Appointments to Public Sector Boards in Australia:
A comparative assessment

Emeritus Professor Meredith Edwards

Preface

This paper is part of a major project – *Corporate Governance in the Public Sector: An Evaluation of its Tensions, Gaps and Potential*. The project will provide the first comprehensive theoretical and empirical work on corporate governance in the Commonwealth public sector. It has been designed to enhance communication and participation in governance across government, industry, and the community by improving corporate governance literacy and making information publicly available.

The project is a collaborative venture between three University of Canberra research centres; Macquarie University; and key governmental and industry partners including the Australian National Audit Office, the Australian Government Department of Finance and Administration, Deloitte Touche Tohmatsu, CPA Australia, and Minter Ellison Lawyers.

This paper is the third in a series that will be produced by researchers and industry partners involved in the project. The aim of the series is to identify and explore key emerging public sector governance issues and encourage wider discussion and activity.

The series has been designed for public sector practitioners and corporate governance 'enthusiasts' across the public and private sectors. All papers will be broadly distributed and will be available online at: www.canberra.edu.au/corpgov-aps.

Corporate Governance in the Public Sector: An Evaluation of its Tensions, Gaps and Potential
University of Canberra

For more information please contact:
Roberta Dowd, Project Administrator
Ph: 02 6201 5960, email: Roberta.Dowd@canberra.edu.au
www.canberra.edu.au/corpgov-aps

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1. Background

In the United Kingdom (UK) and Canada, and to a lesser extent, New Zealand (NZ), governments have recently felt the need to enhance public confidence in the integrity of the political processes around public sector appointments. They have established transparent processes with a high degree of independence, if not also attention to ensuring merit-based appointments. So far, however, the Australian Government has not shown any interest in reform of appointment processes to its boards. Relatively little is known about the appointment processes that are followed in relation to public sector boards of the Australian Government but what we do know is that appointment processes are not nearly as comprehensive or as systematic as in several other countries.

The processes of selection and appointment in Australia are usually focused around the relevant minister, the Prime Minister, the Governor-General and the Federal Executive Council, with assistance provided by Cabinet, the Department of the Prime Minister and Cabinet and other relevant departments. Boards may or may not be involved in identifying the skills and experiences required when vacancies arise. No major crisis of confidence has arisen in recent times concerning board appointments and there has generally been a lack of pressure on the Government to make the current processes more transparent, rigorous and independent. An exception has been the resignation of Adelaide businessman Robert Gerard from his position on the board of the Reserve Bank of Australia in December 2005 after allegations of tax evasion were raised by the Opposition. Another has been controversy over recent appointments to the board of the Australian Broadcasting Commission (ABC). These incidents shed some light on an issue that has largely been overlooked by the mainstream media.

The aim of this paper is to take some generally acceptable principles in use overseas which relate to board selection and appointment processes, consider their relevance for Australia and suggest some reforms, based on overseas experiences that might lead to improved governance of Australian public boards. Section 2 provides relevant background on what is widely regarded as better practice in public sector appointments in terms of stages in selection and appointment to public sector boards. Section 3 briefly addresses what has motivated governments in a few overseas jurisdictions to reform their selection and appointment processes. Section 4 presents a set of principles based on those recommended by the Nolan Committee in the UK and practiced by the Commissioners for Public Appointments. Drawing on experiences in other jurisdictions and the principles enunciated by the Commissioner for Public Appointments in England and Wales, Section 5 identifies some key issues for Australia to address if good governance processes are to be ensured. Section 6 makes some suggestions on how the current appointments system could usefully be improved and Section 7 draws some conclusions.

This paper does not deal with the full range of public sector appointments; rather it focuses on those appointments that relate to Commonwealth authorities under the *Commonwealth Authorities and Companies Act 1997* (CAC Act). These are bodies that have the power to make and implement decisions on matters related to the public purpose of the entity and which are the subject of detailed examination as part of an ARC project of which this paper is a part.[1] The paper does not cover agencies that have advisory, judicial or quasi-judicial

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[1] Details of the project are available at: www.canberra.edu.au/corpgov-aps.

functions—although much of what is stated here has generic application both to different types of government agencies and different jurisdictions. The paper touches on but does not delve into issues relating to actual board composition, tenure of board members[2] or whether or not they should be paid. It also only briefly analyses why and when, if at all, representatives and/or experts should sit on public sector boards and the perceived conflicts of interest that might arise.[3]

2. Motivations for Reform

Experience elsewhere suggests reform of how public sector board appointments occur has arisen, either as a result of one or more crises related to flawed processes, or from an attempt to improve governance structures in public agencies so that they more closely match what occurs in the private sector.

In the UK and Canada especially there have been particular triggers for making improvements in appointment processes. Changes to reduce perceived cronyism in the UK were driven by a desire to lessen public cynicism in the mid-1990s following a series of scandals (OCPA 2005a). The UK now has a relatively sophisticated appointment system based around the oversight and monitoring of various Commissioners for Public Appointments.[4] More recently in Canada, which has a system of parliamentary scrutiny of appointments, change was a response to a crisis arising from a major sponsorship scandal and an adverse Auditor General's report in which the governance of several Crown corporations came under scrutiny (Treasury Board of Canada 2005). More limited reform has also recently occurred in New Zealand, where board appointments are made by ministers, but in accordance with guidelines and with advice and assistance from a number of other bodies (NZ Cabinet Office 2005).

As yet, Australia cannot be said to have experienced a significant crisis in public confidence concerning board appointments. But in a 2003 study by the National Institute for Governance at the University of Canberra which sought the opinion of Australian Government agencies and their board members, many issues arose associated with the effectiveness of the operation of public sector boards. One of the issues frequently raised by interviewees was practices related to the selection and appointment of people to public sector boards.[5] The survey sample was small and the results only indicative but the main findings on selection and appointment processes were as follows:

- While some of the participants were satisfied with the current system, others nominated appointment processes as one of their prime concerns.

- Several agencies had not considered the type of expertise and skills they needed on their boards and had therefore not effectively considered selection criteria.

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[2] It is to be noted that there has been a tendency to shorten tenure in recent years. (See Wettenhall 2004.)

[3] This is a large and complex issue that is covered more fully in a forthcoming book being prepared as part of the Corporate Governance ARC Project.

[4] Prior to 2004 there existed a single UK Commissioner. Since then, this system has been replaced by one Commissioner for England and Wales and separate Commissioners for Scotland (2004) and Ireland (2005). These countries have separate institutions and processes that share similar principles as those outlined above, although the Scottish system is stricter in many regards. (See OCPAS 2006).

[5] See, for example, Edwards *et al.* (2003); and Howard and Seth-Purdie (2005).

- Those that had developed criteria for selection of new board appointees used them to select and recommend nominees to ministers but without any assurance that the nominations would be accepted.

- Some interviewees felt that ministers appointed political 'mates'.

More generally, recent high profile corporate collapses in the private sector have reinforced a sense that stewardship of all large organisations is a difficult task requiring skilled and competent people. These incidences have underlined the fundamental importance of accountability and probity in organisational governance in the public as well as the private sectors.

Another important motivating factor for reform of public sector appointment processes is the growing body of literature, especially from the private sector, on the role that relevant experience and skills of board members can have on the performance of an organisation (SSC 1999a; Edwards and Clough 2005). Leblanc and Gillies (2005) have released a study, based on surveys of board members, that indicates that it is not so much structural factors but board processes, membership and behaviours that matter: board structure does not take into account the competencies of directors and the way decisions are made. A 2004 report written for the UK Treasury by Lynton Barker of the Public Services Productivity Panel makes a similar point about the strong relationship between skills and experience of board members and organisational performance.

> Recruitment and retention of able board members is critical to success … recruitment should relate to the board's skills, knowledge and aptitude requirements. Recruitment should be about maximising the pool from which board members can be recruited to provide the widest possible choice of candidates (Barker 2004, p.2).

In the Australian context the Australian Government is currently emphasising good governance of public sector bodies, especially through the leadership activities of the Department of Finance and Administration (Finance).[6] Following the endorsement by the Government of key recommendations in the Uhrig Report, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Uhrig 2003) (discussed in Issues Paper 2 in this series), one important current activity of Finance is the implementation of the Uhrig Report. The Uhrig Report noted how significant appropriate board appointments can be.

> In order to get the best from the board, and the entity itself, it is important to ensure the board has the necessary skills and experience to carry out its responsibilities. The ability of a board to provide effective governance will be placed in jeopardy if its members are inexperienced or inappropriately skilled or the board as a whole is dysfunctional. To ensure this does not occur, Ministers need to be well supported in terms of advice in the appointment process (Uhrig 2003, pp.97–98).

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[6] There are several recent Finance documents that cover appointment processes:
e.g. Department of Finance and Administration, *Governance Arrangements for Commonwealth Government Business Enterprises*, June 1997 (Board Nomination and Remuneration Committee, clause 3.5). Available at: http://www.finance.gov.au/GBPFAU/docs/Governance_Arrangements_June_1997.PDF.
e.g. Department of Finance and Administration, *Financial Management Reference Material No. 2: Governance Arrangements for Australian Government Bodies*, Australian Government, August 2005. Available at: http://www.finance.gov.au/finframework/FMR2.pdf.
e.g. forthcoming Issues Paper by John Kalokerinos which gives as an example the *Australian Postal Corporation Act 1989*, s 73(2). (This contains specific enabling legislation which requires consultation between the chair and the minister.)

The report offers some guidance on how ministers can be supported in the appointment process to ensure the necessary experience and skills relevant for any particular appointment (Uhrig 2003, pp.86–87, 97–98). Unfortunately though, it does not include a recommendation on this issue.

There is a trend for convergence in international corporate governance practices, especially in Westminster-style governments, toward adopting many private sector governance arrangements and the Australian Government is in that group. However in terms of public board appointment processes, there is an anomaly as Australia clearly lags comparator countries.

3. Stages in Selection and Appointment

Identifying the main stages in appointment processes is the first step in reforming the appointments system. Guiding principles like those articulated by the UK Commissioners for Public Appointments could then be used to formulate appropriate procedures and to identify where changes are needed.[7]

Different jurisdictions have identified a variety of ways of selecting and appointing to public sector boards. However, essentially there is widespread acknowledgement of five main stages if better practices are to be followed.

(1) Preparation—the process and vacancy profile

The first step is to agree on a process and timeline for the appointment. After the process has been agreed, an assessment of the board's current skills and expertise should be carried out by the board to identify gaps that need to be filled. The assessment would need to consider required expertise in line with the current and emerging priorities of the board. It would also need to consider personal qualities required for board members generally. Following this process, selection criteria for a specific vacancy or vacancies would be drawn up in line with criteria set for board membership as a whole.

(2) Locating suitable candidates

Suitable candidates who meet the position profile (or selection criteria) need to be located and encouraged to apply in accordance with the agreed appointment process. To promote transparency and diversity, this typically involves the publication of a job advertisement, which could appear in newspapers, government gazettes, professional journals or websites. For certain appointments, there may also be a need to target particular individuals whose names are recommended by ministers, departments, professional recruiters and other relevant organisations.

An important part of this stage in the process is the provision of information to potential candidates. Under the *Code of Practice* for England and Wales, for example, information packs must be sent to all applicants. These packs must contain various documents and information, including an application form, a role description and position profile, an indication of the required time commitment, remuneration details, information on the organisation and a complaints leaflet on the Commissioner for Public Appointment's complaints procedure (OCPA 2005b, p.30).

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[7] Ideally these stages in the selection and appointment of board members, in one form or another, would be specified in enabling legislation.

(3) Assessing and vetting potential candidates

After suitable candidates have been located, a selection committee needs to assess candidates against the selection criteria. The candidates' qualifications and prior experience also need to be verified and an understanding gained of the extent of the candidates' commitment to fulfilling the responsibilities of the position (i.e. probity check). Part of this process involves the evaluation of potential conflicts of interest.

(4) Selection and appointment

This stage in the process usually involves the selection of a candidate from a shortlist in accordance with relevant statutory and customary requirements. At the federal government level, this often involves a decision being made by a minister after consultation with the Prime Minister, Cabinet and other relevant individuals. Whatever processes are followed, they need to comply with any pre-determined, merit-based procedures and all applicable legal requirements.

(5) Audit

A less common element of assessment processes is auditing, whereby an internal or external group reviews the documentation that has been kept to determine how appointments have been made. As discussed, the *Code of Practice* for England and Wales now dictates that regular audits be conducted on appointments that are made by organisations that fall within the remit of the Commission for Public Appointments. No such process currently applies in Australia, although it offers a number of potential advantages, including greater rigor and transparency, which can help to promote public confidence in public sector boards and appointment processes.

Each of these stages in appointment processes has its challenges. It would be easy in stage one, for example, not to take sufficient account of the overall composition of the board.[8] Stage two, without due consideration of the recruitment strategy and appropriate advertising, could fail to find qualified candidates. In the critical third stage, as well as at stage four, pressure of time and other factors (e.g. cronyism) may mean merit-based and verifying processes are not given adequate weight or are simply bypassed. Even if the merit principle has been properly applied, if the minister or other influential decision-maker has personal, business or political connections with the chosen candidate, the process could then be perceived to be compromised unless any conflict of interest has been acknowledged and appropriately handled.

- A well-structured and managed process would cover all these stages in a way that not only makes merit a primary consideration, but is also transparent and accountable and has a suitable degree of independence. Irrespective of who oversees the process, it would be expected to be accompanied by establishing effective board charters that specify the roles and responsibilities of directors, with associated monitoring of board and director performance.

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[8] See Leblanc and Gillies (2005), Auditor General of Canada (2005) and Treasury Board of Canada (2005) for discussion on its importance.

4. Relevant Principles

Given that the UK has the most comprehensive appointment processes to boards of countries which have adopted the Westminster system, it is useful to trace events in the UK that led to a set of comprehensive principles and a code of practice around public sector appointments. The 'widespread public unease at standards in public life' (HOCPASC 2003, p.10), including concerns about abuse of power, cronyism and political bias in public appointments[9] led Prime Minister, John Major, in 1994, to establish a committee to inquire into the standards of conduct of holders of public office (called the Committee on Standards in Public Life or The Nolan Committee).[10]

Amongst a number of matters, the Nolan Committee was concerned to ensure that appointments to boards of non-departmental public bodies (so-called Quangos) are made on the basis of merit without undue political bias in accordance with a transparent and accountable process. To this end, the Committee made a number of recommendations relating to appointments that were subsequently largely adopted by the Government, including that:

- responsibility for appointments to Quango boards should remain with the minister

- appointments should be merit-based and take into account the need for boards to have a balance of skills and backgrounds

- ministers should receive advice on appointments from a panel or committee that includes an independent element

- an independent Commissioner for Public Appointments should be established to monitor, regulate and oversee appointment processes.

The position of Commissioner for Public Appointments was established soon after the publication of the Nolan Committee's report. The Office of the Commissioner has since created a *Code of Practice*[11] (OCPA 2005b) governing ministerial appointments to public boards that is based on principles enunciated by the Committee. These principles are as follows:

- *Ministerial responsibility*—the ultimate responsibility for appointments is with ministers.

- *Merit*—all public appointments should be governed by the overriding principle of selection based on merit, by the well-informed choice of individuals who through their abilities, experience and qualities match the needs of the public body in question.

- *Independent scrutiny*—no appointment will take place without first being scrutinised by an independent panel or by a group including membership independent of the department filling the post.

- *Equal opportunities*—departments should sustain programmes to deliver equal opportunities principles.

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[9] See Committee on Standards in Public Life (1995) for further details of the degree of public unease about the standard of conduct of holders of public office.

[10] The Chair of the first Committee was Lord Nolan. The Committee is a standing committee of the House of Commons. It is intended to function as a forum for the evaluation of ethical issues concerning politicians and the public sector. It is currently engaged in its eleventh review, which relates to the Electoral Commission. For further details see: http://www.public-standards.gov.uk/index.asp. (Accessed 20 April 2006.)

[11] There are now separate codes for England and Wales, Ireland and Scotland: all based on the same principles but diverging in some cases, quite significantly. See also footnote 4.

- *Probity*—board members of public bodies must be committed to the principles and values of public service and perform their duties with integrity.

- *Openness and transparency*—the principles of open government must be applied to the appointments process, its workings must be transparent and information must be provided about the appointments made.

- *Proportionality*—the appointment procedures need to be subject to the principle of proportionality, that is they should be appropriate for the nature of the post and the size and weight of its responsibilities (OCPA 2005b, p.9).

As a result of the application of these principles, a relatively systematic and transparent process of selection and appointment is now in place in England and Wales. The system requires appointments to be advertised and a shortlist to be compiled by a panel that includes or is overseen by an independent assessor. While the final decision on appointment still lies with the relevant minister, the processes that have been established reduce the scope for cronyism by increasing the probability that such decisions will be publicly exposed.[12] A review by the House of Commons Public Administration Select Committee in 2003 found:

> … no evidence of any systematic subversion of Nolan principles and practice, nor of the OCPA Code. More to the point, while the Commissioner's latest annual report describes deficiencies and failures in process, she reports broad progress in terms of compliance with the Code and gives only two examples of what she and we consider to be undue ministerial involvement in making appointments (HOCPASC 2003, p.23).

Despite finding that significant improvements had been made, the Committee expressed concern that more public confidence was required in the integrity of the system and that there was a need to eradicate any element of patronage. It also commented on a lack of diversity in public sector boards, especially the lack of women and members of minority groups.

A similar assessment of the success of the regulatory system was provided in the Tenth Report of the Committee on Standards in Public Life (Committee on Standards in Public Life 2005). The Committee found that while the 'system works relatively well … there are significant weaknesses and these need to be addressed' (Committee on Standards in Public Life 2005, p.21). Some of the problems identified in the report include unregulated ministerial intervention in appointment processes, impediments to the capacity of the Commissioner to ensure a strategic approach is taken to appointments, a failure to widen the social base of candidates, and an absence of attempts to address problems associated with conflicts of interest. Separate research conducted on behalf of the Committee has also shown that there remains a considerable amount of skepticism amongst the general public about the probity of many public appointments (Hayward *et al.* 2004; MORI 2005).

Like the House of Commons Public Administration Select Committee, the Committee on Standards in Public Life recommended significant changes be made to various aspects of the appointment system, including a diminished role for ministers. In relation to senior and strategic appointments to public bodies, the Committee suggested that ministers decide on the appointment process and be consulted on the shortlisting of candidates, but that the final decision be transferred to an independent panel. Although the Government endorsed a

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[12] The minister can select someone who is not on the shortlist provided by the panel, but this must be reported to the Commissioner for Public Appointments. In Scotland the minister's decision on which candidate(s) is (are) appointed, and the reasons for this decision, will be recorded and retained as part of the audit trail for the appointment round (OCPAS 2006, 24.5).

number of the Committee's proposals, it rejected this recommendation (UK Government 2005).

There are still ongoing problems with the system in England and Wales that need attention. However, difficulties are to be expected in a regime that is still in its infancy, particularly given the cultural and political hurdles that must be overcome. Despite its weaknesses, the UK appointment system has provided a framework for change that is generating more robust and transparent processes. It deserves closer consideration by the Australian Government and other Australian jurisdictions as it offers a means of enhancing accountability and rigor in public processes, which could assist in improving the performance of, and building greater confidence in, government institutions.

5. Issues for Australia

Before any changes are made to existing practices, several critical issues must be resolved, including:

- the role of ministers

- the meaning of 'merit' and how it relates to diversity and equal opportunity

- mechanisms for independent scrutiny

- openness and transparency

- conflicts of interest or role (encompassing probity issues)

- efficiency considerations (i.e. proportionality).

The experiences in other jurisdictions provide valuable insights into how best to address these issues. Sections 5.1 to 5.6 discuss these matters with reference to practices in the UK, Canada and New Zealand.

5.1 Role of ministers

The principle of responsible government that underlies Australia's system of representative democracy suggests that ministers should have the ultimate responsibility for appointments.[13] Consistent with this principle, most appointments to public sector boards are technically made by ministers. Beyond this, it is difficult to find out what processes are actually used— from the identification of a vacancy until an appointment is made. Recent survey evidence suggests there is a variety of practices ranging from a systematic process of audit, advertisement, merit-based selection with Cabinet approval, at one extreme, to the practice of appointing 'mates' with little due process, at the other (Edwards 2006).

Some guidance on federal public sector board appointments is found in the Prime Minister's *A Guide on Key Elements of Ministerial Responsibility*, which states that ministers should 'perform their public duties not influenced by fear or favour' and that ministers 'should not exercise the influence obtained from their public office … to gain any improper benefit for themselves or another' (Howard 1998, p.11). More specifically, the *Guide* states:

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[13] Note that the Gomery Report in Canada recommended that ministers not have this power in relation to Canadian Crown Corporation Boards but that the board itself makes the appointments (Gomery 2006, Recommendation 18, p.204).

> [s]ubject to provisions in legislation or other formal documents relating to the establishment of government bodies or positions, government appointments are to be made on the basis of merit, taking into account the skills, qualifications, experience and any special qualities required of the person to be appointed (Howard 1998, p.11).

It continues 'appointment proposals should identify the elements of merit, skills, qualifications, experience and special qualities on which they are based' (Howard 1998, p.11).

The *Federal Executive Council Handbook* and the *Cabinet Handbook* provide further snippets of information on federal appointment processes (Commonwealth of Australia 2000; Commonwealth of Australia 2004). The *Cabinet Handbook* contains information on the procedures that are required to be followed in relation to appointments requiring Cabinet approval. It states that 'in the case of significant Government appointments, ministers must write to the Prime Minister seeking his or, at his discretion, Cabinet's approval of the appointment' (Commonwealth of Australia 2004, p.24).

Details of which appointments are likely to be regarded as significant are provided, along with particulars on how candidates should be vetted and the information that should be provided to the Prime Minister. It also notes that:

> … ministers must ensure that the person being proposed is appropriately qualified and has experience relevant to the position … ; due regard must be paid to the Government's policy of encouraging an increase in the number of appointments of women; … [and] careful attention must also be paid to the need to have an appropriate geographical balance in appointments (Commonwealth of Australia 2004, p.25).

Apart from the general statements contained in the Prime Minister's *Guide*, the *Cabinet Handbook* and the *Federal Executive Council Handbook*, the only other major publicly available source of information on appointment processes comes from relevant statutes (for example, the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth), *Freedom of Information Act 1982* (Cwlth) and statutes that contain the powers of appointment and the common law concerning the exercise of discretionary powers. These sources provide the broad legal framework for appointments, but they generally leave decision-makers with considerable scope with respect to the processes that are followed and the appointments that are made.

In some cases, the enabling legislation of Commonwealth authorities does impose some important restrictions on ministers' powers of appointment. For example, a number of statutes require board members to have expertise in a specified area. There are also several Acts that specify a process that must be followed before members are appointed.[14] Under the *Primary Industries and Energy Research and Development Act 1989* (Cwlth), for example, R&D Corporations can be established that are comprised of a chairperson, government director, executive director and between four and six non-executive (or nominated) directors. The non-executive directors are appointed by the minister on the basis of nominations made by a separate selection committee, although the minister can reject nominations. In contrast, the chairperson and government director are selected and appointed by the minister, while the executive director is appointed by the board. Section 17 of the Act also states that the

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[14] When John Kerin was Minister for Primary Industries in the Hawke Government, he ensured that relevant experience and expertise in the selecting of members was specified in the legislation for Commonwealth marketing boards (Wettenhall 2004).

minister cannot appoint a government director unless 'the person has experience in, and knowledge of, government policy processes and public administration'.[15]

The placement of restrictions of this nature on the powers of appointment can improve the efficacy and accountability of the process. Yet, in the vast majority of cases (including R&D Corporations), ministers have broad statutory powers that seem to be subject to little or no formal oversight or transparency. Unlike a number of other Australian jurisdictions, there does not even appear to be a comprehensive set of guidelines governing appointments to federal boards.[16]

Serious problems can arise where all members of a board as well as the CEO of the organisation are appointed by a minister without an outside body being involved in the process. In these cases, it can be difficult for board members to perform their duties in a sufficiently independent manner (Edwards *et al.* 2003). In the 2003 University of Canberra study, one director had this to say:

> On this board, there is no one left who was appointed by the previous government …. Members are conscious of the advantages that come from good relations with the government. The minister's office communicates with members of the board, public service staff and the chair—an interesting dynamic. Sometimes insider knowledge of the cabinet is a 'currency' of prestige on the board. Sometimes the chair has fallen out with the Government and other members can demonstrate superior insider knowledge (Edwards *et al.* 2003, p.40).

The breadth of the powers given to federal ministers in existing appointment processes contrasts with the position in the UK where the *Code of Practice* of Commissioners for Public Appointments places restrictions on ministerial involvement in the system. The Code relating to England and Wales, for instance, states that ministers:

- are involved at the outset in agreeing to the appointment criteria and the processes to be followed

- can nominate candidates at the commencement of the process but must take no further part in the process until the decision stage

- are responsible for selecting from the candidates put forward by the selection panel or department who meet the criteria (OCPA 2005b).

The Treasury Board of Canada has now outlined a set of principles and processes for appointments to Crown corporations, which includes details on the respective roles of ministers and boards (Treasury Board of Canada 2005). To address problems associated with the competency of boards, the regime requires boards to advise the government on the selection criteria and competency profiles for directors, for references to be obtained for all board appointments and suggests that the government consult with boards on appointments. Accountability and transparency are supposed to be enhanced by a number of measures, including a proposed Parliamentary Appointments Commission, requirements that the selection criteria and board profiles be made public and that parliamentary committees be

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[15] See also the *Fisheries Administration Act 1991* (Cwlth), which contains a similar process for the selection and appointment of directors of the Australian Fisheries Management Authority.

[16] Jurisdictions that have publicly available guidelines on appointment processes include New South Wales (New South Wales Government 2004), Queensland (Queensland Government 2006), South Australia (South Australian Government (undated)), Western Australia (Keys 1997) and Victoria (Victorian Government 2003). These guides provide some insight into appointment processes, however, they do not contain mandatory procedural requirements and the information they contain is usually of a general nature.

given the option of reviewing proposed appointments prior to their finalisation. These measures form part of a broader agenda of 'democratic renewal' that appears to have been prompted, at least in part, by the widespread view that the Prime Minister holds a relatively unchecked position in government, demonstrated by the recent sponsorship crisis under Prime Minister Jean Cretien.

These new measures could significantly improve appointment processes. However, to date, the appointment and governance structures in Crown corporations in Canada have been resistant to reform. The Auditor General of Canada's 2005 report on Crown corporations concluded that:

> [o]verall, progress in addressing the recommendations from our 2000 audit of Crown corporation governance has been unsatisfactory. Individual Crown corporations have strengthened their own governance structures and practices. However, improvements that we recommended to strengthen the overall governance and accountability framework have not progressed as quickly and as far as we had expected (Auditor General of Canada 2005, p.1).

Several Canadian provinces have also introduced reforms to the appointment process for public sector boards that curtail the role of ministers. In British Columbia, for example, again following a crisis, a radical new appointment system has been put in place (Watson 2004; BRDO 2005). All appointments to boards of public agencies now go through a single clearing house, a specialised central agency, which screens all applicants according to skills-based criteria determined in advance without ministerial involvement. The agency offers a selection of suitable candidates to the relevant minister after it has completed recruitment and vetting of candidates for a specific vacancy. Nova Scotia—again following a scandal in the early 1990s—has gone a step further in constraining the power of ministers by giving legislative committees the power to veto ministerial appointments as well as introducing a relative-merit standard that requires the appointment of the *most qualified* applicant (Aucoin and Goodyear-Grant 2002).

New Zealand has not gone as far as the UK or Canada in its reform process, perhaps because there has not been an identified crisis to spur on reform. However, it does have a more formalised system than that currently operated by the Australian Government in that the processes are outlined in greater detail in a number of publicly available documents. The most relevant of these documents are: the State Services Commission's *Board Appointment and Induction Guidelines* (SSC Guidelines) (SSC 1999b); the Crown Company Monitoring Advisory Unit's *Owner's Expectations Manual* (CCMAU Guidelines) (CCMAU 2002); and the *Step by Step Guide—Cabinet and Cabinet Committee Processes*, which is published by the Cabinet Office (NZ Cabinet Office 2005).[17] These guides contain information on both procedural and substantive matters associated with appointment processes, including details of the respective roles and responsibilities of ministers, advisers, and department officials. Unlike the guides published by the Australian Government, they also include check lists of good practice and specify how appointment processes should be planned, how position descriptions should be prepared and how candidates should be identified, shortlisted, selected and appointed.

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[17] The NZ Cabinet Office publishes a number of circulars which provide further details of appointment procedures. See for example, Cabinet Office Circulars CO (03) 4—*Fees Framework for Members of Statutory and Other Bodies Appointed by the Crown*; CO (02) 16—*Government Appointments: Increasing Diversity of Board Membership*; and CO (99) 12—*Guidance for Members of Statutory, Commercial and Other Bodies Appointed by the Crown*. Available at: http://www.dpmc.govt.nz/cabinet/circulars/index.html. (Accessed 25 April 2006.)

Three other innovative aspects of the NZ system are that:

- ministers are required to certify that the appointment process complied with either the SSC or CCMAU Guidelines as appropriate

- ministers are required to certify that appropriate conflicts of interest checks have been carried out and that either no conflicts were identified or that specified steps will be taken to address the conflicts that have been identified

- there is a Cabinet Appointments and Honours Committee that is consulted on the majority of appointments to public sector boards, which is in addition to the consultation process that applies in relation to the Prime Minister and Cabinet.

The Australian Government needs to seriously consider whether it wishes to have more capable members of public sector boards, and whether it wants to address public cynicism about cronyism in appointments. If so, then the above suggests a key issue it needs to address is how far and in what way does it want to go with more rigorous and transparent processes? If changes are going to be made, key issues that must be resolved are what role ministers should play and whether a more independent body or parliamentary committee should be involved in vetting appointments—if not also in the selection process. The related issue of independence in the process is discussed in Section 5.3.

5.2 Meaning of merit

Appointing on the basis of merit would seem incontrovertible but its meaning does differ across jurisdictions and has differed over time. In the UK, for example, merit is the overriding principle in the appointment process (e.g. OCPA 2005b). However, in line with the original recommendations of the Nolan Committee, the selection criteria can take account of a balance of skills and background. The Cabinet Office has emphasised that formal qualifications and traditional work experience:

> … form only one aspect of merit. Other aspects can include: demonstrable involvement within a community; practical experience of relevant issues; transferable skills gained in a variety of ways (communicating, negotiating and influencing, ability to think strategically etc) (UK Cabinet Office 2006, p.13).

Further, under the *Code of Practice*, the concept of merit must be read in conjunction with the principles of equal opportunity and diversity, which are required to be 'inherent within the appointments process' (OCPA 2005b, p.12). The Cabinet Office has explained that the principle of diversity is aimed at achieving:

- equal representation of women and men in public appointments, pro rata representation of ethnic minority groups, and increased participation of disabled people

- appointment on merit, using fair selection procedures, which recognise non-traditional career patterns as suitable qualifications for appointments (UK Cabinet Office 2006, pp.13–14).

In practice, this means that ministers and departments are required to adopt a broad definition of merit that not only takes into account competencies and capabilities but also takes into account non-traditional activities and career paths, while encouraging a greater number of women, people with disabilities and members of minorities to participate in selection processes. Due to legal issues associated with discrimination and human rights laws, the *Code*

of Practice states that 'departments must guard against positive discrimination' and that people involved in appointment processes must ensure that 'any initiative or positive action they take to encourage or achieve wider representation is within the law' (OCPA 2005b, pp.10 and 13).[18]

Merit, Equality of Opportunity and Diversity: Good Practice Points Advocated by the UK Cabinet Office for Board Appointments

- Always seek to attract as wide as possible a field of suitable candidates.

- Use an evidence-based competence approach. This will help you to identify your merit requirements.

- Remember that formal qualifications, traditional work experience and/or specialist knowledge form only one aspect of merit. Other aspects can include: demonstrable involvement within a community; practical experience of relevant issues; and transferable skills gained in a variety of ways (communicating, negotiating and influencing, ability to think strategically etc).

- Set criteria which: recognise non-traditional career patterns and experience, such as community involvement and voluntary work, as suitable qualifications for appointments; do not contain unnecessary requirements which might discourage or eliminate suitable applicants from under-represented groups; and are realistic—you do not want to raise expectations that cannot be met.

- Examine the diversity of your selection panels; try to ensure that all members have undertaken diversity awareness training.

- Conduct interviews in a way that is sympathetic to those with less experience of job hunting.

- Think about positive steps, such as: offering training days in particular skills; holding open days for members of under-represented groups; always offer to make appropriate arrangements for disabled candidates (at the application stages as well as at formal interview) such as providing Braille and audio-taped information packs and application forms; and offering compensation for child and other care costs—and make sure this is clearly referred to in the information packs.

Source: UK Cabinet Office 2006, pp.13–15.

As noted above, the bar is higher in the province of Nova Scotia in Canada than is the case in the UK on what constitutes a merit-based appointment: as Aucoin and Goodyear-Grant have observed, the decision-maker is required to appoint the *most qualified* applicant and not merely *a* qualified candidate (Aucoin and Goodyear-Grant 2002). According to Aucoin and Goodyear-Grant, despite its merit focus, the Nova Scotia regime leaves much to be desired in the processes around specifying the qualifications for selection. In addition, secrecy surrounding how ministers make the choice of the best candidate leads to public cynicism about whether in fact patronage is not still alive and well. Their conclusion is that if the principle of relative merit is to be effective, then ministers should not have a say in appointments: '… the standard of relative merit demands a process that is separate and independent of ministers' (Aucoin and Goodyear-Grant 2002, p.314).

They go on to say that in line with the principle of responsible government, the minister or Cabinet needs to retain the power of appointment 'in the sense of having the authority to approve or not approve an appointment' (p.314), but with minimal interference in the merit-based process.

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[18] This is consistent with a definition of merit which encompasses both individual and institutional merit factors.

Two issues arise here which have some pertinence for Australia:

- What is the meaning to be given to the concept of 'merit' in the appointment process, in principle and in practice and how is it balanced with diversity and equal opportunity?

- Should decision-makers be required to select the most qualified candidate or merely a qualified applicant?

5.3 Independent Scrutiny

A central part of appointment processes to public sector bodies in the UK is independent scrutiny by an independent assessor. According to the Commissioner for Public Appointments for England and Wales, independent scrutiny 'underwrites the integrity of the whole appointments process' (OCPA 2005b, p.31). The assessors are selected either by the OCPA or by departments in a competitive process from those who have, as Nolan mandated, 'no operational role within bodies or the government departments concerned' (OCPA 2005b, p.12), but generally have 'some familiarity with recruitment processes and selection techniques' (OCPA 2005b, p.59). They can play a role at most stages of the appointment process, although they are usually prominent in the identification and selection of candidates.[19] Their job is to ensure that the appointment process meets the requirements of the Code and is in line with its principles (UK Cabinet Office 2006, p.15).

British Columbia, as mentioned above, uses a central agency to oversee and manage all appointments; from the original audit of board needs to the point of giving a shortlist of names to the minister.

The available evidence suggests that the Australian Government has three main options in relation to scrutiny:

- continue to rely on the dominance of the minister and the executive in appointment processes

- establish some form of independent body (as in the UK)

  or

- rely more on parliamentary processes (as in Canada) (for example, a Joint Standing Committee).

The first could be undertaken more systematically but runs the risk of perception of cronyism and the consequent lack of public integrity. There are pros and cons of the second and third routes; these were explored by a Commonwealth Parliamentary Committee in the context of the ABC in 2001 (SECITARC 2001). While noting that submissions favoured some form of parliamentary oversight with ministerial authority to make the final appointment decision, the chair recommended the first option combined with an independent selection panel to shortlist applicants, with all shortlists being made public (SECITARC 2001, p.39).

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[19] As a minimum, the *Code of Practice* requires that an independent assessor be directly involved in the identification and selection of candidates for positions in upper tier bodies and that it review the process up to shortlisting for lower tier bodies (OCPA 2005b, p.32). Note that in Scotland, independent assessors are involved through all stages in the appointment process and are selected by the OCPAS and not departments. (Interview with officer of OCPAS in Scotland, April 2006.)

5.4 Openness and transparency

This principle is about accountability and ensuring that members of the public have confidence in the system as a result of having information on relevant aspects of appointment processes. The desire for a transparent process must, however, be weighed against privacy concerns. In certain instances, the disclosure of the details of candidates and members of selection panels could have adverse employment consequences or jeopardise their personal safety.

The response to this dilemma in England and Wales for example, has been to establish mandatory publicising, confidentiality and audit requirements. All appointments must be publicised in a manner that is consistent with the principle of proportionality. Documentation in relation to appointment processes must be kept and retained for a minimum of two years. The Commissioner for Public Appointments is required to conduct annual audits to evaluate compliance with the *Code of Practice*, while auditors may also be asked to conduct 'thematic reviews throughout the year' (OCPA 2005b, p.41). To address privacy concerns, personal information about candidates and members of selection panels must remain confidential unless the relevant person consents to its disclosure.

In Canada, the desire for transparency featured prominently in the governance reforms for Crown corporations announced in 2005 by the Treasury Board. The report published by the Treasury Board states that 'the government's goals for the selection process remain as they were in March 2004: the process should be competency-based, professional and transparent' (Treasury Board of Canada 2005, p.30).

To ensure greater transparency, the selection criteria for board positions and CEOs are required to be made public, opportunities are required to be published in the Canada Gazette and the Government has undertaken to develop a central website to solicit candidates. In addition, a process exists that enables parliamentary committees to review appointments before they are finalised.

In Australia, there is no real transparency about how people are selected for board positions, unlike other countries where transparency has been regarded as essential to a process which gains and maintains public confidence. This is not just about who is selected, but about all stages in the appointment process. The public should be provided with sufficient information to understand what processes are followed to fill positions on public boards—from identifying vacancies through to choosing suitable candidates.

Much could be done in Australia to make the current processes more transparent. As a short-term measure, guidelines should be prepared to encourage greater consistency and provide information on the processes that are to be followed.

5.5 Conflicts of interest

Conflicts of interest (including 'duty')[20] arise where 'the impartiality of an officer in discharging their duties could be called into question because of the potential, perceived or actual influence of personal considerations' (ANAO 2003, p.1). There can also be conflicts of role, especially in the public sector with government members on their boards. Conflicts of

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[20] See for example the work of Professor Paul Finn on conflicts of interest (Finn 1993). Also see the OECD's recent (2004, 2005) guidance publications on conflicts of interest for public officials.

role arise where 'a person is called upon to play incompatible professional roles, and may face pressure to bring selective memory to bear on privileged information and/or act with dual personality' (Howard and Seth-Purdie 2005, p.61).

In the 2003 survey by the University of Canberra's National Institute for Governance concerning the corporate governance practices of public sector boards, interviewees revealed that conflicts usually arose in two main contexts where there was insufficient clarity about the role of the board member

- where there was uncertainty about the relationship between boards and the political executive

- where departmental representatives were required to 'wear two hats'.

The last type of conflict of *role* was the most controversial with differing views about whether or not a departmental representative should be on the board. Some thought it was good to have a departmental representative on the board because it can bring awareness of government thinking and priorities to board discussions. Others were troubled by potential conflicts, especially when budget proposals were being considered and funding was being sought from the department. Much depends on the quality and capacity of particular public servants with dual roles and the processes that are put in place to manage potential conflicts and tensions. As one secretary in the survey stated: 'there is debate about the secretary [of the department] being on the board. But it is not a question of simply avoiding, but of managing the conflict of interest.'

The Uhrig Report discourages representative board appointments, including the placement of public servants on boards, because they 'can fail to produce independent and objective views' (Uhrig 2003, p.98). In relation to appointees from the public service, Uhrig states that 'where a departmental staff member is appointed on the basis of representing the government's interests or having a "quasi" supervision approach, conflicts of interest may arise and poor governance is likely' (Uhrig 2003, p.99).

Discouragement is also evident in Finance's publication on governance arrangements (Department of Finance and Administration 2005, p.xv). Avoiding public service appointments can be difficult in practice because of the need for certain boards to contain expertise, experience and contacts that are held by departmental employees.[21] In some instances, public service appointments are also a statutory requirement.

Consistent with the findings in the Uhrig Report, the Treasury Board of Canada has taken a firm stand on the role of public servants on boards, arguing that 'their presence in some circumstances, could lead to questions about the independence of the Board, and for the individuals concerned, could give rise to situations of divided loyalty' (Treasury Board of Canada 2005, p.27).

On the basis of these concerns, the Treasury Board's report states that:

> [t]he government is committed to the principle of ensuring Board independence, and will only continue to have public servants on Boards of Crown corporations in a limited number of cases, when it is essential to the best interests of the government and the Crown corporation (Treasury Board of Canada 2005, p.27).

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[21] This issue will be covered in a forthcoming book arising out of the Corporate Governance ARC Project.

The report indicates that the Canadian Government will review the appointment of public servants to the boards of Crown corporations 'with a view to restricting or eliminating their participation' (Treasury Board of Canada 2005, p.27).

Similar to the situation in Canada, the trend in New Zealand appears to be away from the inclusion of members of the public service on the boards of government authorities. The NZ Government has agreed that 'as a general rule, Ministers should not appoint public servants to statutory boards' (NZ Cabinet Office 2005, p.44; NZ Cabinet Office 2002, p.1). A Cabinet Office Circular published in 2002 outlines the Government's position on this issue (NZ Cabinet Office 2002). It states that although ministers should avoid appointing public servants this may be necessary in 'special circumstances', including where there is a need to improve board performance, to capitalise on the expertise of retiring public servants and where there is a need to build capacity on boards by appointing women and members of minority groups. If a minister believes there are special circumstances justifying the appointment of a public servant to a board, they are now required to outline these circumstances in the submission provided to the Cabinet Appointments and Honours Committee.

Under the CAC Act, a director of a Commonwealth authority who has a material personal interest in a matter that relates to the affairs of the authority is generally required to disclose the interest to the other directors, excuse themselves from meetings where the matter is considered and refrain from voting on the matter.[22] The *Cabinet Handbook* and the Prime Minister's *A Guide on Key Elements of Ministerial Responsibility* also contain some broad guidance on the procedures that should be followed to avoid conflicts of interest that can arise in appointment processes.

The legal requirements contained in the CAC Act and these statements of principle leave considerable room for conflicts, or the perception of conflicts, to arise, which can undermine confidence in the integrity and independence of public sector boards.[23]

The Australian Fisheries Management Authority (AFMA) is one Commonwealth authority that has established a process to deal with potential or perceived conflicts of interest that goes beyond the requirements outlined in the CAC Act (AFMA 2006).[24]

The Commissioner for Public Appointment's *Code of Practice* for England and Wales identifies five issues that are most frequently associated with conflicts of interest in relation to appointments to public sector boards:

- financial interests or share ownership

- candidates being sought from a field of expertise in which the public body operates

- membership of societies or organizations

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[22] See CAC Act, sections 27F–27K. This provision mirrors that applying in the private sector.

[23] The OECD has recently produced some guidelines and a toolkit (2005) to assist governments who wish to minimise actual or perceived conflicts. These have already been the basis of tools used by the NSW Independent Commission Against Corruption and the Queensland Crime and Misconduct Commission (OECD 2004, p.8).

[24] Further guidance on the procedures to be followed in managing both conflicts of interest and role can be found in the Australian National Audit Office's, *Better Practice Guide: Conflicts of Personal Interest and Conflicts of Role* (ANAO 2003).

- perception of rewards for previous or future contributions or favours

- relationships to departmental or ministerial staff (OCPA 2005b, pp.13–14).[25]

According to the *Code of Practice*, none of these factors on their own will necessarily prevent appointment, but they need to be carefully assessed. Public perceptions about conflicts should form an important part of the evaluation of how to deal with these circumstances.

The appointment system in New Zealand adopts a similar approach. The SSC Guidelines list a number of circumstances where conflicts could arise, yet they state that 'a conflict of interest will not necessarily bar an appointment, although a serious conflict may mean a candidate is not suitable for an appointment' (SSC 1999b, p.31). To deal with these issues, the Guidelines urge decision-makers to view all conflicts 'within an ethical context of good faith, honesty and impartiality' (SSC 1999b, p.31) and requires them to place conflicts in one of two categories: unmanageable and manageable. Where the conflict is unmanageable (e.g. because the person will not divest themselves of the interest or because managing the issue would be impractical), the Guidelines state that the conflict is likely to make the person ineligible for the position. In relation to manageable conflicts, the Guidelines provide a list of suggestions on how to deal with the situation, including: divestment of the interest; establishment of a blind trust; severing connections with an organisation; entering into a confidentiality agreement; abstaining from voting and participating in discussions; and agreeing not to receive relevant information.

In summary, the systems that currently apply to appointments to federal public sector boards do not adequately deal with potential conflicts of interest. At the international level, there appear to be two main trends to deal with problems related to appointing board members that may have conflicts. Firstly, the development of guidelines to assist decision-makers to identify criteria for accepting or rejecting applicants. Secondly, a move away from the appointment of public servants to boards. Both of these ideas could be implemented to improve federal appointment processes.

5.6 Efficiency considerations

An important consideration in the establishment of appointment processes is the cost and timeliness associated with the various options. The need for greater accountability, independence and rigor must be balanced against the need to use scarce resources in a cost-effective manner. This is emphasised in many of the processes that have been established in other western countries. For example, the Treasury Board of Canada has noted that the Canadian Government 'recognizes the need for the selection process to identify candidates in a timely and cost-effective manner' (Treasury Board of Canada 2005, p.30). Similarly, one of the seven principles outlined in the *Code of Practice* in England and Wales is proportionality; the notion that the processes 'should be appropriate for the nature of the post and the size and weight of its responsibilities' (OCPA 2005b, p.9).

A more structured, transparent and independent process for federal public sector board appointments in Australia would be more costly than the current informal system. However, the additional costs associated with a more rigorous system could be expected to be offset by the advantages associated with greater accountability and public confidence in the process, as

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[25] It is interesting to note Aucoin's point of view here: he argues that because of this partisan conflict of interest, ministers should not be involved, except perhaps having a veto power (personal correspondence).

well as the improvements in organisational performance that stem from having a more competent and cohesive board. Indeed, as mentioned above, some recent research has stressed the value of the right expertise and skills on boards in improving performance.

To address efficiency concerns, under the system in England and Wales, all organisations that fall within the remit of the Commissioner for Public Appointments are allocated to one of two categories (upper and lower tier) depending on the remuneration paid to directors and the level of government funding the entity receives (OCPA 2005b; HOCPASC 2003). The procedural requirements are more onerous for upper tier organisations than they are for those that are allocated to the lower tier. This tiered approach ensures a degree of proportionality is 'built into the appointment process' (OCPA 2005b, p.15), which is then supplemented by the general requirement that the systems that are used are consistent with the principle of proportionality. To avoid the exploitation of efficiency concerns for improper purposes, the *Code of Practice* states that 'proportionality arguments must not be used to circumvent proper procedures' (OCPA 2005b, p.15).

An alternative to the structured approach adopted in the UK is to provide decision-makers with the discretion to select processes that they believe are appropriate. In New Zealand, for example, the SSC Guidelines, state that people designing appointment processes are 'expected to use their judgment and common sense when deciding the sophistication of the process to use in each circumstance' (SSC 1999b, p.2). The benefit of this approach is the flexibility it provides for those responsible for the process. However, the flexibility leaves room for exploitation and the perception of exploitation. Similarly, guidelines issued by the Office of the Commissioner for Public Appointments in Scotland (OCPAS) state that, 'the practice employed during each appointment round will be appropriate for the specific position, the nature and function of the board concerned' and the selection panel makes that judgement. (OCPAS 2006, p.4) The issue is achieving a workable balance between efficiency and concerns associated with accountability, independence and rigor.

6. Suggestions for Change

In the 2003 study into public sector governance by the National Institute for Governance referred to earlier, interviewees commonly noted the absence of protocols or a code of best practice, or, indeed, any regular process in board appointments (Edwards *et al.* 2003, p.40). An obvious first step to improve federal processes would be to establish such protocols and guidelines, which could be drafted in a manner that is similar to those that already apply in many other jurisdictions, including several Australian states. Protocols and guidelines, while not necessarily being legally binding, can add clarity, encourage transparent, timely and cost-effective processes, and ensure greater attention is paid to relevant skills and experience and the need for diversity.

Beyond this minor change, there are many options for reform that could help to improve existing practices and processes. The most desirable option will depend, amongst other factors, on the type of organisation. Table 1 outlines three general types of models that could be considered and which are not necessarily mutually exclusive.[26]

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[26] There is considerable scope for variation within each of these three models. One radical proposal, for example, is contained within the Canadian Gomery Report (2006) advocating appointments to be made by the public sector board itself, as would be the case in the private sector. Another variation would be to ensure the

Table 1: Models for reform of appointment processes for federal public sector boards

Appointment stage	Model A – minimalist (transparency)	Model B – moderate (transparency + central oversight)	Model C – radical (transparency + independence)*
Preparation	Code of practice prepared and made publicly available. Position descriptions and selection criteria made publicly available.	Independent authority appointed to oversee appointments – could be a new agency or a parliamentary committee. Code of practice, position descriptions and selection criteria made publicly available.	Independent authority established to manage appointments. Code of practice, position descriptions and selection criteria made publicly available. Independent authority ensures comprehensive selection process in line with merit and diversity principles.
Candidate location	All board positions advertised on central government website + senior positions advertised in popular newspapers.	All board positions advertised on central government website + senior positions advertised in popular newspapers.	All board positions advertised on independent authority's website + senior positions advertised in popular newspapers.
Assessment of candidates	Assessments carried out by departments in accordance with the code of practice. Details of conflicts of interest made publicly available.	Assessment carried out by departments, with participation or oversight by the independent authority. Details of conflicts of interest made publicly available.	Assessments carried out by the independent authority, possibly with a representative from the responsible department providing input.
Selection	Ministers make appointments in accordance with code of practice and relevant protocols. Names of appointees and reasons for decisions made publicly available.	Ministers make appointments in accordance with code of practice and relevant protocols. Names of appointees and reasons for decisions made publicly available.	Appointments made by independent authority. Names of appointees and reasons for decisions made publicly available.
Audit	None	Appointment processes subject to an audit by independent authority and the details of the audit made publicly available.	Appointment processes subject to an audit by ANAO.

*There may be legal provisions specifying that appointments might ultimately need to be made formally by government in which case they would need to be reviewed if Model C were adopted.

Under Model A, ministers would remain responsible for appointments but changes would be made to improve the transparency and consistency of the processes. A code of practice would be prepared (e.g. by the Department of the Prime Minister and Cabinet) that would apply to all board appointments. It would spell out the protocols that should be followed throughout the appointment process, from the preparation of the selection criteria and position description through to selection. Unlike the other models proposed, an audit would not be required of the processes that are put into practice, with trust being placed in ministers and

name of the best person for the job is given to the minister who may have the power of veto (e.g. Aucoin and Goodyear-Grant 2002).

departments to abide by the code. To promote compliance with the code, departments and ministers would be encouraged to disclose information on appointments, details of conflicts of interest and reasons for appointment decisions.

Model B would seek to improve transparency, rigor and independence by appointing an independent authority to oversee board appointments. The authority could be a new entity like the Commissioners for Public Appointments in the UK or a parliamentary committee like those which oversee appointments in Canada. Again, a code of practice would be prepared that applies to all appointments and ministers would remain responsible for appointments and the management of appointment processes. However, unlike Model A, the independent authority may have some involvement in the assessment and vetting of candidates (e.g. by having assessors on selection panels) and all appointment processes would be subject to auditing by the authority. If there was a desire to further improve independence and accountability, one variant is to give the independent authority power to veto appointments in certain circumstances. Departments and ministers would also be encouraged to disclose information on the processes that were followed in relation to particular appointment decisions.

Model C, seeks more radical change. Under this approach, an independent authority would be responsible for the management of appointment processes. The authority would prepare position descriptions and selection criteria, advertise positions, conduct interviews and assessments, and make the final decisions on appointments. To ensure accountability, the process would be audited annually by the Commonwealth Auditor-General and the agency would be overseen by the Minister for Finance and Administration and/or the Special Minister of State.

Those responsible for the design of appointment processes should be mindful of the principles articulated by the UK Commissioners for Public Appointments. These ideals provide a framework for improving outcomes and public confidence. While there is considerable scope for variation in the processes that are adopted, departing from these general principles could jeopardise the integrity of the appointment process and the institutions they are intended to serve.

7. Conclusion

The background to reforms in several overseas jurisdictions suggests that a crisis of public confidence is often needed to motivate change in appointment processes. Although the modifications have usually proven to be beneficial, the events that prompted them can cause lasting damage to public institutions, while skewing the reform process to suit political interests. If the Australian Government persists with the current arrangements, controversy will continue to be generated around appointments to public sector boards and there is a significant risk that a scandal will arise that will force the hand of the Government. The fundamental issue is whether the Australian Government will have the political will to implement even the minimalist option before a crisis arises that causes lasting damage to public institutions.

Whatever the political persuasion of the Government, there is an opportunity to begin a measured process of reform that could help restore and protect public confidence in the

governance of public institutions.[27] As a latecomer to reform in this area, much could be gained from examining the changes that have been made in recent years in other western countries. The UK has established an innovative system in which an independent body, the Office of the Commissioner for Public Appointments, plays a central role. Despite being a significant improvement on previous systems, there have been calls for further changes to be made and for responsibility for appointments to be transferred to the Commissioner. In Canada and NZ, the reforms have been more conservative, with emphasis being placed on greater transparency rather than independence. These new processes could be improved, but they are noticeably better than those which are currently applied by the Australian Government.

Three broad options for reform have been proposed here, ranging from a minimalist approach that largely mirrors the reforms in Canada and NZ to a radical model that calls for responsibility for appointment decisions to be transferred to an independent authority. Each of these models offers advantages over existing arrangements. Model A or some variant of it which places emphasis on transparency of process would be a significant advance for Australia given current processes.

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[27] The ALP is committed to reforming public board appointment processes. (See Australian Labor Party 2004, para 52.) It has proposed that there be an independent ABC Appointment Selection Committee. (See Crean and Tanner 2003.)

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