

(3) Except as otherwise provided by subsection (2) or section 95, the Retirement Benefits Act 1993 does not apply in relation to a Government Business Enterprise that is not an Agency, its chief executive officer or its employees.

(4) A Government Business Enterprise must not establish a superannuation scheme after the commencement day specified in the Public Sector Superannuation Reform Act 1999.

(5) A Government Business Enterprise must comply with any instruction relating to superannuation given by the Minister responsible for the administration of the Retirement Benefits Act 1993 or the Public Sector Superannuation Reform Act 1999.

23. Long Service Leave (State Employees) Act 1994 does not apply

Subject to this Act, the Long Service Leave (State Employees) Act 1994 does not apply in relation to a Government Business Enterprise that is not an Agency, its chief executive officer or its employees.

PART 5 - Powers and duties of, offences by and indemnification of directors and staff

23A. Power of former director to access records

(1) In this section,

"former director" means a person who ceased to be a director within the period of 7 years immediately preceding the relevant time.

(2) A former director of a Government Business Enterprise may inspect and make copies of the records of the Government Business Enterprise, including its accounting records, financial

statements and interim reports, at any reasonable time for the purpose of a legal proceeding –

(a) to which the former director is a party; or

(b) that the former director proposes in good faith to bring; or

(c) that the former director has reason to believe will be brought against him or her.

(3) The Government Business Enterprise must allow a former director to exercise his or her powers under this section to inspect and make copies of records.

Penalty:

Fine not exceeding 500 penalty units.

(4) This section does not limit any right of access to the records of a Government Business Enterprise that a former director has apart from this section.

23B. Power of director to access records

(1) A director may inspect and make copies of the records of the Government Business Enterprise, including its accounting records, financial statements and interim reports, at any reasonable time.

(2) A director or officer must not prevent a director from exercising his or her powers under this section to inspect and make copies of records.

Penalty:

Fine not exceeding 50 penalty units.

24. Duties of officers and employees

(1) In this section –

"business judgment" means any decision to take or not take action in respect of a matter relevant to the business operations of the Government Business Enterprise;

"former employee" means a person who ceased to be an employee within the period of 7 years immediately preceding the relevant time;

"former officer" means a person who ceased to be an officer within the period of 7 years immediately preceding the relevant time.

(2) An officer of a Government Business Enterprise must perform and exercise the functions and powers of his or her office in that Government Business Enterprise –

(a) in good faith in the best interests of the Government Business Enterprise; and

(b) for a proper purpose.

Penalty:

Fine not exceeding 2 000 penalty units or a term of imprisonment not exceeding 5 years, or both.

(3) An officer of a Government Business Enterprise must exercise his or her powers and perform his or her functions with

the degree of care and diligence that a reasonable person would exercise if he or she –

(a) were an officer of a Government Business Enterprise in the circumstances of the Government Business Enterprise; and

(b) occupied the office held by, and had the same responsibilities within the Government Business Enterprise as, the officer.

Penalty:

Fine not exceeding 2 000 penalty units or a term of imprisonment not exceeding 5 years, or both.

(4) An officer of a Government Business Enterprise who makes a business judgment is taken to meet the requirements of subsection (3), and his or her equivalent duties at common law and in equity, in respect of the judgment if the officer –

(a) makes the judgment in good faith for a proper purpose; and

(b) does not have a material personal interest in the subject matter of the judgment; and

(c) informs himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and

(d) rationally believes that the judgment is in the best interests of the Government Business Enterprise.

(5) For the purposes of subsection (4)(d), the belief of an officer of a Government Business Enterprise that a business judgment is in the best interests of the Government Business

Enterprise is rational unless the belief is one that no reasonable person in the position of the officer would hold.

(6) An officer, employee, former officer or former employee of a Government Business Enterprise must not make improper use, in Tasmania or elsewhere, of information acquired because of his or her office or employment in the Government Business Enterprise –

(a) to gain, directly or indirectly, an advantage for himself or herself or another person; or

(b) to cause damage to the Government Business Enterprise or any of its subsidiaries.

Penalty:

Fine not exceeding 2 000 penalty units or a term of imprisonment not exceeding 5 years, or both.

(7) An officer or employee must not make improper use, in Tasmania or elsewhere, of his or her position as an officer or employee of a Government Business Enterprise –

(a) to gain, directly or indirectly, an advantage for himself or herself or another person; or

(b) to cause damage to the Government Business Enterprise or any of its subsidiaries.

Penalty:

Fine not exceeding 2 000 penalty units or a term of imprisonment not exceeding 5 years, or both.

25. Duty to prevent insolvent trading

(1) A director must prevent a Government Business Enterprise from incurring a debt if –

(a) the Government Business Enterprise is insolvent at that time or will become insolvent by incurring at that time the debt or debts which include that debt; and

(b) at that time there are reasonable grounds for suspecting that the Government Business Enterprise is insolvent or would become insolvent by incurring the debt or those debts; and

(c) the director is aware of those grounds or a reasonable person in the position of director would be aware of those grounds.

(2) A director is guilty of an offence and liable, on conviction, to a penalty of a fine not exceeding 2 000 penalty units or a term of imprisonment not exceeding 5 years, or both, if he or she contravenes subsection (1) knowingly, intentionally or recklessly and –

(a) dishonestly and intending to gain, directly or indirectly, an advantage for himself or herself or another person; or

(b) intending to deceive or defraud any person.

(3) It is a defence for an offence against subsection (2) or for a contravention of subsection (1) in proceedings under section 29 if it is proved –

(a) that, at the time the debt was incurred, the director –

(i) had reasonable grounds to believe and did believe that a competent and reliable person was responsible for providing the director with adequate information as to whether the Government Business Enterprise was solvent; and

(ii) had reasonable grounds to believe and did believe that the person referred to in subparagraph (i) was fulfilling the responsibility referred to in that subparagraph; and

(iii) expected, on the basis of information provided by the person referred to in subparagraph (i), that the Government Business Enterprise was solvent at that time and would remain solvent even if it incurred the debt and any other debts that it incurred at that time; or

(b) that, at the time when the debt was incurred, the director had other reasonable grounds to expect, and did expect, that the Government Business Enterprise was solvent and would remain solvent even if it incurred the debt and any other debts that it incurred at that time; or

(c) that the director took all reasonable steps to prevent the Government Business Enterprise from incurring the debt; or

(d) that the director did not take part at the time in the Government Business Enterprise's management because of illness or for some other good cause; or

(e) that the director informed the Portfolio Minister and Treasurer, before the debt was incurred, that the Government Business Enterprise was insolvent or would become insolvent if the debt or the debt and other debts were incurred; or

(f) that the debt was incurred as the direct result of a direction given under this Act to the director or the Government Business Enterprise by the Portfolio Minister and Treasurer.

26. False or misleading information

(1) An officer must not –

(a) make a statement concerning the affairs of the Government Business Enterprise or a subsidiary to a director, the Treasurer, the Portfolio Minister or the Auditor-General that the officer knows is false or misleading in a material particular; or

(b) omit from a statement concerning the affairs of the Government Business Enterprise or a subsidiary made to a director, the Treasurer, the Portfolio Minister or the Auditor-General anything without which the statement is, to the officer's knowledge, misleading in a material particular.

Penalty:

Fine not exceeding 50 penalty units or a term of imprisonment not exceeding 2 years, or both.

(2) A complaint against a person for an offence against subsection (1)(a) or (b) is sufficient if it states that the information given was false or misleading to the person's knowledge.

(3) An officer must not give to a director, the Treasurer, the Portfolio Minister or the Auditor-General a document containing information that the officer knows is false, misleading or incomplete in a material particular without–

(a) indicating to the recipient that the document is false, misleading or incomplete and the respect in which the document is false, misleading or incomplete; and

(b) giving the correct information to the recipient if the officer has, or can reasonably obtain, the correct information.

Penalty:

Fine not exceeding 25 penalty units or a term of imprisonment not exceeding 1 year, or both.

27. Reliance on information or advice

If –

(a) an officer of a Government Business Enterprise relies on information, or professional or expert advice, given or prepared by –

(i) an employee of the Government Business Enterprise who the officer believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or

(ii) a professional adviser or expert in relation to matters that the officer believes on reasonable grounds to be within the person's professional or expert competence; or

(iii) another officer in relation to matters within the officer's authority; or

(iv) a committee of officers on which the officer did not serve in relation to matters within the committee's authority; and

(b) the reliance was made –

(i) in good faith; and

(ii) after making an independent assessment of the information or advice, having regard to the officer's knowledge of the Government Business Enterprise and the complexity of the structure and operations of the Government Business Enterprise; and

(c) the reasonableness of the officer's reliance on the information or advice arises in proceedings brought to determine whether an officer has performed a duty under this Act or an equivalent general law duty – the officer's reliance on the information or advice is taken to be reasonable unless the contrary is proved.

28. Director to disclose material personal interest

(1) A director who has or may have a material personal interest in a matter that relates to the affairs of the Government Business Enterprise must give the other directors notice of the interest except where –

(a) the interest –

(i) arises in relation to the director's remuneration as a director of the Government Business Enterprise; or

(ii) relates to a contract that insures, or would insure, the director against liabilities the director incurs as an officer of the Government Business Enterprise (but only if the contract does

not make the Government Business Enterprise or a related body the insurer); or

(iii) relates to any payment by the Government Business Enterprise or a related body in respect of an indemnity permitted under section 35; or

(iv) is in a contract, or proposed contract, with or for the benefit of, or on behalf of, a related body and arises because the director is a director of the related body; or

(v) is a beneficial interest in shares in a public company, within the meaning of the *Corporations Act 2001* of the Commonwealth, and the total number of shares in which the director has a beneficial interest does not exceed 5% of the total number of shares issued by the company; or

(b) all of the following conditions are satisfied:

(i) the director has already given notice of the nature and extent of the interest and its relation to the affairs of the Government Business Enterprise to all directors under this subsection;

(ii) if after the time when notice of the nature and extent of the interest and its relation to the affairs of the Government Business Enterprise under this subsection was given a person who was not a director of the Government Business Enterprise at that time is appointed as a director, that notice is given to the new director;

(iii) the nature or extent of the interest has not materially increased above that disclosed in the notice; or

(c) the director has given a standing notice of the nature and extent of the interest under section 28B and the notice is still effective in relation to the interest.

Penalty:

Fine not exceeding 500 penalty units.

(2) For the purposes of subsection (1), a body is a related body in respect of a Government Business Enterprise if –

(a) the body is a subsidiary of the Government Business Enterprise; or

(b) the Government Business Enterprise is the body's subsidiary; or

(c) the body and the Government Business Enterprise are both subsidiaries of another Government Business Enterprise.

(3) The notice of a director's material personal interest in a matter that relates to the affairs of the Government Business Enterprise must –

(a) include details of –

(i) the nature and extent of the interest; and

(ii) the relation of the interest to the affairs of the Government Business Enterprise; and

(b) be given at a meeting of the Board as soon as practicable after the director becomes aware of his or her interest in the matter.

(4) The details of the notice of a director's material personal interest in a matter that relates to the affairs of the Government Business Enterprise must be –

(a) recorded in the minutes of the meeting at which the notice is given; and

(b) provided to the Portfolio Minister and Treasurer.

(5) A contravention of subsection (1) by a director does not affect the validity of an act or proceeding of the Board or of any person (including that director) acting pursuant to any direction of the Board.

28A. Board may declare material personal interest

(1) If a Board is of the opinion that a director has a material personal interest in a matter that relates to the affairs of the Government Business Enterprise, it may pass a resolution declaring –

(a) that the director has such an interest; and

(b) the nature and extent of the interest; and

(c) the relation of the interest to the affairs of the Government Business Enterprise.

(2) If a declaration is made under subsection (1), the director declared to have a material personal interest is taken to have that interest.

(3) The details of a declaration made under subsection (1) must be provided to the Portfolio Minister and Treasurer.

(4) The making of a declaration under subsection (1) does not preclude the taking of proceedings for an offence against section 28(1) in respect of the failure of the director to give notice of the material personal interest.

28B. Standing notice of director's interest

(1) A director who has an interest, whether direct or indirect, in a matter may give the other directors of the Government Business Enterprise standing notice of the nature and extent of the interest.

(2) The standing notice may be given at any time and whether or not the matter relates to the affairs of the Government Business Enterprise at the time the notice is given.

(3) The standing notice must –

(a) include details of the nature and extent of the interest; and

(b) be given –

(i) at a meeting of the Board, either in writing or orally; or

(ii) to the other directors individually in writing.

(4) Standing notice given to the directors individually –

(a) must be tabled at the next meeting of the Board after it has been given; and

(b) is given when it has been given to every director.

(5) The details of the standing notice given at or tabled at a meeting of the Board must be –

(a) recorded in the minutes of the meeting; and

(b) provided to the Portfolio Minister and Treasurer.

(6) A standing notice –

(a) takes effect as soon as it is given; and

(b) ceases to have effect if a person who was not a director of the Government Business Enterprise at the time when the notice was given is appointed as a director.

(7) A standing notice that has ceased to have effect under subsection (6) recommences to have effect if it is given to the new director referred to in that subsection.

(8) A standing notice ceases to have effect in relation to a particular interest if the nature or extent of the interest materially increases above that disclosed in the notice.

28C. Restriction on director's participation in case of material personal interest

(1) If a director has a material personal interest in a matter being considered at a meeting of the Board, the director must not, except as allowed by the Board under subsection (4) –

(a) be present while the matter is being considered; and

(b) vote on the matter.

(2) If –

(a) a director has a material personal interest in a contract that the Government Business Enterprise has with a person; and

(b) either –

(i) the director, in compliance with subsection (1), was not present while the Board considered whether to enter into the contract and did not vote on the matter; or

(ii) the director was allowed under subsection (4) to be present while the Board considered whether to enter into the contract and to vote on the matter –

the Government Business Enterprise, by reason of the director holding that interest, cannot avoid the contract and the director is not liable to account to the Government Business Enterprise for any profits derived from that interest.

(3) If –

(a) a director has a material personal interest in a contract that the Government Business Enterprise has with a person; and

(b) the director, in contravention of subsection (1), was present while the Board considered whether to enter into the contract or voted on the matter –

the Government Business Enterprise, by reason of the director holding that interest, may avoid the contract and the director is liable to account to the Government Business Enterprise for any profits derived from that interest if the Board so determines by written notice provided to the director.

(4) If a director has a material personal interest in a matter being considered by the Board and the Board, in the absence of the director, passes a resolution that –

(a) identifies the director, the nature and extent of the interest and its relation to the affairs of the Government Business Enterprise; and

(b) states that the interest should not disqualify the director from being present when the matter is considered by the Board or from voting on the matter –

the director may be present when the matter is considered by the Board and may vote on the matter.

(5) Nothing in subsection (4) affects the duty of the Board to provide notice of the material personal interest to the Portfolio Minister and Treasurer under section 28(4), 28A(3) or 28B(5).

28D. Director may be required to divest of material personal interest

If the Portfolio Minister and Treasurer consider that a material personal interest held by a director is such that holding the interest is not consistent with the proper discharge of his or her duties as director, the Portfolio Minister and Treasurer, jointly,

may require the director to either divest himself or herself of the interest or resign as director.

29. Civil penalty order

(1) In this section, "**court**" means a court of summary jurisdiction.

(2) If a person contravenes section 24(2), (3), (6) or (7) or section 25(1), the Government Business Enterprise or a person authorised in writing by the Portfolio Minister or Treasurer may apply to the court, within 6 years after the contravention, for an order under subsection (3).

(3) If the court is satisfied of the matters specified in subsection (3A), the court may make one or more of the following orders:

(a) an order prohibiting the person from being an officer of a Government Business Enterprise for the period specified in the order;

(b) an order that the person pay to the Treasurer an amount not exceeding \$200 000.

(3A) Before making an order under subsection (3), the court must be satisfied that –

(a) the person has contravened section 24(2), (3), (6) or (7) or section 25(1); and

(b) the contravention of that section –

(i) materially prejudices the interests of the Government Business Enterprise; or

(ii) materially prejudices the ability of the Government Business Enterprise to pay its creditors; or

(iii) is serious.

(4) The court must not make an order under subsection (3)(a) if the court is satisfied that the person is a fit and proper person to be an officer of a Government Business Enterprise despite the contravention.

(5) The court must not make an order under subsection (3)(b) if the court or any other court has ordered the person to pay punitive damages because of the act or omission constituting the contravention.

(6) In proceedings under this section, the court may relieve a person who has contravened section 24(2), (3), (6) or (7) or section 25(1) from the whole or part of a liability to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention if the court is satisfied that—

(a) the person has acted honestly; and

(b) having regard to all the circumstances of the case (including, where appropriate, circumstances connected with the person's appointment as an officer), the person ought fairly to be excused for the contravention.

(7) An application made under subsection (2) is a civil matter and the rules of evidence and procedure that the court

applies in hearing and determining civil matters apply in relation to the hearing and determination of the application.

(7A) Proceedings may be commenced and determined under this section whether or not proceedings for an offence against section 24(2), (3), (6) or (7) or section 25(2) have been commenced or determined.

(8) The Treasurer may enforce an order made under subsection (3)(b) as if it were a judgment of the court.

30. Proceedings under this Part prevail

If, in respect of an act or omission, a person could be charged with an offence against this Part and could be found to have breached the Code of Conduct within the meaning of the *State Service Act 2000*, proceedings may only be commenced under this Part.

31. Proceedings for offence

(1) Proceedings for an offence against this Part may be commenced within 5 years after the commission of the act or omission which constitutes the offence notwithstanding any contrary provision in any other Act.

(2) Proceedings for an offence against this Part may be instituted and determined in a court of summary jurisdiction.

(3) Proceedings for an offence against this Part may be instituted by a person authorised in writing by the Portfolio Minister.

(4) Proceedings for an offence against section 24(2), (3), (6) or (7) or section 25(2) may be commenced and determined whether or not proceedings under section 29 in respect of the

contravention of section 24(2), (3), (6) or (7) or section 25(1) have been commenced or determined.

32. Effect of conviction for offence

A person is not entitled to be appointed or employed as a director or chief executive officer or to be otherwise concerned with, or take part in, the management of a Government Business Enterprise if, within the preceding 5 years –

- (a) the person was convicted of an offence against this Part; or
- (b) the person, having been sentenced to a term of imprisonment in respect of an offence against this Part, was released from prison.

33. Compensation and other payments for contravention of this Part

(1) Sections 24, 25, 26, 27 and 28 have effect in addition to any rule of law relating to the function, power or liability of a person because of the person's office or employment in a Government Business Enterprise and do not affect the right of any person to institute civil proceedings in relation to a contravention of any of those provisions.

(2) If a person is found guilty of an offence against section 24(2), (3), (6) or (7) or section 25(2) or an order is made under section 29(3) in respect of a contravention of section 24 or 25, the court making that finding or order may, in addition to any other penalty it may impose or order it may make, order the person to pay to a Government Business Enterprise or subsidiary–

(a) any profit made by the person as a result of the contravention of section 24 or 25; and

(b) an amount equal to any loss and damage the Government Business Enterprise or subsidiary suffered as a result of the contravention of section 24 or 25.

(3) The Government Business Enterprise or subsidiary may enforce an order made under subsection (2) as if it were a judgment of the court.

34. Indemnifying officers

(1) A Government Business Enterprise must not exempt a person, whether directly or through an interposed person, from a liability to –

(a) that Government Business Enterprise; or

(b) a subsidiary of that Government Business Enterprise – incurred as an officer.

(2) A subsidiary of a Government Business Enterprise must not exempt a person, whether directly or through an interposed person, from a liability to –

(a) that subsidiary; or

(b) that Government Business Enterprise; or

(c) another subsidiary of that Government Business Enterprise – incurred as a person who is concerned with, or takes part in, the management of that subsidiary, Government Business Enterprise or other subsidiary.

(3) A Government Business Enterprise or subsidiary of a Government Business Enterprise must not indemnify a person, whether by agreement or by making a payment and whether directly or through an interposed person, against any of the following liabilities incurred as an officer of the Government Business Enterprise:

(a) a liability owed to the Government Business Enterprise, that subsidiary or another subsidiary of that Government Business Enterprise;

(b) a liability to pay compensation under an order made under section 33;

(c) a liability that is owed to someone other than that Government Business Enterprise, that subsidiary or another subsidiary of that Government Business Enterprise and that did not arise out of conduct in good faith.

(4) Subsection (3) does not apply to a liability for legal costs.

(5) A Government Business Enterprise or subsidiary of a Government Business Enterprise must not indemnify a person, whether by agreement or by making a payment and whether directly or through an interposed person, against legal costs incurred in defending an action for a liability incurred as an officer of that Government Business Enterprise if the costs are incurred –

(a) in defending or resisting proceedings in which the person is found to have a liability for which he or she could not be indemnified under subsection (3); or

(b) in defending or resisting proceedings for an offence in which the person is found guilty.

(6) For the purposes of subsection (5), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

(7) An instrument is void so far as it provides for a Government Business Enterprise to do something that is prohibited by this section.

(8) The *Statutory Authorities (Protection from Liability of Members) Act 1993* does not apply in respect of a Government Business Enterprise or its directors or chief executive officer.

35. Premiums for certain liabilities of officers

(1) A Government Business Enterprise may pay, or agree to pay, a premium in relation to a contract insuring a person who is or has been an officer of the Government Business Enterprise against a liability other than a liability –

(a) incurred by the person as an officer; and

(b) arising out of conduct involving –

(i) a wilful breach of duty in relation to the Government Business Enterprise; or

(ii) without limiting subparagraph (i), a contravention of section 24(3) or (4).

(2) Under subsection (1), a Government Business Enterprise may pay or agree to pay a premium in relation to a liability for costs and expenses incurred by a person in defending proceedings, whether civil or criminal, and whatever their outcome regardless of whether those costs are incurred in respect of conduct referred to in subsection (1)(b).

(2A) This section applies to a premium whether it is paid directly or through an interposed person.

(3) An instrument is void so far as it insures a person against a liability in contravention of subsection (1).

PART 6 - Charters and plans

Division 1 - Ministerial charter

36. Ministerial charter

(1) Within 3 months after a statutory authority becomes a Government Business Enterprise, the Portfolio Minister and Treasurer, jointly, must provide the Government Business Enterprise with a ministerial charter.

(2) The Portfolio Minister and Treasurer, jointly, may at any time at their own discretion or on receipt of an application of a Government Business Enterprise—

(a) amend a ministerial charter; or

(b) revoke a ministerial charter and substitute another ministerial charter.

(3) Before or while preparing a ministerial charter or an amendment to a ministerial charter, the Portfolio Minister and