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# The non-executive director of Australian statutory authorities

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This paper is based on a review of the board composition of material Commonwealth Statutory Authorities with particular focus on the profile of non-executive directors. The analysis examines the mix of non-executive directors gender, remuneration, length of board membership and the number of other directorships held and The paper will review the roles of directors and outline a number of additional requirements these directors have in comparison to directors of private sector organisations and highlight the paradoxical requirement of independence. The paper concludes questioning the need for independent directors (if there are any) on the boards of Commonwealth Statutory Authorities.

## **Keywords**

Non-executive directors, corporate governance

## **Disciplines**

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# **The Non-Executive Director of Australian Statutory Authorities**

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# **The Non-Executive Director of Australian Statutory Authorities**

## **Abstract**

This paper is based on a review of the board composition of material Commonwealth Statutory Authorities with particular focus on the profile of non-executive directors. The analysis examines the mix of non-executive directors gender, remuneration, length of board membership and the number of other directorships held and

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## **Introduction**

The Australian Commonwealth Public Service has, like the private sector, increased significantly its focus on the corporate governance arrangements of Government, government departments, agencies and statutory authorities. Corporate governance can be defined simply as the system by which organisations are directed, controlled and managed (ASX 2003; O'Regan *et al* 2005). A more precise definition, developed by the Australian National Audit Office (ANAO) which has been adopted by the Department of Prime Minister and Cabinet (PM&C) for Commonwealth Public Sector Annual Reports, states that “corporate governance refers to the processes by which organisations are directed, controlled and held to account. It encompasses authority, accountability, stewardship, leadership, direction and control exercised in the organisation. (ANAO, 2003a, p.6) This definition of public sector corporate governance is supported by Uhrig in his 2003 report on corporate governance of Statutory Authorities by explaining it is concerned with “the power of those in control of the strategy and direction of an entity ..... taking into account risk and the environment in which it is operating.” (2003, p.2)

Public sector corporate governance structures are generally considered to no different than the corporate governance structures in the private sector. This belief has led to a significant push, over the past decade, for the public sector to adopt private sector corporate governance processes and structures (Edwards 2002, p.52).

One of the key processes required to be undertaken to develop an effective corporate governance structure of an organisation is the clarification of appropriate roles for management and for the board of directors (ASX 2003, p.3). However, while the roles and powers of directors on public sector boards appear similar to those of directors on private sector boards there are significant fundamental differences. The most significant difference is in relation to the level of power of directors “a key characteristic of a board in a public company is its full power to act and its responsibility to do so. This includes the approval of strategy and direction for the business and important company policies, as well as overseeing the performance of management”. (Uhrig 2003, p.4) However a board in the public sector has limited power due, primarily to the fact government organisations are created for the implementation of established policy and the delivery of intended outcomes based on government policies. (Uhrig 2003, p.31) The real power in a public sector organisation rests not with the board of directors but with the responsible Minister as he or she controls the appointment of board members and can therefore influence the behaviour of board members and reduce the autonomy of boards. (Howard and Seth-Purdie, 2005 p.60) The Minister is provided by legislation with certain powers over the organisation that can significantly impact on the level of autonomy of public sector boards. For example under sections 28 and 43 of the Commonwealth Authorities and Corporations Act 1997 (CAC Act) the Minister has the power to provide, after consultation with the board, written notification to the board about general government policy which the board is obliged to ensure is carried out. (ANAO 2003b, p.3) The Minister also has the authority to appoint, along with other board members, the CEO or Managing Director. The former Deputy Secretary of the Department of Finance and

Administration (DoFA) Professor Steven Bartos explains that “the power to appoint or remove CEOs is one of the most prized powers of government.” (Bartos 2005, p.96) It is also worth considering when examining the effectiveness and independence of a public sector board that the minister also has the “the power of the purse, through portfolio budget allocations”. (Howard and Seth-Purdie, 2005 p59)

Regardless of the level of power and autonomy of public sector boards they still need to ensure the corporate governance structures of their organisations allows them to effectively meet their responsibilities to their key stakeholders. To assist the Australian National Audit Office (ANAO) has developed comprehensive Better Practice Guides, for use amongst the public sector, that outlines quite explicitly the frameworks, processes and practices government organisations should take to ensure their corporate government arrangements meet the expectations of their key stakeholders to effectively discharge their accountabilities. There is also a number of pieces of specific legislation developed for Commonwealth Government entities which prescribe the required processes and functions that affect the governance of these entities. The main pieces of legislation include the Auditor-General Act 1997, the Public Service Act 1999 (PS Act), the Financial Management and Accountability Act 1997 (FMA Act), the Commonwealth Authorities and Companies Act 1997 (CAC Act) and the Corporations Act 2001. (ANAO 2003 a, p.10)

**Background: Commonwealth Authorities and Companies Act 1997 (CAC Act)**

The Commonwealth Authorities and Companies Act 1997 (CAC Act) was developed to regulate the financial reporting and accountability of Commonwealth Statutory Authorities and Commonwealth Companies. Commonwealth Statutory Authorities are body corporates, that hold money on their own account, incorporated for a public purpose by Act or by regulations under an Act. (CAC Act ss.7) Commonwealth Companies are Corporations Act 2001 companies in which the Commonwealth has a controlling interest (ss 34). The CAC Act “has reporting requirements and other requirements that apply in addition to the requirements of the *Corporations Act 2001*”. (CAC Act page 1)

The creation of Commonwealth Statutory Authorities and Commonwealth Companies is based on various decisions made by government where it is considered more appropriate for government controlled entities to operate “outside a traditional departmental structure” (Uhrig 2003 p.16) To ensure these detached organisations operate effectively and in line with government expectations the majority of Commonwealth Statutory Authorities have a governing body such as a council or board where the members of the governing body are defined as directors. (CAC Act, ss 5). The role of directors, who are selected and appointed by the responsible Minister, of Statutory Authorities which are Commonwealth authorities for CAC Act 1997 purposes is rather more complex than those for public corporations. They are subject to similar requirements as specified for directors of public companies in the Corporations Act 2001. For example Section 27E of the CAC Act 1997 states:

If the directors of a Commonwealth authority delegate a power under its enabling legislation, a director is responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves.



which is comparable to section 198D of the Corporations Act 2001:

The directors of a company may delegate any of their powers ..... the exercise of the power by the delegate is as effective as if the directors had exercised it.

However there are also additional requirements directors of Statutory Authorities outlined in the CAC Act 1997.

The directors of a CAC Act 1997 statutory authority in addition to preparing an annual report, which is eventually tabled in Parliament, and forwarding the completed annual report to the responsible Minister (CAC Act 1997, ss.9) the directors are also required to prepare budget estimates for each financial year. (ss.14) The budget estimates are estimates of the proposed annual expenditure of the statutory authority and they are referred, via the Government to one of the Senate's legislation committees for examination and report. These legislation committees consist of six senators, three from the government (one of whom is the committee chair), two from the opposition, and one representing the minority parties or independents (Senate, Brief 5). Harry Evans (2004), Clerk of the Senate, explains that the legislation committees' scrutiny of the estimates provides an opportunity for the Senate to assess the performance of the public service and its administration of government policy and programs. The review of the budget estimates is one of the most important accountability functions of the Parliament and therefore the directors must not fail to provide the responsible Minister with the Budget Estimates by the required deadline.

Sections 16 and 17 of the CAC Act 1997 outline the additional requirements of directors of a statutory authority including they must inform the Minister of the operations of the authority and provide the minister and the Finance Minister reports, documents and information as the Ministers' require (ss.16) and they must also, each year, prepare a corporate plan which includes the objectives of the authority , business assumptions based on the organisation's operating environment as well as the organisation's price and quality control strategies and community service obligations. (ss.17)

Like directors of public companies the directors of statutory authorities are legally required to ensure the financial statements of the organisation are audited by an appropriately qualified auditor. However the directors of the statutory don't have a choice of auditor, rather

... the directors of a Commonwealth authority must do whatever is necessary to ensure that all relevant subsidiary's financial statements are audited by the Auditor-General. (section 12, (1))

To support this requirement the CACAAct1997 (ss.12.3) states the Auditor-General must give the report to the responsible Minister(section 12, (3))

## **Empirical Tests**

There are 71 statutory authorities which are Commonwealth Authorities for CAC Act purposes – as at 4 December 2006 – of which 25 are defined as material entities as they comprise 99% of revenues, expenses, assets and liabilities (DoFA . ) From the 25

material Commonwealth Statutory Authorities 19 were selected for this review. The Australian Securities and Investments Commission (ASIC) was excluded as it operates under the Financial Management and Accountability Act 1997 (FMA Act), while the Australian Government Solicitor, Comcare, and the Civil Aviation Authority were excluded as they have a single person at the apex of the body rather than a multi-member board. (DoFA ). The Australian Industry Development Corporation and Coal Mining Industry (Long Service Leave Funding) Corporation were also excluded.

The 19 Statutory Authorities in the review had a total on 176 directors which equates to an average number of over 9 directors per Statutory Authority board which is consistent with the findings of the Higg's 2003 report "the board should be of sufficient size that the balance of skills and experience is appropriate for the requirement of the business" (p.22). One of the better practice recommendations of the Uhrig report (2003) is "the board size should be developed taking into consideration factors such as an entity's size, complexity, risk of operations and the needs of the board". The ASX Corporate Governance Principle 2 summarises that the size of the board should be conducive to encourage expedient and efficient decision making. (2003, p.22) These three reports indicate that it is not necessary to prescribe a definite board size but rather a decision based on individual organizational needs is advised. The other important recommendation of these reports is that the majority of directors should be non-executive directors. The justification for this recommendation is that the greater the number of non-executive directors the greater the level of independence the directors.

The 2005 -06 Annual Report for each of the 19 Statutory Authorities was used to collect the following information:

- Number of directors
- Mix of executive and non-executive directors
- Gender of directors
- Average length of service of directors
- Highest level of qualification of directors
- Remuneration of non-executive directors
- Number of other directorships

The results from this review are presented in the following section

## **Results**

Of the 176 directors 161 (91%) could be classified as non-executive directors (NED), however of these 161 directors 23 are also current senior public servants and are considered to be non-independent non-executive directors (Non Ind). These non-independent non-executive directors include senior departmental officers as well as current members of parliament. They are primarily on the board to represent the interests of the major stakeholders of the Statutory Authority, the Commonwealth Government and Parliament. For example Senator George Brandis (member of the Government) and Martin Ferguson MP (member of the Opposition) are both on the board of the National Library and their presence would be to ensure the interests of Parliament are represented. An example of a current senior public servant having a representational position on the

board of a Statutory Authority is Ms Lisa Paul, Secretary of Department of Science, Education and Training (DEST). Ms Paul is also a director on the board of the Commonwealth Scientific and Industrial Research Organisation (CSIRO) which also happens to be a Statutory Authority within her –DEST’s – portfolio. This high level of non-independent directors was criticised in the Uhrig report because representational appointments have the potential to place the success of the entity at risk.(2003, p.13) Howard and Seth-Purdie support this criticism by commenting “having the portfolio secretary as an ex-officio member of the board, regardless of whether the position carries voting rights, is a further complication, particularly when financial matters are at stake.” (Howard and Seth-Purdie, 2005 p56-57)

### **Take in table 1**

The results from table 1 are consistent with the recommendations of the Higg’s report “at least half of the members of the board, excluding the chairman, should be independent non-executive directors” (2003, p.35) and the ASX Essential Corporate Governance Principles “a majority of the board should be independent directors”. (2003, p.19)

Table 2 reports the gender mix of non-executive directors and executive directors. The portion of female non-executive directors (29%) is significantly higher than comparable studies of non-executive directors in the private sector. Li and Wearing’s (2004) study reported female non-executive directors only made 6% of non-executive directors in the top 350 UK listed companies. Pass (2004) reported a slightly higher portion of female non-executive directors in large UK companies (11%) while Cortese and Bowrey’s

(2007) study of the top 50 Australian listed companies (ASX 50) found 16% of non-executive directors were female.

### **Take in table 2**

Even more significant than the larger proportion of female non-executive directors is the fact that all statutory authority boards in the study had one or more female non-executive directors. This is significant when comparing to Pass's (2004) study which showed only 58 percent of UK companies had one or more female board members while the Cortese and Bowrey (2007) study indicated only 83% had one or more female board members.

The qualifications of 113 directors could be determined from the various Statutory Authorities annual reports (64% of the sample). Table 3 shows the split of the highest level of formal qualifications these 113 directors have attained.

### **Take in table 3**

It is apparent from the data most directors have some level of tertiary qualifications. Of the directors with post graduate qualifications a significant proportion 19 (25%) have been awarded PhDs with remainder holders of Masters degrees and or professional qualifications such as CPA Australia status.

The length of service of non-executive directors has also been identified as a possible key indicator of board performance and level of independence. The ASX listing rules suggest non-executive directors should serve on a board only for a period time where it would not interfere with the director's ability to act in the best interests of the company. (ASX, 2003, p.20). This view is reflected in Uhrig's (2003) report where it was suggested a maximum board service period be set so as to allow for appropriate rotation of directors. Higg's came to the conclusion that non-executive directors could appropriately serve two three-year terms with a company however it would be questionable the value for a non-executive director serving longer. (2003, p.53)

#### **Take in table 4**

Table 4 shows the average length of service of non-executive directors in the sample Statutory Authorities to be 4.5 years which is similar to the findings of the comparable study of ASX50 corporations (Cortese and Bowrey 2007). There is some concern with approximately 8% of non-executive directors in the sample being members of their respective boards for 10 or more years. This length of service could present problems, particularly in relation to the independence of non-executive directors, "the substantial length of time served by some non-executive directors could reasonably be perceived to interfere with the independence of these board members" (ASX, 2003, p.20)

The most obvious difference between non-executive directors of Commonwealth Statutory Authorities and private sector companies is the level of remuneration for non-executive directors. Cortese and Bowrey (2007) found that the majority of the ASX50

companies provided their non-executive directors with average remuneration in excess of \$140,000. Table 5 shows the majority (68%) of non-executive directors in the sample received remuneration between \$15,000 and \$45,000 per year with the average level of remuneration \$32,000.

### **Take in table 5**

Excluded from the above table is the average level of remuneration for the non-executive directors of the Reserve Bank of Australia (RBA) board. This is because the RBA's 2005-06 Annual Report only discloses in the financial notes (Note 12, p.85) the consolidated remuneration of Key Management Personnel which includes the Governor and Deputy Governor, 8 non-executive RBA Board members, 5 non-executive Payments System Board members and 5 senior staff. Even though the RBA is a Statutory Authority operating under the CAC Act 1997 it is surprising it was not possible to identify separately the remuneration of board members. The ASX Essential Corporate Governance Principle 9 (ASX 2003) requires the disclosure of non-executive directors' remuneration to be clear and adequately distinguished from the remuneration structure applied to company executives.

Also not included in the above table is the remuneration of non-independent non-executive directors, senior public servants and members of parliament, as they do not receive any remuneration for their directorships on Statutory Authorities boards. This is generally made clear in the notes to the financial statements, for example in the National



Library of Australia 2005-06 Annual Report Note 13 (page 115) states “Parliamentary members of Council do not receive any remuneration from the Library for their service on Council”

The data collected shows 84 directors of Statutory Authorities (48% of the sample) held at least one other directorship.

### **Take in table 6**

However, of all the directors in the sample only five hold at least one other directorship with another Statutory Authority. Two of which are non-independent non-executive directors, Mark Paterson Secretary of the Department of Industry, Tourism and Resources (DITR) and Helen Williams Secretary of Secretary Department of Communications, Information Technology and the Arts (DCITA). This tends to indicate the non-executive directors of Commonwealth Statutory Authorities are able to contribute a significant amount of private sector corporate experience to their roles on the boards of Statutory Authorities. However, whilst on the surface private sector experience would be invaluable to the boards of Statutory Authorities Howard and Seth-Purdy (2005) found, through their interviews of non-executive directors, a number of non-executive directors initially struggled adapting to the processes and functions of public sector organisations.

### **Summary and conclusion**

The boards of directors of Commonwealth Statutory Authorities are unique in a number of different ways when compared to the boards of the public companies. On the surface they appear similar, for example they are similar in size and composition, but scratch away at the surface and a range of different characteristics and requirements become apparent. In public companies there is a definite drive to increase the proportion of non-executive directors in the hope the level of independence of the board from the management of the organisation is improved. However, independence does not appear to be a characteristic required nor encouraged for directors of Statutory Authorities. The findings from this small study indicate the proportion of non-executive directors is comparable if not higher than public corporation boards, but the fact the Minister selects and appoints (or recommends for appointment) negates the superficial independence of these non-executive directors.

Besides executive and non-executive directors some boards of Commonwealth Statutory Authorities also include non-independent non-executive directors who are literally representational directors. These directors are either senior public servants or members of parliament. Their role is to represent the government or parliament and protect their interests, rather than participate for the benefit of the Statutory Authority. For example Ms Helen Williams who is the Secretary of the Department of Communications, Information Technology and the Arts (DCITA) sits on the boards of National Library of

Australia and the Australian Sports Commission. Both of these Statutory Authorities come under the umbrella of her portfolio department (DCITA). This presents an interesting position, for not only does Ms Williams sit on the board and assist in preparing and signing-off the Annual Reports and Budget Estimates of these two Statutory Authorities, she also has the role of Secretary of DCITA with responsibilities which include considering funding requests from these statutory authorities. Howard and Seth-Purdie summarise this interesting position as “a secretary would be simultaneously policy advisor to the minister, major client of the authority and authority board member”. (2005, p.62) The situation complements the independence paradox created by the need of independent directors, in the course of fulfilling their responsibilities, to rely heavily on the information provided by the same executives from whom they are to said to be independent Hooghiemstra and van Manen (2004).

The other glaring conflict within the current public sector governance structure is the due to the power of the responsible Minister over the Commonwealth Statutory Authority. As outlined above, the Minister appoints board members, can direct the board to comply with general government policies (ss.28 of the CAC Act) as well as determine the overall strategy of the authority (Uhrig 2003, p.35). Where is the independence and autonomy of the board? Uhrig commented that the power to act is essential to a board’s ability to govern effectively (2003, p.23) however due to the powers of the responsible Minister it appears the boards of Statutory Authorities are not able to govern effectively as they do not have the power to act with autonomy.

## Appendix 1: Statutory Authorities included in the analysis

<b>Statutory Authority</b>	<b>Portfolio</b>
Grains Research and Development Corporation	Agriculture, Fisheries and Forestry
Australian Broadcasting Corporation (ABC)	Communications, Information Technology and the Arts
Australian Postal Corporation	Communications, Information Technology and the Arts
Australian Sports Commission	Communications, Information Technology and the Arts
National Gallery of Australia	Communications, Information Technology and the Arts
National Library of Australia	Communications, Information Technology and the Arts
National Museum of Australia	Communications, Information Technology and the Arts
Special Broadcasting Service Corporation (SBS)	Communications, Information Technology and the Arts
Defence Housing Australia (DHA)	Defence
Australian Nuclear Science and Technology Organisation (ANSTO)	Education, Science and Training
Commonwealth Scientific and Industrial Research Organisation (CSIRO)	Education, Science and Training
Indigenous Business Australia	Employment and Workplace Relations
Export Finance and Insurance Corporation	Foreign Affairs and Trade
Australian Hearing Services	Human Services
Tourism Australia	Industry, Tourism and Resources
Australian Reinsurance Pool Corporation	Treasury
Reserve Bank of Australia	Treasury
Australian War Memorial	Veteran's Affairs
Airservices Australia	Transport and Regional Services

## **Appendix 2**

### **The Uhrig Report 2003 - Summary of Better Practice Guidance for Boards**

1. Board size should be developed taking into consideration factors such as an entity's size, complexity, risk of operations and the needs of the board.
2. Committees are a useful mechanism for the board to enhance its effectiveness through further detailed oversight and supervision of the management of risks that are critical to the success of the entity. Committees should be used only for this purpose.
3. In getting the best from boards, appropriately experienced directors are critical to good governance.
4. Representational appointments to boards have the potential to place the success of the entity at risk.
5. Responsible Ministers should issue appointment letters detailing government expectations of directors.
6. Maximum board service periods allow for a structured rotation of directors.
7. All boards should have orientation programs and directors should have the opportunity for ongoing professional development.
8. Annual assessments of the board need to occur to ensure government gets the best from the board.

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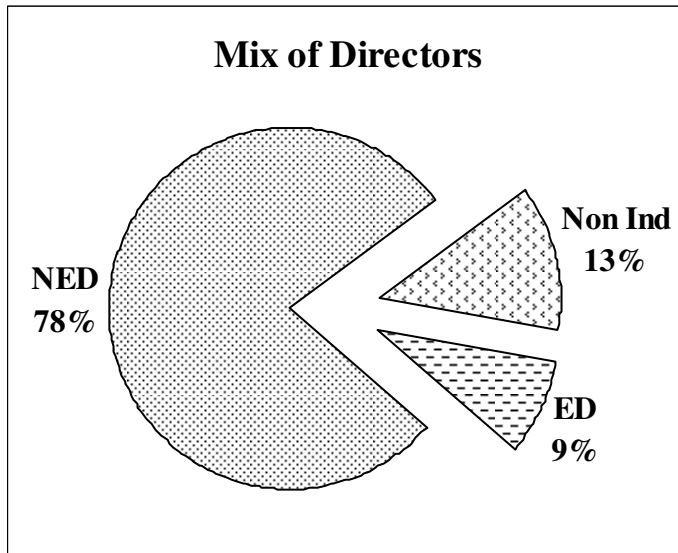
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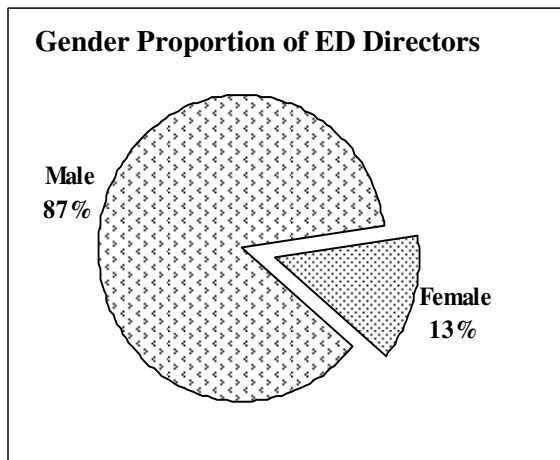
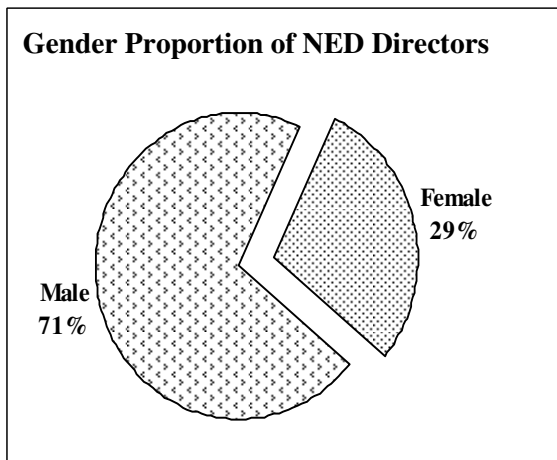
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**Tables**

**Table 1**

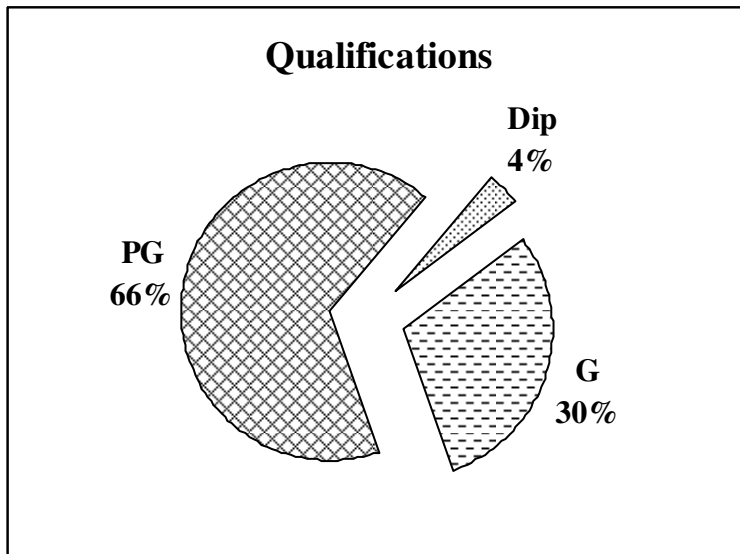


**Table 2**

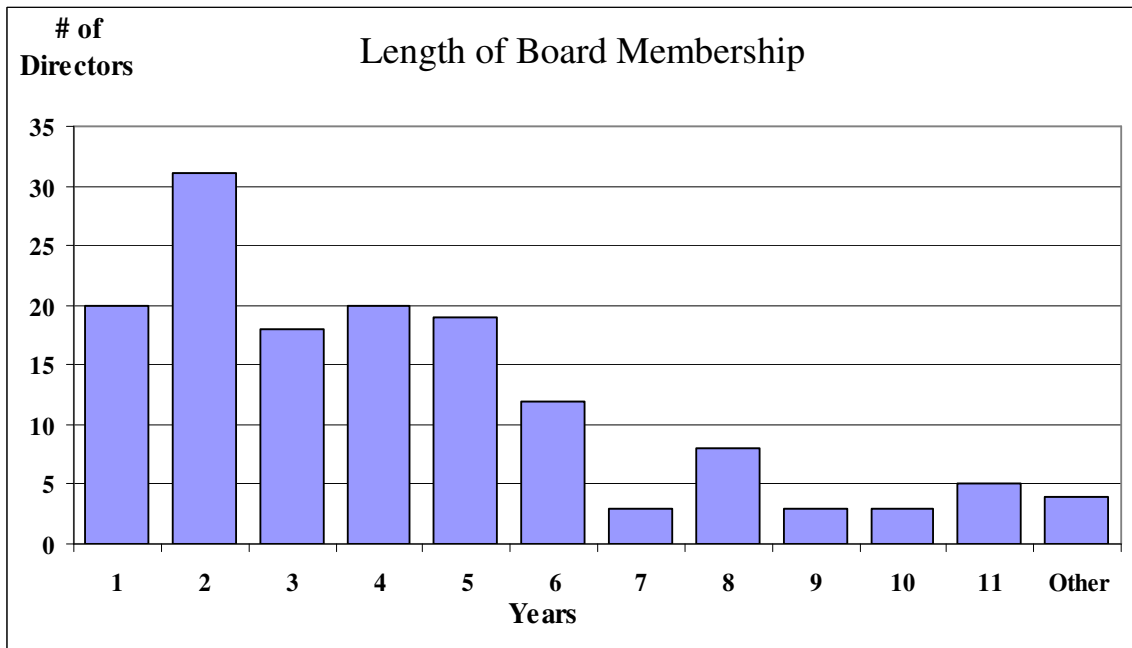




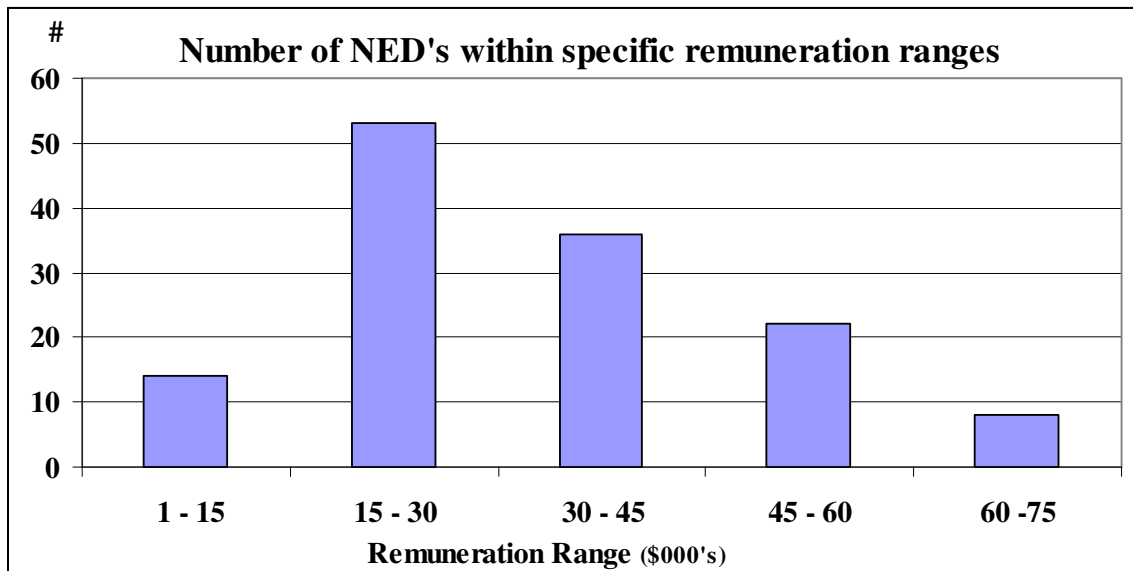
**Table 3**



**Table 4**



**Table 5**



**Table 6**

