if the court is satisfied that the corporation or a subsidiary of the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

(4) If a person is guilty of a contravention of subsection (2), the corporation or the corporation's Minister may (whether or not proceedings have been brought for the offence) recover from the person by action in a court of competent jurisdiction—

(a) if the person or any other person made a profit as a result of the contravention—an amount equal to the profit;

(b) if the corporation or a subsidiary of the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

#### **Validity of transactions of corporation**

**39.** (1) Subject to subsection (2), a transaction to which a public corporation is a party or apparently a party (whether made or apparently made under the corporation's common seal or by a person with authority to bind the corporation) is not invalid because of—

(a) any deficiency of power on the part of the corporation;

(b) any procedural irregularity on the part of the board or any director, employee or agent of the corporation;

or

(c) any procedural irregularity affecting the appointment of a director, employee or agent of the corporation.

(2) This section does not validate a transaction in favour of a party—

(a) who enters into the transaction with actual knowledge of the deficiency or irregularity;

or

- (b) who has a connection or relationship with the corporation such that the person ought to know of the deficiency or irregularity.

**Power to investigate corporation's or subsidiary's operations**

**40.** (1) A public corporation's Minister may appoint—

- (a) the Auditor-General;
- or
- (b) some other suitable person,

to make an investigation and report under this section.

(2) An investigator so appointed—

- (a) must investigate such matters relating to the operations and financial position of the corporation or any of its subsidiaries as are determined by the Minister, which matters may include—
  - (i) any possible conflict of interest or breach of duty or other unlawful, corrupt or improper activity on the part of a director or employee of the corporation or any of its subsidiaries;
  - or
  - (ii) any possible failure to exercise reasonable care and diligence on the part of a director or employee of the corporation or any of its subsidiaries;
- (b) may investigate a matter of a kind referred to in subparagraph (i) or (ii) that the investigator has not been required by the Minister to investigate if, in his or her opinion, the matter should be investigated and it is practicable to do so.

(3) The investigator must—

- (a) report to the Minister on the results of an investigation or investigations under subsection (2) and advise the Minister whether, in his or her opinion, any matter should be the subject of further action;

and

- (b) where, in the case of a matter referred to in subsection (2)(b), the investigator decided not to investigate or complete investigation of the matter—report on the matter to the Minister and advise whether, in his or her opinion, the matter should be the subject of any or further investigation or other action.

(4) The investigator must comply with any directions of the Minister as to the manner in which the investigation is to be conducted and the manner in which the results of the investigation are to be reported, including any direction requiring reports to be presented to a specified person or body in addition to the Minister.

(5) Subject to any directions of the Minister, the investigator may, if he or she sees fit to do so in connection with the investigation, make public statements as to the nature and conduct of the investigation and may invite and receive information or submissions as to any matter relevant to the investigation from such persons as he or she thinks fit.

(6) The investigator must, when presenting to the Minister any report that the investigator considers need not remain confidential, also present copies of the report to the President of the Legislative Council and the Speaker of the House of Assembly who must in turn, not later than the first sitting day after receipt of the reports, lay them before their respective Houses.

(7) For the purposes of an investigation under this section, the investigator and authorized persons have the same powers as the Auditor-General and authorized officers have under Division III of Part III of the *Public Finance and Audit Act 1987* for an audit or examination under that Act, and the provisions of that Division (including section 34(2) and (3)) apply in relation to the investigation and the exercise of those powers as if the investigator or authorized person were the Auditor-General or an authorized officer exercising those powers under that Division.

(8) Without limiting the effect of any other provisions of this section, a magistrate may, on application by the investigator—

- (a) if satisfied that there are reasonable grounds to believe that a person has information, or possession or control of records, relevant to the investigation, issue a summons requiring the person to appear before the investigator and answer questions or produce the records;
- (b) if satisfied that a person has been served with such a summons and paid or tendered a reasonable sum for the person's expenses but has failed (without reasonable excuse) to appear or produce records in obedience to the summons, issue a warrant directed to all members of the police force for the person to be apprehended and brought before the investigator.

(9) The grounds of an application for a summons or warrant must be verified by affidavit.

(10) A person who—

- (a) is served with a summons under this section and paid or tendered a reasonable sum for the person's expenses;

but

- (b) fails (without reasonable excuse) to obey the summons,

is guilty of a summary offence.

Penalty: Division 6 fine or division 6 imprisonment.

(11) An investigator or authorized person incurs no civil or criminal liability for an honest act or omission in the exercise or purported exercise of a power conferred by this section.

(12) A person incurs no civil or criminal liability for anything done honestly in compliance or purported compliance with a requirement of an investigator or authorized person under this section.

(13) In this section—

"**authorized person**" in relation to an investigation under this section, means a person authorized by the investigator to exercise the powers conferred by this section for the purposes of the investigation.

#### **Approvals and exemptions**

**41.** (1) An approval or exemption given by a Minister under this Act may be—

(a) specific or general;

and

(b) conditional or unconditional.

(2) An approval or exemption or a condition of an approval or exemption given by a Minister under this Act may be varied or revoked by the Minister at any time.

#### **Proceedings for offences**

**42.** (1) A complaint for an offence against this Act may not be made except with the consent of the Director of Public Prosecutions.

(2) Notwithstanding any other Act, proceedings for a summary offence against this Act may be brought within the period of three years after the date on which the offence is alleged to have been committed or, with the consent of the Director of Public Prosecutions, at any later time.

(3) A document purporting to be a consent of the Director of Public Prosecutions given under this section is, in the absence of proof to the contrary, proof of the consent.

#### **Regulations**

**43.** The Governor may make such regulations as are contemplated by this Act or necessary or expedient for the purposes of this Act.

## **SCHEDULE**

### *Provisions applicable to subsidiaries*

#### **Application and interpretation**

1. (1) This schedule applies—

(a) to a body corporate established by regulation under Part 5 as a subsidiary of a public corporation;

and

(b) subject to the regulations, to a company that is a subsidiary of a public corporation.

(2) In this schedule—

"**board**" in relation to a subsidiary, means the board of directors of the subsidiary;

"**director**" in relation to a subsidiary, means a person appointed as a member of the board of the subsidiary;

"**parent corporation**" in relation to a subsidiary, means the public corporation of which the subsidiary is a subsidiary.

#### **Direction by board of parent corporation**

2. A subsidiary is subject to control and direction by the board of its parent corporation.

#### **General management duties of board**

3. (1) The board of a subsidiary is responsible to its parent corporation for overseeing the operations of the subsidiary with the goal of—

(a) securing continuing improvements of performance;

and

(b) protecting the long term viability of the subsidiary and the Crown's financial interests in the subsidiary.

(2) Without limiting the effect of subclause (1), the board must for that purpose ensure as far as practicable—

(a) that the subsidiary establishes or observes all such plans, targets, structures, systems and practices as are required or applied to the subsidiary by its parent corporation;

(b) that the subsidiary operates within the limits imposed by its parent corporation's incorporating Act and charter and complies with the requirements imposed by or under this or any other Act or law;

(c) that the subsidiary observes high standards of corporate and business ethics;

(d) that its parent corporation receives regular reports on the performance of the subsidiary and on the initiatives of the board;

(e) that its parent corporation is advised, as soon as practicable, of any material development that affects the financial or operating capacity of the subsidiary or gives rise to an expectation that the subsidiary may not be able to meet its debts as and when they fall due;

and

(f) that all information furnished to its parent corporation by the subsidiary is accurate and comprehensive.

#### **Directors' duties of care, etc.**

4. (1) A director of a subsidiary must at all times exercise a reasonable degree of care and diligence in the performance of his or her functions, and (without limiting the effect of the foregoing) for that purpose—

- (a) must take reasonable steps to inform himself or herself about the subsidiary, its parent corporation and the other subsidiaries of its parent corporation, their businesses and activities and the circumstances in which they operate;
- (b) must take reasonable steps through the processes of the board to obtain sufficient information and advice about all matters to be decided by the board or pursuant to a delegation to enable him or her to make conscientious and informed decisions;

and

- (c) must exercise an active discretion with respect to all matters to be decided by the board or pursuant to a delegation.

(2) A director is not bound to give continuous attention to the affairs of the subsidiary but is required to exercise reasonable diligence in attendance at and preparation for board meetings.

(3) In determining the degree of care and diligence required to be exercised by a director, regard must be had to the skills, knowledge or acumen possessed by the director and to the degree of risk involved in any particular circumstances.

(4) If a director of a subsidiary is culpably negligent in the performance of his or her functions, the director is guilty of an offence.

Penalty: Division 4 fine.

(5) A director is not culpably negligent for the purposes of subclause (5) unless the court is satisfied the director's conduct fell sufficiently short of the standards required under this schedule of the director to warrant the imposition of a criminal sanction.

(6) A director of a subsidiary does not commit any breach of duty under this clause by acting in accordance with a direction of the board of its parent corporation.

#### **Directors' duties of honesty**

**5.** (1) A director of a subsidiary must at all times act honestly in the performance of the functions of his or her office, whether within or outside the State.

Penalty: Division 4 fine or division 4 imprisonment, or both.

(2) A director or former director of a subsidiary must not, whether within or outside the State, make improper use of information acquired by virtue of his or her position as such a director to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the subsidiary, its parent corporation or any other subsidiary of its parent corporation.

Penalty: Division 4 fine or division 4 imprisonment, or both.

(3) A director of a subsidiary must not, whether within or outside the State, make improper use of his or her position as a director to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the subsidiary, its parent corporation or any other subsidiary of its parent corporation.

Penalty: Division 4 fine or division 4 imprisonment, or both.

**Transactions with directors or associates of directors**

6. (1) Neither a director of a subsidiary nor an associate of a director of a subsidiary may, without the approval of the parent corporation's Minister, be directly or indirectly involved in a transaction with the subsidiary, its parent corporation or any other subsidiary of its parent corporation.

(2) A person will be treated as being indirectly involved in a transaction for the purposes of subclause (1)—

(a) if the person initiates, promotes or takes any part in negotiations or steps leading to the making of the transaction with a view to that person or an associate of that person gaining some financial or other benefit (whether immediately or at a time after the making of the transaction);

and

(b) despite the fact that neither that person nor an agent, nominee or trustee of that person becomes a party to the transaction.

(3) Subclause (1) does not apply to—

(a) to—

(i) the receipt by the subsidiary, its parent corporation or any other subsidiary of the corporation of deposits of money or investments;

(ii) the provision of loans or other financial accommodation by the subsidiary, its parent corporation or any other subsidiary of the corporation for domestic or non-commercial purposes;

(iii) the provision of accident, health, life, property damage or income protection insurance or insurance against other risks (excluding credit or financial risks) by the subsidiary, its parent corporation or any other subsidiary of the corporation;

(iv) the provision of services (other than financial or insurance services) by the subsidiary, its parent corporation or any other subsidiary of the corporation,

in the ordinary course of its ordinary business and on ordinary commercial terms;

or

(b) to transactions of a prescribed class.

(4) If a transaction is made with the subsidiary, its parent corporation or any other subsidiary of its parent corporation in contravention of subclause (1), the transaction is liable to be avoided by the subsidiary or by its parent corporation or its parent corporation's Minister.

(5) A transaction may not be avoided under subclause (4) if a person has acquired an interest in property the subject of the transaction in good faith for valuable consideration and without notice of the contravention.

(6) A director of a subsidiary must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subclause (1).

Penalty: If an intention to deceive or defraud is proved—Division 4 fine or division 4 imprisonment, or both.

In any other case—Division 6 fine.

#### **Directors' and associates' interests in subsidiary or parent corporation**

7. (1) Neither a director of a subsidiary nor an associate of a director of a subsidiary may, without the approval of the parent corporation's Minister—

(a) have or acquire a beneficial interest in shares in, debentures of or prescribed interests made available by the subsidiary, its parent corporation or any other subsidiary of its parent corporation;

(b) have or hold or acquire (whether alone or with another person or persons) a right or option in respect of the acquisition or disposal of shares in, debentures of or prescribed interests made available by the subsidiary, its parent corporation or any other subsidiary of its parent corporation;

or

(c) be a party to, or entitled to a benefit under, a contract under which a person has a right to call for or make delivery of shares in, debentures of or prescribed interests made available by the subsidiary, its parent corporation or any other subsidiary of its parent corporation.

(2) A director of a subsidiary must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subclause (1).

Penalty: If an intention to deceive or defraud is proved—Division 4 fine or division 4 imprisonment, or both.

In any other case—Division 6 fine.

#### **Conflict of interest**

8. (1) A director of a subsidiary who has a direct or indirect personal or pecuniary interest in a matter decided or under consideration by the board—

(a) must, as soon as reasonably practicable, disclose to the board full and accurate details of the interest;

(b) must not take part in any discussion by the board relating to that matter;

(c) must not vote in relation to that matter;

and

(d) must be absent from the meeting room when any such discussion or voting is taking place.

Penalty: Division 4 fine.

(2) If a director makes a disclosure of interest and complies with the other requirements of subclause (1) in respect of a proposed contract—

(a) the contract is not liable to be avoided by the subsidiary;

and

(b) the director is not liable to account to the subsidiary for profits derived from the contract.

(3) If a director fails to make a disclosure of interest or fails to comply with any other requirement of subclause (1) in respect of a proposed contract, the contract is liable to be avoided by the subsidiary or by its parent corporation or its parent corporation's Minister.

(4) A contract may not be avoided under subclause (3) if a person has acquired an interest in property the subject of the contract in good faith for valuable consideration and without notice of the contravention.

(5) Where a director of a subsidiary has or acquires a personal or pecuniary interest, or is or becomes the holder of an office, such that it is reasonably foreseeable that a conflict might arise with his or her duties as a director of the subsidiary, the director must, as soon as reasonably practicable, disclose full and accurate details of the interest or office to the board of the subsidiary.

Penalty: Division 4 fine.

(6) A disclosure under this clause must be recorded in the minutes of the board and reported to the board of the parent corporation and the parent corporation's Minister.

(7) If, in the opinion of the parent corporation's Minister, a particular interest or office of a director is of such significance that the holding of the interest or office is not consistent with the proper discharge of the duties of the director, the Minister may require the director either to divest himself or herself of the interest or office or to resign from the board (and non-compliance with the requirement constitutes misconduct and hence a ground for removal of the director from the board).

(8) Without limiting the effect of this clause, a director will be taken to have an interest in a matter for the purposes of this clause if an associate of the director has an interest in the matter.

(9) This clause does not apply in relation to a matter in which a director has an interest while the director remains unaware that he or she has an interest in the matter, but in any proceedings against the director the burden will lie on the director to prove that he or she was not, at the material time, aware of his or her interest.

**Removal of director or board**

9. Non-compliance by a director of a subsidiary with a duty imposed by this schedule constitutes a ground for removal of the director from office.

**Civil liability if director or former director of subsidiary contravenes this schedule**

10. (1) If a person who is a director or former director of a subsidiary is convicted of an offence for a contravention of any of the preceding provisions of this schedule (other than an offence consisting of culpable negligence), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the parent corporation of the subsidiary—

(a) if the court is satisfied that the person or any other person made a profit as a result of the contravention—an amount equal to the profit;

and

(b) if the court is satisfied that the subsidiary, the parent corporation or any other subsidiary of the parent corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

(2) If a person who is a director or former director of a subsidiary is guilty of a contravention of any of the preceding provisions of this schedule for which a criminal penalty is fixed (other than a contravention consisting of culpable negligence), the parent corporation or the parent corporation's Minister may (whether or not proceedings have been brought for the offence) recover from the person by action in a court of competent jurisdiction—

(a) if the person or any other person made a profit as a result of the contravention—an amount equal to the profit;

and

(b) if the subsidiary, the parent corporation or any other subsidiary of the parent corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

**Immunity for directors of subsidiaries**

11. (1) Except as otherwise provided by this schedule, a director of a subsidiary incurs no civil liability for an honest act or omission in the performance or discharge, or purported performance or discharge, of functions or duties as such a director.

(2) A liability that would, but for subclause (1), lie against a director of a subsidiary lies instead against the subsidiary.

**Tax and other liabilities of subsidiary**

12. (1) Except as otherwise determined by the Treasurer, a subsidiary is liable to all such rates (other than rates that would be payable to a council), duties, taxes and imposts and has all such other liabilities and duties as would apply under the law of the State if the subsidiary were not an instrumentality of the Crown.

(2) Except as otherwise determined by the Treasurer, a subsidiary is liable to pay to the Treasurer, for the credit of the Consolidated Account, such amounts as the Treasurer from time to time determines to be equivalent to—

- (a) income tax and any other taxes or imposts that the subsidiary does not pay to the Commonwealth but would be liable to pay under the law of the Commonwealth if it were constituted and organized in such manner as the Treasurer determines to be appropriate for the purposes of this subclause as a public company or group of public companies carrying on the business carried on by the subsidiary;

and

- (b) rates that the subsidiary would be liable to pay to a council if the subsidiary were not an instrumentality of the Crown.

(3) Amounts determined by the Treasurer to be payable under subclause (2) must be paid by the subsidiary at the times and in the manner determined by the Treasurer.

(4) This clause does not affect any liability that the subsidiary would have apart from this clause to pay rates to a council.

#### **Accounts and external audit**

**13.** (1) A subsidiary must cause proper accounts to be kept of its financial affairs and financial statements to be prepared in respect of each financial year.

(2) The accounts and financial statements must comply with—

- (a) the requirements of the Treasurer contained in its parent corporation's charter;

and

- (b) any applicable instructions of the Treasurer issued under the *Public Finance and Audit Act 1987*.

(3) The Auditor-General may at any time, and must in respect of each financial year, audit the accounts and financial statements of the subsidiary.

#### **Delegation**

**14.** (1) The board of a subsidiary may delegate any of its powers or functions.

(2) A power or function delegated under this clause may, if the instrument of delegation so provides, be further delegated.

(3) A delegation—

- (a) may be made subject to conditions and limitations specified in the instrument of delegation;

and

- (b) is revocable at will and does not derogate from the power of the delegator to act in any matter.

(4) A delegate must not act in any matter pursuant to the delegation in which the delegate has a direct or indirect pecuniary or personal interest.

Penalty: Division 4 fine.

(5) If a delegate makes a contract in contravention of subclause (4), the contract is liable to be avoided by the subsidiary or by its parent corporation or its parent corporation's Minister.

(6) A contract may not be avoided under subclause (5) if a person has acquired an interest in property the subject of the contract in good faith for valuable consideration and without notice of the contravention.

(7) If a person is convicted of an offence for a contravention of subclause (4), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the subsidiary—

- (a) if the court is satisfied that the person or any other person made a profit as a result of the contravention—an amount equal to the profit;
- (b) if the court is satisfied that the subsidiary suffered loss or damage as a result of the contravention—compensation for the loss or damage.

(8) If a person is guilty of a contravention of subclause (4), the subsidiary or the subsidiary's parent corporation or the parent corporation's Minister may (whether or not proceedings have been brought for the offence) recover from the person by action in a court of competent jurisdiction—

- (a) if the person or any other person made a profit as a result of the contravention—an amount equal to the profit;
- (b) if the subsidiary suffered loss or damage as a result of the contravention—compensation for the loss or damage.

(9) Without limiting the effect of subclause (4), a person will be taken to have an interest in a matter for the purposes of subclause (4) if an associate of the person has an interest in the matter.

(10) Subclause (4) does not apply in relation to a matter in which a person has an interest if the person is unaware that he or she has an interest in the matter, but, in any proceedings against the person, the burden will lie on the person to prove that he or she was not, at the material time, aware of his or her interest.

(11) A contravention of subclause (4) by a person who is a director of the subsidiary constitutes a ground for removal of the director from the board of the subsidiary.

#### **Transactions with executives or associates of executives**

**15.** (1) Neither an executive of a subsidiary nor an associate of an executive of a subsidiary may, without the approval of the parent corporation's Minister, be directly or indirectly involved in a transaction with the subsidiary, its parent corporation or any other subsidiary of its parent corporation.

- (2) A person will be treated as being indirectly involved in a transaction for the purposes of subclause (1)—

- (a) if the person initiates, promotes or takes any part in negotiations or steps leading to the making of the transaction with a view to that person or an associate of that person gaining some financial or other benefit (whether immediately or at a time after the making of the transaction);

and

- (b) despite the fact that neither that person nor an agent, nominee or trustee of that person becomes a party to the transaction.

(3) Subclause (1) does not apply—

(a) to—

- (i) the receipt by the subsidiary, its parent corporation or any other subsidiary of the corporation of deposits of money or investments;
- (ii) the provision of loans or other financial accommodation by the subsidiary, its parent corporation or any other subsidiary of the corporation for domestic or non-commercial purposes;
- (iii) the provision of accident, health, life, property damage or income protection insurance or insurance against other risks (excluding credit or financial risks) by the subsidiary, its parent corporation or any other subsidiary of the corporation;
- (iv) the provision of services (other than financial or insurance services) by the subsidiary, its parent corporation or any other subsidiary of the corporation,

in the ordinary course of its ordinary business and on ordinary commercial terms;

- (b) to the employment of a person under a contract of service with the subsidiary, its parent corporation or any other subsidiary of the corporation or to a transaction that is ancillary or incidental to such employment;

or

- (c) to transactions of a prescribed class.

(4) If a transaction is made with the subsidiary, its parent corporation or any other subsidiary of its parent corporation in contravention of subclause (1), the transaction is liable to be avoided by the subsidiary or by its parent corporation or its parent corporation's Minister.

(5) A transaction may not be avoided under subclause (4) if a person has acquired an interest in property the subject of the transaction in good faith for valuable consideration and without notice of the contravention.

(6) An executive of a subsidiary must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subclause (1).

Penalty: If an intention to deceive or defraud is proved—Division 4 fine or division 4 imprisonment, or both.

In any other case—Division 6 fine.

(7) If a person is convicted of an offence for a contravention of subclause (6), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the parent corporation of the subsidiary—

- (a) if the court is satisfied that the person or any other person made a profit as a result of the contravention—an amount equal to the profit;
- (b) if the court is satisfied that the subsidiary, its parent corporation or any other subsidiary of the parent corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

(8) If a person is guilty of a contravention of subclause (6), the parent corporation or the parent corporation's Minister may (whether or not proceedings have been brought for the offence) recover from the person by action in a court of competent jurisdiction—

- (a) if the person or any other person made a profit as a result of the contravention—an amount equal to the profit;
- (b) if the subsidiary, its parent corporation or any other subsidiary of the parent corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

#### **Executives' and associates' interests in subsidiary or parent corporation**

**16.** (1) Neither an executive of a subsidiary nor an associate of an executive of a subsidiary may, without the approval of the parent corporation's Minister—

- (a) have or acquire a beneficial interest in shares in, debentures of or prescribed interests made available by the subsidiary, its parent corporation or any other subsidiary of its parent corporation;
- (b) have or hold or acquire (whether alone or with another person or persons) a right or option in respect of the acquisition or disposal of shares in, debentures of or prescribed interests made available by the subsidiary, its parent corporation or any other subsidiary of its parent corporation;

or

- (c) be a party to, or entitled to a benefit under, a contract under which a person has a right to call for or make delivery of shares in, debentures of or prescribed interests made available by the subsidiary, its parent corporation or any other subsidiary of its parent corporation.

(2) An executive of a subsidiary must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subclause (1).

Penalty: If an intention to deceive or defraud is proved—Division 4 fine or division 4 imprisonment, or both.

In any other case—Division 6 fine.

(3) If a person is convicted of an offence for a contravention of subclause (2), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the parent corporation of the subsidiary—

(a) if the court is satisfied that the person or any other person made a profit as a result of the contravention—an amount equal to the profit;

(b) if the court is satisfied that the subsidiary, its parent corporation or any other subsidiary of the parent corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

(4) If a person is guilty of a contravention of subclause (2), the parent corporation or the parent corporation's Minister may (whether or not proceedings have been brought for the offence) recover from the person by action in a court of competent jurisdiction—

(a) if the person or any other person made a profit as a result of the contravention—an amount equal to the profit;

(b) if the subsidiary, its parent corporation or any other subsidiary of the parent corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

#### **Validity of transactions of subsidiary**

**17.** (1) Subject to subclause (2), a transaction to which a subsidiary is a party or apparently a party (whether made or apparently made under the subsidiary's common seal or by a person with authority to bind the subsidiary) is not invalid because of—

(a) any deficiency of power on the part of the subsidiary;

(b) any procedural irregularity on the part of the board or any director, employee or agent of the subsidiary;

or

(c) any procedural irregularity affecting the appointment of a director, employee or agent of the subsidiary.

(2) This clause does not validate a transaction in favour of a party—

(a) who enters into the transaction with actual knowledge of the deficiency or irregularity;

or

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- (b) who has a connection or relationship with the corporation such that the person ought to know of the deficiency or irregularity.

**APPENDIX****DIVISIONAL PENALTIES AND EXPIATION FEES**

At the date of assent to this Act divisional penalties and expiation fees are, as provided by section 28a of the *Acts Interpretation Act 1915*, as follows:

Division	Maximum imprisonment	Maximum fine	Expiation fee
1	15 years	\$60 000	—
2	10 years	\$40 000	—
3	7 years	\$30 000	—
4	4 years	\$15 000	—
5	2 years	\$8 000	—
6	1 year	\$4 000	\$300
7	6 months	\$2 000	\$200
8	3 months	\$1 000	\$150
9	-	\$500	\$100
10	-	\$200	\$75
11	-	\$100	\$50
12	-	\$50	\$25

*Note: This appendix is provided for convenience of reference only.*