



UNIVERSITY OF CANBERRA, AUSTRALIA

Corporate Governance ARC Project

Reforming Corporate Governance in the Australian Federal Public Sector: From Uhrig to Implementation

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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 second 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.

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Corporate Governance in the Public Sector: An Evaluation of its Tensions, Gaps and Potential
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Introduction¹

The Uhrig Report and its aftermath usher in a new stage of corporate governance for the Australian federal public sector. The Report cannot be assessed or applied in isolation. It sits within wider paradigm and evolutionary shifts in Australian public administration, management, and law.² That point affects both the conceptual design and the operational implementation of the Uhrig Report, as well as the standards and guidelines that also require development, customisation, and adaptation in that implementation to individual bodies and the sector as a whole. Tracking and analysing some of those key wider shifts, and their broad implications for the Australian Government's post-Uhrig agenda, is the focus of the first part of this Issues Paper. The second part addresses some key design and implementation issues for the immediate post-Uhrig era.³

ENVIRONMENT FACTORS AND THE UHRIG AGENDA

Australian Management Reform

The result of sustained reform in the 1980s and 1990s was the disestablishment of monolithic multifunctional departments and a greater reliance on third parties for the provision of services. Under this highly devolved public management model, the agency was the focus, individualisation provided the basis for public servant employment, and a disaggregated public service was the result. There was also an increase in the number of public bodies (although the major ones had been largely moved out of the public sector).

The impact on central agencies of both management and market principles was resounding. Australia reduced the old Public Service Board to a shadow of its former self⁴, before its successor, the Public Service Commission evolved an expanding identity through tools such as the State of the Service report. Finance moved through several stages during the reform era, eventually adopting a 'strategic' role⁵ but was so heavily purged in the second wave of market reform (in the second half of the 1990s) that debate came to centre on whether it would survive organisationally (one option being to re-integrate it with Treasury from whence it was originally derived) as its role was diminished by the pursuit of a minimalist agenda. The Department of the Prime Minister and Cabinet (PM&C) withdrew from active intervention except where required and was no longer providing strong leadership for the public service.

Australia moved from a strong centre with a locus in central institutions and high capacity for certain types of coordination to a smaller centre with a corresponding reduction in capacity, coherence, and control of coordination. At this stage it had reached a point on the devolved end of the spectrum that was comparable in some respects with New Zealand. Both countries have subsequently engaged in a rebalancing process.

Reasons for Change

There are internal and external explanations for significant change. The importance of the latter provides a reminder of how governments must respond and adapt to exigencies and that major reform has often reflected that imperative. The presence of external threat is a powerful motivating force. Nevertheless, the internal explanation is also of interest because a government is enacting measures that both counter its previous agenda and extend it.

The first factor was external threat. A dramatic reminder of the role of the environment was the impact of international events on the Australian community and public management. Apart from the long-term reverberations from 9/11, these were the October 2002 terrorist attack in Bali and the government's decision in March 2003 to commit Australian forces to the coalition of America and Britain in a war against Iraq. Since then, issues of security and terrorism have dominated both the domestic and international landscape. The Secretary of the Department of the Prime Minister and Cabinet observed that the threat of global terrorism and the emerging challenges of counter-terrorism, protection of borders, and domestic security had transformed Australian life and identity. 'Those issues, typically "non-routine", will test bureaucratic structures. Ensuring effective coordination of intelligence, analysis and strategic policy responses will test public administration'.⁶

There were other complex domestic policy issues that required strategic and integrated government responses involving multiple agencies and levels of government. These were both intractable policy problems and issues experiencing bureaucratic blockages.

Turning to internal factors, two were most significant. This was a time when movement within the public management reform cycle became more apparent: from an intense reform agenda in the first five years of the Howard government, reflection on the results was producing refinements and revaluation of the worth of the public service under a new leadership of the central agencies that suited different agendas.⁷ The features of new public management – disaggregation, devolution, outsourcing, and multiple services providers – supported specialisation but also encouraged fragmentation and reinforced vertical structures (or silos).

Underlying the new direction were political control and performance issues. The government that drove the reforms of the 1990s confronted their limitations and the contradictions of complex reform programs. A particular lever for change was the government's concern that political priorities were not being sufficiently reflected in policy directions, and were not being followed through in program implementation and delivery. The intensity of the Australian reassertion of the centre and the ministerial department, then, results from both system shortcomings and environmental uncertainty and threat favouring the stronger centre. A combination of internal and external sources of change facilitated the emergence of the new approach.

Emerging Model

The emerging Australian model has four dimensions, each embodying a relationship.

- Resurrection of the central agency as a major actor and of control over departments
- Whole of government as the current expression of a range of forms of coordination
- Central monitoring of agency implementation and delivery
- Departmentalisation through absorbing statutory authorities and reclaiming control of agencies with hybrid boards to accord with corporate governance prescriptions.

A centralising trend within the federal system has also been identified, which stretches across policy sectors.⁸ Several themes are recurrent: delivery and implementation, coherence and whole-of-government, and performance and responsiveness to government policy.

These trends shift the focus to some extent from the vertical towards the horizontal. Instead of emphasising the individual agency, there is now also a concern with cross-agency

programs and relationships. At the same time there is a reinforcement of, and significant extension to, vertical relationships. The whole-of-government agenda also has a centralising element in so far as central agencies are driving policy directions or principles, either systemically or across several agencies. The result has been the tempering of devolution through strategic steering and management from the centre and a rebalancing of the positions of centre and line agencies.

The significance of political control in the Australian approach to public management needs to be emphasised even though most of the story of enhanced political control predates this period of transition. The consistent pattern in the last three decades has been for the political executive to challenge elements of the traditional system in the drive for a more responsive public service. Three types of changes have been important: the strengthening of ministerial influence and resources particularly through the extensive use of ministerial advisors; the reduction in the breadth and exclusivity of the role of senior public servants; and changes to the appointment and tenure of the senior public servant.⁹ The current government has tightened aspects at the centre (eg a political appointee heads the cabinet secretariat) and through maintaining tight control of the appointment processes within the public service, public boards, and parliamentary positions.

Underlying each of the four dimensions of change is a political control dimension: these include improved financial information on a program basis for ministers; strategic coordination under cabinet; control of major policy agendas; organisational integration through abolition of bodies and features of autonomy; and monitoring the implementation of government policy down to the delivery level. The overall result is unprecedented potential for policy and program control and integration using the conventional machinery of cabinet, central agencies, and departments.

1. Resurrection of central agency as major actor

The overriding trend for over a decade – to devolve responsibilities to agencies – remains a feature of the Australian system, but it has been modified in two respects involving central agencies: first, through the whole-of-government agenda driven by the Department of the Prime Minister and Cabinet – discussed in the next section; and second, through a more prominent role for central agencies in espousing and enforcing principles, and monitoring and guiding in the areas of budgeting, performance, and values.

The new budget framework introduced in 1999 involved changing financial management and reporting, including budgeting on a full accrual basis; implementation of outputs and outcomes reporting; and extending agency devolution to inter alia budget estimates and financial management. A number of the expected benefits were not, however, forthcoming. The combination of a highly centralised budgetary process and highly devolved agencies was problematic. ‘Ministers usually make decisions at the programme level and want information at that level. Finance does not currently collect programme data systematically’.¹⁰ There was also parliamentary critique of the lack of information about the Commonwealth’s position as a result of financial management information systems that were accrual based in contrast to those of traditional cash transactions.

A Budget Estimates and Framework Review, established by the Department of Finance and Administration (Finance) to evaluate system effectiveness and responsiveness and in meeting government needs, reported on the scope for streamlining the financial framework, improving information management systems, and enhancing the quality of financial

information provided to the government and its central agency.¹¹ The result was an enhancement of Finance's role and capacity to oversight financial management and information, and a greater focus on departmental programs, a renewed emphasis on cash accounting and an expansion of staff capacity in a shrunken department to provide the necessary advice for government.¹²

With regard to monitoring, the Australian Public Service Commission sought to facilitate implementation of the 1999 public service legislation by assisting agencies to take advantage of it and investing in improvements to its capacity for evaluation.¹³ The devolved environment was to be balanced by greater public accountability through the legislative requirement of an annual report by the Public Service Commissioner on the state of the public service.¹⁴ The effectiveness of the combination of new approaches to the public service – including decentralisation, contractualism, and accountability through the 'State of the Service report' – is becoming clearer as the analysis improves with each report. The Commission has extended evaluation in its annual State of the Service report to include surveying employees and agencies, and to scrutinising more closely the institutionalisation of values in public service organisations as part of the greater focus on evaluation and quality assurance.¹⁵

Australia has been more committed to performance management than most OECD countries.¹⁶ One feature has been central oversight with recent inquiries reviewing principles and their application, but they have revealed a persistent problem with the credibility of performance management systems as they affect individual public servants.¹⁷

2. Whole of government and horizontal management

Australia has been slower to adopt a systematic approach to whole-of-government issues than Canada and the UK, both of which were pursuing these issues in the 1990s while Australia was still focused on its legislative and management reform agendas. The environment created by these reforms emphasised devolution of responsibility to agency heads, with direct agency accountability through them, and the importance of each agency pursuing its own business and policy agenda. In recent years the need to temper devolution with a broader, whole-of-government perspective has permeated much government activity.

The Prime Minister committed to a series of whole-of-government priorities for new policy-making that included national security, defence, and counter-terrorism and other generally defined priorities such as sustainable environment, rural and regional affairs, and work and family life.¹⁸ The priorities are being pursued through a range of traditional coordinating and new whole-of-government processes including changes to cabinet processes aimed at strengthening its strategic leadership role. They involved setting aside more time in the cabinet's program to consider broader strategy and strategic issues; streamlining consideration of submissions; and giving more emphasis to following up decisions.¹⁹ The priorities have been pursued through a range of coordinating or whole-of-government processes, including: cabinet and ministerial processes (eg Ministerial Oversight Committee on Energy); the Council of Australian Governments (COAG) and Commonwealth/State arrangements (eg sustainable water management, land transport); inter-departmental taskforces (eg work and family life); integrated service delivery (eg stronger regions); and lead agency approaches (eg indigenous initiative).

The Howard government's organisational response to the testing external environment experienced by Australia in recent years has been mainly to build coordinating units within

current structures, particularly within the Department of the Prime Minister and Cabinet – the National Security Division of PM&C was a prominent example. Another was the Energy Taskforce Secretariat charged with developing a comprehensive and coordinated national energy policy. The idea of creating a Department of Homeland Security, as in the United States, was rejected by the government, which pursued an approach that involved a partial reorganisation of the Department of Prime Minister and Cabinet. The National Security Division was created to coordinate and apply whole-of-government principles in national security focusing on border protection, counter-terrorism, defence, intelligence, law enforcement, and security. The Department is coordinating activities across the Australian Public Service as well as inter-governmentally.²⁰

The shift in emphasis was expressed through a major report by the Management Advisory Committee (MAC), which consists of departmental secretaries. The report indicates how the Commonwealth can address a series of issues about whole-of-government processes and structures, cultures, managing information, budgetary frameworks and includes the different levels of policy advice, program management and integrating service delivery.²¹

3. Central monitoring down to program delivery

Implementation has often been the neglected end of the policy cycle. Under the market agenda, outsourcing, agents and specialised agencies were favoured for service delivery (eg Centrelink). By the government's third term the limits of this approach had been reached. Having become more accustomed to working with the public service, it turned to the internal constraints on implementation. Political concerns about public perceptions of the performance of delivery agencies were heightened prior to the 2004 election.

The solution has been to extend central control to remove implementation blockages and delays. A Cabinet Implementation Unit (CIU) was established to seek effectiveness in program delivery by ensuring government policies and services are 'delivered in a timely and responsive manner'. It has been depicted as a partnership with government agencies in producing systematic reform to the implementation of government policies, and ensuring effective delivery.²² The implementation being monitored involves the 'stage of the policy process in which the underlying logic of policy decisions, the choice of policy instruments and the resources allocated during the formulation process is tested against reality'.²³

The authority of cabinet is drawn on both as 'a gateway' and a 'checkpoint'. With new proposals, appropriate details regarding implementation are required. Cabinet submissions with a risk element must address implementation, and in particular, 'the scope, milestones, risks, impacts and governance arrangements which provide the delivery framework'. In addition, adopted policy proposals require formal, detailed implementation plans. On the basis of these plans, progress is reported to the prime minister and cabinet against milestones in 'traffic light' format. The 'traffic light' report to the prime minister and cabinet is regarded as a powerful incentive for organisational learning for public servants. The CIU reviews of policy initiatives that cross portfolio boundaries are seen to be requiring agency reflection on how to improve co-ordination.²⁴

There is also promotion of cultural change around a project management approach. The methodology used is intended to provide a means for codifying and thinking through the connections between policy objectives, inputs, outputs and outcomes, to expose the underlying assumptions to questioning and to clarify risks and results.²⁵

4. Departmental control of public bodies

The final strand of the model involves the resurrection of a more comprehensive ministerial department. The targeting of the broader public sector derived from election agenda²⁶ and led to the commissioning of the Uhrig review into the corporate governance of statutory authorities and office holders. The Uhrig Report (2003)²⁷ is discussed in detail in the second part of this paper.

The post-Uhrig agenda is for ministerial departments to have tighter and more direct control over public agencies. There were two issues: the extent of non-departmental organisations, and their governance. The array of Commonwealth public bodies had been comprehensively mapped and typed by the Department of Finance and Administration.²⁸ The ‘dangers imposed by bureaucratic proliferation’ have been proclaimed along with the observation that departments of state employed only 22 per cent of public sector employees – most worked in the approximately 180 agencies, many of which had statutory independence.²⁹

The centre was also concerned about the different legislative bases, constitutions (boards or not) and, therefore, opaque governance. ‘If implementation is to be driven hard it is important that there be clarity of purpose, powers and relationships between ministers, public servants and boards. Good governance depends upon transparency of authority, accountability and disclosure. There should be no doubts, no ambiguities’.³⁰

A core principle of the 1980s was to require departments to manage as well as to provide policy advice. The language of the mid-2000s has become to enforce effective delivery as well as policy advice with the latter defined in terms of outcomes.³¹ Departmentalisation is expressed through absorbing statutory authorities and reclaiming control of agencies with hybrid boards that do not accord with a particular corporate (and therefore private sector) governance prescription.

Similar agendas for rationalising non-departmental organisations (NDOs) are apparent in other Anglo-Saxon systems³² although they do not appear yet to be as aggressive as the Australian.

An Integrated Performance Model?

A central question is how to interpret the implications of this model and whether it represents system rebalancing (as a consequence of reform excesses) or a reconfiguration of central and devolved roles to produce a governance model appropriate for a changed environment. In terms of the characterisation of the model the new integration allows a combination of devolved dimensions with a reactivated centre. The relational basis retains a strong hierarchical dimension underpinned by political authority but with a reliance on performance management and the employment of project management for some purposes.

Four components covering a spectrum of relationships have been distinguished. In summary they involve a rebalancing of centre and line; a commitment to whole-of-government and integrating agendas; central monitoring of agency delivery; and a reconfiguring of portfolios through a reduction of public bodies. They are subject to ongoing processes of change, although preliminary judgments can be made about several dimensions. The structural and organisational priorities are substantially in place for the central agencies. An extensive apparatus now exists for exacting greater coordination and whole-of-

government results. Short-term improvements in delivery have been reported.³³ There are better information flows to senior executives and politicians.³⁴ There is no doubt that the level of fragmentation of public bodies is being diminished in the short term, and that clarification of the roles of agencies will emerge. Whole-of-government solutions to societal problems are of course a much greater challenge.

The elements that emerge are the search for coherence, strengthening of internal capacity and performance improvement. First, organising for coherence is occurring within and across portfolios and organisations with the whole-of-government agenda. The reliance is less on legislation, the management framework and values for sustaining organisational operations – although each remains prominent – and more on bureaucratic structures and formal centres of influence such as the ministerial department.

Second, there is a strengthening of internal capacity, through the whole-of-government agenda, enhancing central agencies' roles in coordination, and improving implementation and capability. While the previous agenda was to shed responsibilities, and the devolution component continues to be anointed as a cornerstone because it has produced improved performance and productivity;³⁵ now there is a preference to reincorporate, to clarify, to establish better accountability, and to improve performance. In response to the challenges of complexity and through attentiveness to maintaining system attributes, in the new construction horizontal governance ranks equal with vertical relationships and hierarchy.³⁶

There has been a reconfirmation of the three organisational components of the traditional system: cabinet, central agency, and the department. The two most diminished central agencies – the Australian Public Service Commission and Department of Finance and Administration – have been reconstituted with stronger roles. The Department of the Prime Minister and Cabinet's role has also been greatly enhanced.

Third, there is the question of performance. Overall the performance management ethos presides. 'The next challenge is to ensure that the performance of the Australian Public Service (APS) – as a coherent whole – is lifted; and to ensure that the implementation of delivery is viewed as just as important as the development of policy'. The concept of the 'performing state' (borrowed from Allen Schick, Professor of Public Policy, University of Maryland) is employed for a system 'that is continuously open to, and reading its environment, and learning and changing in response: a state "inherently in transition"'. To produce and sustain this condition, the public service must 'embrace a culture of collegiality and creativity'. The head of the public service declared the building of this culture to be his main task.³⁷

There are a number of significantly different features from the earlier hierarchical model of integration. The public service is operating under a strong political executive with more political instruments for securing and sustaining control and direction. There is a brace of instruments for working the system strategically and at several levels. The empowered departments have substantially greater responsibilities than traditional arrangements. This adds up potentially to a formidable apparatus for control, scrutiny, and performance management.

As with much reform, a lot depends on applications. This can be seen through the Uhrig agenda for rationalising public bodies. It prescribes two models for public bodies despite their diverse form and functions. The latent as opposed to the manifest function of the Uhrig

exercise is to provide opportunities for scrutinising the proliferation of public bodies, how they are organised and whether they fit comfortably within the constitutional basis of government (in effect a question of responsiveness). It remains unclear what the long-term impact of this agenda will be in practice.

KEY DESIGN AND IMPLEMENTATION ISSUES FOR THE IMMEDIATE POST-UHRIG ERA

As with the introduction in the mid-1990s of national competition policy and its imposition of governmental trade practices liability upon public sector entities in the states and territories, the application of the bulk of the Uhrig Report to federal public sector entities is proceeding through a number of audit, assessment, and implementation stages. These necessary stages include: auditing and assessing the implications of its recommendations for particular organisations; implementing the results of those audits and assessments; and incorporating them in the ongoing creation, arrangements, and monitoring of federal public sector entities.³⁸

Scene-Setting and Ground-Clearing

Some scene-setting comments are necessary to set up the analysis that follows. First, the Uhrig Report is not about all aspects of corporate governance in the Australian public sector. The brief in its terms of reference focused upon ‘the *structures* and the *governance practices* of Commonwealth *statutory authorities* and office holders’ – hence the primary emphasis upon ‘structures’, ‘governance arrangements’, ‘accountability frameworks’, ‘best practice corporate governance *structures*’ (cf best practice corporate governance), ‘*formal* accountability and risk management requirement’, ‘relationship *structures*’, ‘accountability and reporting *mechanisms*’, and ‘a *template* of governance principles and policy options’ (emphasis added). While the Uhrig Report certainly mentions a number of important aspects of governance responsibility and accountability in passing – eg the Australian people’s ownership of government, the constitutional system of government, the connection between parliament and statutory authorities, and organisational cultures and values – its main emphasis lies elsewhere.

Second, the Uhrig Report adopts a particular conception of corporate governance, and takes a particular orientation to corporate governance that emphasises some things and not others. That particular conception and its correlative orientation permeate its underlying thrust and its detailed analysis as well as drive its recommendations. The Federal Government can accept that, the Australian Public Service can implement it, and critics can critique it, but one essential fact remains. Whether it proves to do the job the Federal Government wants or not, the Uhrig Report *can* be characterised in that way. Its way is not the only way possible. However, in the absence of a ‘clean slate’ approach now that the government has accepted and commenced implementing the bulk of the Uhrig Report, the comments below focus on highlighting remedial and implementation issues that must be confronted in the post-Uhrig phase.

Third, the more that attention is focused on those bodies in the sector that are not simply engaged in service delivery, directed implementation of policy, and departmental advice and assistance to ministers, the more that anomalies and exceptions emerge that diverge from the two basic Uhrig Report templates (ie the ‘Board Template’ and the ‘Executive Management Template’). The Uhrig-based response might be that, despite the wide range of different entities across the federal public sector, and however different they might seem from various perspectives, most will fit one of the two Uhrig templates from a

management and ‘accountability to government’ perspective. Still, the Department of Human Services and maybe even the Australian Research Council are different creatures from federal courts (including the High Court), the Reserve Bank, regulators like ASIC, and a federally created university like the ANU. Similarly, the Auditor-General and the various federal authorities involved in criminal investigation, prosecution, and law enforcement are different too.

Again, the Uhrig-based response might be that the two basic templates do not prevent a multiplicity of internal governance arrangements that might be necessary for essential organisational functioning. The point is that, viewed in context, the templates are focused mainly on the lines of information, communication, reporting, and answerability between an organisation and its (external) relationship to government on departmental, portfolio, and ministerial levels. This is especially in terms of whether the ultimate accountability of the organisation to government is through the medium of a proper board or a single organisational head, whatever other aspects of its management group or structures might be in play for other purposes, such as statutory responsibilities fulfilled by different officials (including commissioners). Still, the templates obviously have implications beyond this external dimension. At the same time, this distinct external dimension of answerability should not be confused with the multiplicity of arrangements that might be necessary for statutory or other reasons in terms of the organisation internally.³⁹

Of course, none of this necessarily detracts from what might be one of the Uhrig Report’s ultimate benefits – namely, clarifying and addressing some of the problems and inconsistencies in how statutory authorities have been created and managed. Indeed, as that was the primary task set in its terms of reference (albeit by reference mainly to those bodies ‘that have critical business relationships’ (p 106)), some emerging problems of fit might flow from the government’s endorsement and application of the Uhrig Report across the sector. In terms of implementation issues, this goes to criteria that justify divergences from the Uhrig templates. One risk here is that too many divergences from the templates might reach a critical mass and create a tipping effect that dilutes the usefulness of the templates, unless the divergences that are said to be justified by the ‘uniqueness’ of a particular organisation’s circumstances are kept tightly reined in. As other commentators note, that need remains in tension with the multiplicity of organisational forms and features across the federal public sector.

The comments and suggestions that follow are intended to contribute to the post-Uhrig implementation and monitoring agenda. They cover the following main points. First, we need a more explicit governance responsibility and accountability *system* that includes, but is not limited to, the ‘ministerial control’ orientation of the governance arrangements, accountability frameworks, and templates outlined in the Uhrig Report. Second, the Uhrig Report’s particular notion of corporate governance permeates everything from its starting assumptions to its recommendations, which leads to some things that are critical to successful governance being underemphasised or untouched. Third, successful implementation of the Uhrig recommendations requires a multi-pronged approach to standard-setting and guidance organisationally and across the sector. Fourth, however valuable the two templates offered by the Uhrig Report in providing a coherent approach to statutory bodies, the range and basis of justified exceptions to the templates are critical. Fifth, both successful corporate governance and the successful implementation of the Uhrig Report turn on a balanced integration of ‘hard’ and ‘soft’ governance factors, in everything from board effectiveness to portfolio communication and information-sharing protocols. Finally, material generated in

implementing the Uhrig Report has significance both in the interplay with legal duties owed by office-holders and legal issues of immunity and liability concerning the executive government.

Uhrig Report – Criticisms and Responses

The role of the government is to make policy on behalf of the people in a representative democracy. The role of the public service is to advise on and implement policy on behalf of the government and the interest of the people they represent. One role of academics is to conceptualise policy problems and options and to inform and critique policy development and its implementation, as part of a contribution to wider public debate and action. The approach taken in this Issues Paper is to note major comment and criticism concerning the Uhrig Report as part of the ground-clearing for identifying and discussing some key implementation issues arising from the Uhrig Report. In doing so, this Issues Paper makes points and suggestions that do not necessarily accord with, or purport to represent, the thinking of others associated with the Corporate Governance Project, the Federal Government, and those in the APS charged with implementing the Uhrig recommendations. All of that is balanced by the approach taken in raising implementation issues of mutual concern to all parties.

The Uhrig Report's approach has been criticised from quite a few different standpoints.⁴⁰ Some criticise it for not having or disclosing an adequate underlying conceptual framework for corporate governance. Some chide it for being selective in its consultations and focus.⁴¹ Despite its rhetorical references to constitutional, parliamentary, and public responsibility and accountability, some note the relatively light treatment of these dimensions in its recommendations about governance arrangements and accountability frameworks, compared to the heavy emphasis upon executive government control of public sector entities and their accountability to the executive government. In particular, some decry its scant incorporation of parliamentary accountability within its governance arrangements and frameworks, given the interdependent relationships between parliament, ministers, and departments concerning the establishment and operations of statutory authorities. Some rebuke it for extrapolating too simple a two-limbed template for statutory authorities from too limited a sample of investigated bodies – a deficiency that, if present, is compounded by the government's extension of the Uhrig Report to all portfolio bodies.

Some castigate it for overestimating what private sector lessons on corporate governance might offer the public sector, and for underestimating some aspects of the public sector that affect the easy transposition of corporate governance lessons from the private sector. Some query its non-engagement with earlier official reports and inquiries, and with comparative public sector developments overseas. Some expert governance academics and practitioners alike are dismayed by its failure to engage with, and position its recommendations within, the wider body of governance knowledge and expertise in the national and international literature on public sector governance generally and corporate governance in particular. Some warn of the significant additional political, workload, and liability problems it creates for portfolio secretaries in receiving information from, and advising ministers about, statutory bodies. Some query whether the evidence of any non-performance and maladministration points to the need for tighter executive and ministerial control or something else. Some wonder at the Uhrig Report's non-engagement with issues of public sector ethics and probity and their significance for the review at hand.

Most of these criticisms have some weight, from their particular standpoints. Some of them are largely irrelevant to the current phase of implementation. At the same time, the

Uhrig Report stands judged by the appropriateness and comprehensibility of its own self-assessment (p 2) that it ‘took a practical rather than theoretical approach, thinking from “first principles”’. That view discloses a disconnection between conceptual design and operational elements of that design that is more illusory than real. Moreover, ‘all theory, no practice’ models are just as bad and flawed as ‘all practice, no theory’ models. It is hard to reconcile the Report’s express disclaimer of ‘theory’ at the outset with its immediate follow up preference for ‘first principles’ and the experiential working theory of corporate governance that clearly underlies the Report. As Professor Bartos pithily puts it, ‘arguably atheoretical first principles are an oxymoron’.⁴² ‘The report itself is infused with an abundance of normative theory that is not only unacknowledged but seems not to have been observed’, he says.⁴³ In short, the Uhrig Report *has* an underlying working *theory* (or conception) of corporate governance in the public sector that underpins its recommendations, and conceptualising its elements and their impact is as vital to the Report’s ongoing implementation as anything else.

There is also possibly a wider governance issue at stake here about the Uhrig Report’s self-proclaimed avoidance of theory. Major public reports and official standard-setting documents are not just instrumental in nature. As a matter of good government and good governance, their connection to current thinking on the issues canvassed in them matters, as does justification of their recommendations in light of comparable models and approaches in other places. This includes assessment of other options and comparable models in the literature and in other jurisdictions, as well as evaluation and justification of the course chosen in light of them. It also includes the evidence-based case for the desirability and workability of the reforms proposed. Recent comparable overseas examinations⁴⁴ of corporate governance in the public sector have both similarities and differences to the Uhrig Report in their terms of reference, focus, coverage, engagement with current thinking, discussion of options, content and final recommendations.

Towards a Broader System of Governance Responsibility and Accountability

Viewed through the prism of the Uhrig Report, governance arrangements and frameworks of accountability are largely things that are within the province of control by and accountability to the executive government. Reflecting and expanding upon the thrust of the Uhrig Report two years after the Federal Government received it from him, John Uhrig spoke publicly and revealingly about the report bearing his name as follows:⁴⁵

(T)he more independence, autonomy in decision-making, and separation of powers, the greater is the need for governance and for, in fact, strong governance. A lot of people, believe, of course, the opposite but that demonstrates, in my view, a misunderstanding of what governance is all about. The more power you hand to somebody else, then the more you need governance to ensure that that power is not improperly used and is in fact used in a constructive way ... So the framework of governance has to give support to ministers. It, of course, should also increase the extent to which ministers are accountable. And I believe what’s in this report does that as well ... (I)f you’re going to reach the right conclusions about governance then you must see all of the issues from the point of view of the owners.

However, glimpses of a wider notion of responsibility and accountability, beyond a primary emphasis upon the triangular accountability relationships between governmental entities, their managers, and ministers, also appear in the Uhrig Report itself. For example, it acknowledges the unsolved problems of ‘assisting stakeholders in identifying appropriate boundaries in their relationships and interactions’ (p 40) and of curing the stakeholder-reported ‘lack of meaningful engagement’ in the ‘current consultation mechanisms’ operating between regulatory authorities and their regulated communities (p 51).

Importantly, the Uhrig Report conceives of ‘the community through the Parliament and government’ as the ‘owners’ of public sector entities (pp 22-23). Consider, for example, the Uhrig Report’s account of governmental responsibility (p 32):

Governments must govern. They are given responsibility for the delivery of a range of functions and services on behalf of the Australian community and are held to account by the public for their performance through the scrutiny of the Parliament, and through the electoral process.

The executive power of the Commonwealth, conferred on the Governor-General by section 61 of the Constitution, is exercised by Ministers under section 64 of the Constitution. In accordance with these provisions and the general principles of responsible government, Ministers are responsible for administering their departments and have a duty to execute and maintain the laws of the Commonwealth.

... Governments are typically elected with a mandate for certain policies and are ultimately held accountable for outcomes achieved, including the distribution of resources. Given that governments are accountable in this way, clearly, frameworks need to recognise the role of the Minister in the governance of authorities.

As a summary of the dimensions of governmental responsibility and accountability, this can be interpreted narrowly or broadly. It is right as far as it goes. What is left implicit in or left out of this account is also important. The system of checks and balances, the separation of powers, and other features point towards a framework for governance arrangements between ministers, public service departments and their managers, and ministers, as well as a wider system of accountability and responsibility involving the Parliament, the courts, the Australian people as the ultimate source of governmental authority both constitutionally and electorally, and community stakeholders engaged with government. That wider system might include a Uhrig-like conception of the framework for governance arrangements, and must be consistent and integrated with that, but it is not limited to that.

Whether or not Uhrig’s terms of reference did go or should have gone to such issues, they are fundamental to governance responsibility and accountability frameworks and arrangements of the kinds contemplated by Uhrig. They highlight another part of the landscape that – rightly or wrongly – is not covered comprehensively by the Uhrig roadmap, despite the Uhrig Report’s toe-dipping in such troubled waters in distinguishing between statutory bodies that are established as statutory corporations and statutory bodies that are not statutory corporations, in terms that have attracted notice and criticism⁴⁶ (pp 33-34):

Where a statutory authority is not created as a body corporate, constitutionally, it remains part of the department of state. In these circumstances, the responsible Minister generally has the same powers in respect of the authority as he or she has in respect of the department of state, except for those matters for which the authority has independent statutory responsibilities ... Consequently, the powers of a Minister in respect of a statutory authority need to be considered in the context of its legislative framework (including the Australian Constitution).

As always, context is important. This Uhrig discussion is directed towards the extent of ministerial power over statutory authorities of different kinds. Still, it is an example of another frustrating aspect of the Uhrig Report. It flags things of significance, or asserts propositions, but in doing so often selects only a particular aspect of a wider and necessary issue for discussion, or fails to follow through on the discussion fully within its recommendations.⁴⁷ The constitutional, legal, and political dimensions of this important relationship between ministers and statutory authorities have features other than those selectively highlighted by Uhrig, and a full account of them and their implications is vital for any governance arrangements and accountability frameworks.

As demonstrated by the landmark *Hughes Aircraft* case⁴⁸ on public sector tenders, the law walks a fine line between protecting statutory authorities from political interference and improper communication with ministers, on one hand, and permitting proper communication and policy direction involving ministers, on the other. Indeed, the allegations in that case go to the heart of Uhrig's concern for proper accountability in interactions between ministers and statutory authorities – namely, guarding against organisational 'evaluation and selection failures', 'political interference', 'audit failure', 'improper interests and affiliations' of board members, 'breach of (commercial) confidence' in communications with ministers, and public service failures in 'fair dealing' (to quote the court's own characterisation of the allegations). At the very least, this highlights the need for two-way notions of responsibility (if not accountability) in the interactions between governmental bodies, on one hand, and ministers and departments exercising portfolio oversight of those bodies, on the other. That needs to be built into post-Uhrig two-way communication and responsibility protocols and understandings too, as part of the governance arrangements and accountability frameworks for such interactions. Included within that must be something that acknowledges and touches upon the growth and role of ministerial and departmental advisers in the interactions and communication between ministers and others.

It is easy to criticise the Uhrig Report's basic two-limbed management template for trying to fit too many round pegs into too few square holes, in terms of the multiplicity of different entities across the public sector. 'How could this template possibly cover the functional and organisational differences of everyone from departments and government business enterprises (GBEs) at one extreme to independent regulatory, law enforcement, prosecution and judicial bodies at the other?', some might ask. Yet the federal public sector has operated successfully for some time with a corresponding two-limbed legislative accountability and governance framework in the form of the Commonwealth Authorities and Companies Act – CAC Act – (eg for governmental entities pursuing commercial activities and appropriately managed by a corporate board) and The Financial Management and Accountability Act – FMA Act – (eg for other entities engaged in non-commercial activities and appropriately managed by an executive management group, headed by a federal departmental secretary in whom statutory responsibility resides). As others note,⁴⁹ this also reflects a broad distinction between bodies that remain part of the federal government for the purposes of financial administration and accountability, and bodies that have a separate legal status and fund-holding capacity in their own right but still fit broadly within the fold of executive government. At the same time, both kinds of governmental entity are answerable in some way – whether directly or by oversight within a portfolio, for example – to relevant ministers and the government. Yet what is suitable in terms of legislative accountability in terms of that two-limbed governance framework is different from what is suitable in terms of legal and decision-making accountability in having a board or an executive management group. In turn, that legal and decision-making autonomy (or lack of it) is different from what is suitable in terms of ministerial and portfolio oversight, which is different again from the parliamentary accountability exercised by various parliamentary committees.

Consider an analogous example from outside the Australian public sector context. New Zealand's Crown Entities Act 2004 applies to various 'Crown entities' including 'statutory entities', 'Crown entity companies', 'Crown entity subsidiaries', 'school boards of trustees', and 'tertiary education institutions'. That wide scope of coverage is presently irrelevant. Focus instead just upon 'statutory entities'. 'Statutory entities' are further divided into three different types – namely, 'Crown agents', 'Autonomous Crown entities', and 'Independent Crown entities'. 'Crown agents' are governmental entities that 'must give effect to

government policy when directed by the responsible Minister'. 'Autonomous Crown entities' are governmental entities that 'must have regard to government policy when directed by the responsible Minister'. 'Independent Crown entities' are governmental entities that 'are generally independent of government policy'. So, in terms of that dimension of accountability that relates to compliance with governmental policy, three different kinds of arrangements for 'statutory entities' are envisaged, along a spectrum of independence from government in the form of policy direction. There are other forms and dimensions of independence in this context too, and not just independence concerning policy compliance. Yet all of those three types of 'statutory entities', as well as the other kinds of 'Crown entities' regulated by that Act, are all 'answerable' in other ways and dimensions to the executive government of the day. Accordingly, whatever the nature of the management template chosen from the Uhrig two-limbed menu for overall management of a governmental entity, and whatever priority and emphasis is given to that choice and what flows from it under the Uhrig Report because of its chosen underlying conception of corporate governance, other dimensions and forms of accountability must be integrated with that framework. That is as much an issue in the implementation of the Uhrig Report as the things that are mentioned expressly in the Report.

All of this crystallises in the main problem examined in the Uhrig review. How do you balance any need for operational autonomy and independence for a statutory body with both departmental oversight and appropriate ministerial policy influence and direction of it? After all, as the Uhrig Report correctly warns (p 34):

Where statutory authorities fail to meet performance expectations, however, it can be Ministers and not the boards of office holders of statutory authorities, who are ultimately held accountable by the Parliament and the public.

That makes it even more important to approach both criticisms and implementation of the Uhrig Report from the wider standpoint of a coherent framework of accountability relationships, forms, and dimensions, as part of a broad framework of constitutional, political and legal responsibility and accountability within which the Uhrig Report and its recommendations must be operationalised. Corporate governance includes, but is not limited to, responsibility and accountability. Responsibility and accountability have numerous *facets* (or dimensions) as well as numerous *forms* (or manifestations). Their multiple *facets* most importantly include ownership, control, directability, monitoring, oversight, responsibility, and answerability. Their multiple *forms* most importantly include:

- 1) Constitutional responsibility and accountability (eg as part of the federal executive government, both empowered and constrained by the Constitution);
- 2) Legislative responsibility and accountability (eg a statutory authority's incorporating statute, as well as the legislative accountability framework enshrined in the CAC Act, the FMA Act, and the Public Service Act);
- 3) Parliamentary responsibility and accountability;
- 4) Departmental/oversight responsibility and accountability;
- 5) Political responsibility and accountability;
- 6) Regulatory responsibility and accountability;
- 7) Financial/auditing responsibility and accountability;
- 8) Electoral responsibility and accountability;
- 9) Legal/judicial responsibility and accountability;
- 10) Stakeholder responsibility and accountability; and
- 11) Public responsibility and accountability.

The point of all of this is that responsibility and accountability are multi-contextual and multi-layered. Someone is responsible *and* accountable *in* some way, *to* someone, *for* something, *through* a particular relationship or interaction, *for* particular purposes. That is a contingent claim, and it is contingent on multiple things. A governmental entity might have constitutional accountability as part of the executive arm of government under the Constitution and yet be at arm's length from the government for other purposes. It might provide information and answer on some level to the departmental secretary, department of state, and minister exercising executive oversight of it and other governmental entities in the same portfolio, and yet not be subject to operational direction by any of them on everyday matters. It might have some form of accountability beyond any linear or triangular entity-department-minister relationship if it has a whole-of-government, federal-state, cross-jurisdictional or transnational (eg Trans-Tasman) role too. So, it is perfectly coherent to applaud what Uhrig rightly says about the different legal accountabilities of corporate boards and executive management groups, criticise what the Uhrig Report leaves out of (or emphasises most in) its accountability frameworks and governance arrangements, and urge the need to incorporate things within those frameworks and arrangements *in addition to* things dealt with in the Uhrig Report.

The Uhrig Report can be positioned along multiple spectrums of analysis. It is more 'top down' than 'bottom up' in its conception of corporate governance and in its accountability framework. It is more one-way than two-way in its treatment of the relationship between ministers and public sector entities. It concentrates more on formal and structural elements of corporate governance than its other elements. These things are strengths, weaknesses, or simply neutral features, depending upon the standpoint from which these observations are made. What matters is that the Uhrig Report carves out a particular group of perspectives, features, mechanisms, and priorities from the full menu available in designing its recommendations. Implementing those recommendations must be undertaken with full and transparent recognition of what is good in what they cover, their inherent capabilities and limits, and what they leave untouched or unsaid that might be part of a fuller picture that is essential for corporate governance success in the federal public sector. This is important is assessing both the published criticisms of the Report and the emerging issues in its implementation.

Power Relations and the Uhrig Report

The Uhrig Report includes within the second of the three strands of its governance framework (ie understanding success, organising for success, and ensuring success) the idea that power must be present, delegated, limited, and exercised, in these terms (p 3):

In order for an entity to achieve its purpose, power must be given to executives to develop strategy and direction *for higher level approval*. Power will need to be *further delegated* as it is not feasible for a small number of individuals to make all decisions. Delegated power needs to be limited to manage risk associated with decision-making and to limit the opportunity for non-alignment with the interests *of those granting power*. Finally, parties in receipt of power must exercise it and do so *in a responsible manner*. (emphasis added)

This conception of power is linear-like in character. It is also more focused upon the responsibility and limits of the recipients of power within public sector entities than that of the governmental donees of power, who themselves are the donees of power from the people and must exercise it accordingly. While there are passing references to these other sides of the equation elsewhere in the Uhrig Report, they do not permeate the Report in the way that this first side of the equation does. This emphasis on some parts of that equation at the

expense of others might be explainable in terms of background concerns about rebalancing governmental control and policy influence over at least some quasi-independent entities in terms of their answerability to government. Nevertheless, this imbalance in emphasis itself has implications for a full system of governance responsibility and accountability, as well as a full account of how ministerial power is limited and conditioned in dealings with public sector entities, not least in terms of checks and balances against improper political influence and intervention.

Public Sector v Private Sector

The Uhrig Report's self-stated position is that it relies heavily on wisdom and expertise gained from practical experience of corporate governance in the private sector. In justifying this focus and its lessons for the public sector, the Uhrig Report (p 26) argues:

There are benefits in looking to developments and lessons learnt in the private sector when considering appropriate governance frameworks for the public sector. The environment in which the private sector operates creates significant challenges for companies. The consequences of failure and threat of takeover provide incentives for the private sector to constantly strive to improve governance practices. In dealing with the challenges of the market, the private sector has gained considerable experience in applying the core elements of governance. The experience of the private sector has provided the review with valuable insights into the full spectrum of governance arrangements and the corresponding impact on outcomes.

Three comments on this are warranted. First, beyond the basic point that there are both similarities and differences in corporate governance in the public and private sectors, even the similarities have their limits. While 'accountability' to stakeholders (including owners) is a common feature in both sectors, the multiple dimensions of 'accountability' differ across the two sectors, and those differences split further into differences of context, character, focus, and stakeholder identity. Second, there are levels on which both sectors can learn from each other, in matters of corporate governance as well as other matters too. The public sector's familiarity with both financial and non-financial aspects of organisational performance as an aspect of governance has much to offer the private sector, for example. Finally, as the APS values and other standard-setting sources indicate, public sector values differ from private sector values, whatever overlaps there may be. For example:⁵⁰

- The public sector produces 'public values', promotes equity, and protects the collective interests (eg about the environment and international relations) as well as market ones;
- The public sector operates in a complex decision-making environment, usually manages many and diverse stakeholder interests and often considers short, medium, and long range effects of decisions (inter-generational equity is one example);
- The public sector's effectiveness often relies on the co-operative, as opposed to the competitive, participation of others. Competition has a dysfunctional effect if applied inappropriately in the public sector: examples include service duplication, loss of scale economies, the dismantling of collaborative institutional arrangements, and the focusing on marketing at the expense of service delivery;
- The public sector uses diverse resources to achieve its policy ends, involving not only public money but, significantly, public power as well.

Official Standard-Setting and Guidance in the Uhrig Report's Implementation

Like practitioners and officials in other areas of law and policy, governance practitioners and officials probably have little time or patience for the conceptual nuances of different kinds of regulation and standard-setting. The differences between 'rules', 'principles', and other regulatory and official standards are probably more likely to be discussed by philosophers than anyone charged with responsibility for implementing or advising on something like the Uhrig Report. Yet this dimension is crucial to its successful implementation.

Here's why. There are drawbacks in practice from the kind of rule-worshipping that flows from mistranslation of respect for the rule of law and for the authority of other official standards into mechanical and formulaic rule applications by those governed by regulation and official standard-setting. Australian regulatory theorist, Professor John Braithwaite, describes how problems like the famous Three Mile Island nuclear accident stem from the inability of workers as 'rule-following automatons' to grasp the complex safety monitoring systems under their control, just as mechanical approaches to checklists (and templates) can undermine quality of care and service in everything from healthcare, at one end of the spectrum, to legal and policy advice, at the other. One of his arguments is that rules deliver more legal certainty in regulating simple phenomena while principles deliver more legal certainty in regulating more complex phenomena.⁵¹ Sometimes both rules and principles are needed, in a hierarchy of interdependent interactions.⁵² There might even be differences between general and specific rules, both of which might operate differently from general and specific principles. Some argue that 'rules' are absolute in their elements and application, and hence context-independent, and that 'principles' are more flexible, can point in different directions, hence have weight, and therefore are highly context-sensitive.⁵³ Others argue that the distinction between 'rules' and 'principles' is largely semantic, or a least simply describes a difference between standards that are very specific and standards that are more open-textured.

Again, this is not an esoteric or arid level of discussion about the Uhrig Report. It goes to the heart of the nature of its recommendations and what is needed in implementing them, especially in flow-on regulatory guidelines in the Uhrig Report's implementation phase, as exemplified by the need for follow-up guidance beyond the Uhrig Report of the kind provided by the *Governance Arrangements for Australian Government Bodies* produced by the Department of Finance and Administration in August 2005. Elsewhere in governance debates, these underlying themes about choosing the right kinds of standards to do the right kinds of jobs are reflected in debates about the virtue of prescriptive laws over self-regulating standards, as well as debates about the virtue of rule-based regulation over principle-based standards in improving corporate disclosure and audit regulation.

For example, the difference between corporate governance regulatory approaches in the USA and Australia in the post-Enron era is often described in terms of a distinction between the USA's prescriptive rule-based approach and Australia's more flexible principle-centred approach. In addition, the menu of regulatory and other official standards for business includes laws, regulatory guidelines (eg the ASX Corporate Governance Council 'best practice' recommendations on corporate governance), regulatory rulings (eg ATO rulings), regulatory guidelines (eg ASIC policy statements and practice notes), official standard-setting (eg accounting and auditing standards), and judicial determinations. All of that must be captured, translated, customised, and operationalised for each business organisation. Whatever other regulatory and standard-setting issues might arise for the post-Uhrig agenda, one immediate issue is the match between what is mandated in that agenda and the menu of options for providing regulatory, official, and organisational direction and guidance in implementing that agenda, both across the sector and within each governmental body (as a post-Uhrig implementer, a post-Uhrig implementee, or both).

So, from this starting perspective, we have the 'rules' of the legislative triumvirate for the Australian public sector (ie the FMA Act, the CAC Act, and the Public Service Act) and now, as additional standards, the general and specific 'principles' enshrined in the Uhrig

Report and its recommendations (to the extent of their acceptance by the Federal Government), to be followed by additional organisation-specific rules and principles and then operational guidelines and standards (eg flowing from post-Uhrig audits of governmental bodies by ministers), as well as sector-wide post-Uhrig rules, principles and other standard-setting benchmarks for implementation (such as the *Governance Arrangements for Australian Government Bodies*). Somewhere in this process the nature, limits, and features of different forms of standard-setting and guidance and their suitability and adaptation for the post-Uhrig agenda need ongoing consideration in designing the implementation of that agenda and the necessary tools for it, from the user's perspective at every organisational level within and across government and beyond. In other words, apart from the legislative framework, the Uhrig Report, and the immediate implementation responses identified above, what other standard-setting and guidance will be necessary and in what forms, both in implementing the Uhrig agenda and in enhancing corporate governance in the Australian public sector beyond the selective aspects covered in the Uhrig Report?

For example, how will the official material required to implement the Uhrig Report's templates interact with common law and statutory duties and obligations of office-holders? Consider this warning by a law firm partner about the conversion of agencies from a 'board' model to an 'executive management' model:⁵⁴

The duty of officers to act in the interests of the authority (which in most cases is a common law and statutory duty) will be reinterpreted to mean something akin to the public interest as articulated by the government of the day on behalf of the community.

The Uhrig Report is attuned to this issue of the relationship between an office-holder and to whom their obligation is ultimately owed. Consider its comments about boards (pp 41-42):

The presence of a board also has the potential to create confusion in the exercise of power. Directors who understand their role to be ensuring the success *of the entity* may interpret the priorities of the authority in such a way as to be in conflict with government objectives. This could arise, for example, where broader government policy objectives indicate a course of action that is different to that which the board would have taken in the absence of this policy. (emphasis added)

The general legal position is that office-holders (including company directors) must act in the best interests *of the organisation*. Where exceptions to this are necessary (eg so that directors of wholly-owned subsidiaries can act in the interests of their parent company), such exceptions usually need mandating by law.⁵⁵ This is why those elected to office as members of a collective decision-making body (eg staff members elected by university staff to membership of university councils) need to be aware of the distinction between the basis of their election by a particular constituency, and the basis of their obligation as an office-holder to the organisation as a whole. The Uhrig Report is also attuned to this distinction and its significance for public sector boards (p 43):

Another common basis for appointment to public sector boards has been the representation of stakeholders ... Representational boards do not provide the best form of governance for an authority due to the potential for directors to be primarily concerned with the interests of those they represent, rather than the success of the entity they are responsible for governing.

The Uhrig Report reinforces this point in one of its key 'better practice' guidelines for boards (p 12):

Representational appointments to boards have the potential to place the success of the entity at risk.

However, the notion of an office-holder acting in the organisation's best interests starts to break down in its application to the public sector and its wider constituencies, just as the

notion of a shareholder strains in its application to shareholding ministers and the various interests – portfolio oversight, parliamentary accountability, governmental interests, and the public interest – that such shareholdings represent in the public sector. Still, section 22 of the CAC Act frames a director’s duty of care and diligence in terms that relate to the best interests *of the CAC authority*. For example, it accepts in its business judgment rule that ‘(t)he officer’s belief that the judgment is in the best interests *of the Commonwealth authority* is a rational one unless the belief is one that no reasonable person in his or her position would hold’. Significantly, modification or conditioning of some duties requires the legislative mandate of that or another Act.⁵⁶ The statutory obligation of a chief executive under the FMA Act is to ‘manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible’, with ‘proper use’ here defined to mean ‘efficient, effective and ethical use’.⁵⁷ Under the Uhrig program, Statements of Expectation and Statements of Intent add a further gloss that might need statutory backing in some form, to the extent (if any) that they affect anything that goes to the primary obligation of an office-holder and to whom they owe their duties. In other words, what is the legal status of important non-statutory instruments like Statements of Expectation and Statements of Intent and what (if anything) needs to be built into the laws regulating public sector entities to accommodate them, not least in terms of their interaction with statutory duties, including – but not necessarily limited to – the statutory duties of organisational decision-makers?

Finally, the Uhrig Report identifies some of the circumstances in which Statements of Expectation and Statements of Intent are not suitable. As the Report notes, they are not appropriate for an office-holder like the Auditor-General, who has ‘statutory independence reporting directly to the Parliament and is not subject to direction by a Minister’ (p 8). Similarly, GBEs might already have arrangements for agreeing corporate plans with ministers. In terms of standard-setting and guidance in the post-Uhrig implementation phase, however, this raises questions about the design, form, promotion, and application of criteria for determining when such Statements are necessary or not, beyond the examples just mentioned.

Corporate Boards v Executive Management

The Uhrig Report rightly highlights the inappropriateness of having a governing board as a form of management when the features of a genuine board are absent. It recommends that boards are reserved for circumstances where the board has full power to act, usually in the ‘rare’ situation of a statutory body that is ‘commercial in nature’ (p 6). If government business enterprises are removed from the equation, one wonders how many of the remaining corporations, authorities, councils, commissions, and other bodies will fit the Uhrig Report’s ‘Board Template’ (as distinct from its ‘Executive Management Template’).⁵⁸

Considered solely from a legal perspective, there are major differences between a corporate board regulated by legislation like the Corporations Act (for the private sector) and the CAC Act (for the federal public sector). The dimension of ‘answerability’ of a CAC Act board and its chair and CEO to relevant shareholding ministers as representative ‘owners’, portfolio ministers, and representatives of governmental law-makers is qualitatively different from the relationship between a conventional corporate board and its shareholders and stakeholders. Nor does an executive or advisory board necessarily duplicate a corporate board completely in structure, function, membership, or responsibility. For example, members of executive or advisory boards might also have line management responsibility within their agencies. They are less likely to include board members who are external to the organisation.

They are also less likely to be subject to formal directors' duties of a kind identified in the Corporations Act and both federal and state legislation on GBEs.

Accordingly, the members of a corporate board have collective and individual responsibility and liability of a kind that is not necessarily shared by members of an executive or advisory 'board', especially one in which formal responsibility and liability is statutorily invested in a particular person as the head of the organisation (eg federal departmental secretaries, who have statutory responsibility for managing their agency's affairs 'in a way that promotes...efficient, effective and ethical use' of their public resources⁵⁹). Committees might be used to advise and support the work of an executive or advisory board, and yet they might function largely outside that board's decision-making structure and might even include non-board members from elsewhere within the agency – unlike the situation with committees of many corporate boards.

The questions that remain, however, are:

- a) whether everything within the federal public sector truly fits within the two-limbed management template;
- b) whether that template identifies all relevant components of the necessary accountability framework; and
- c) whether non-structural, less formal and so-called 'soft' elements of governance need to be built into protocols and procedures that implement the Uhrig Report within each relevant governmental entity.

For example, there are reasons of independence, expertise, function, and organisational integrity that might favour retaining statutory commissions in important regulatory and enforcement roles, in ways that do not fit neatly within either limb. While it is always possible to designate a formal or informal accountability relationship of some kind between ministers and someone from a governmental entity who 'answers' to them in some way – eg the head of a commission, the secretary of a department, the chief executive of a statutory agency, and the chair and CEO of a government corporation – that still leaves untouched two-way forms of responsibility and accountability in the triangular relationships between those individuals, their executive boards/groups, and their portfolio ministers and departments.

Where parliament has played a role – eg in establishing a statutory authority or the template legislative framework for particular kinds of governmental entities (such as the CAC and FMA Acts) – the constitutional separation of powers, the parliamentary system of government, the statutory powers and responsibilities given to ministers, and the obligations imposed upon ministers and governments under the law add to the responsibility and accountability equation in ways that condition the relationship between ministers and portfolio bodies, as well as the way in which those ministerial powers and responsibilities are exercised. As part of the executive arm of government, for example, ministers are affected by what the legislative arm of government enshrines in an Act of relevance to an entity within their portfolio.

Similarly, ministers should not attempt to achieve by informal direction something which a relevant Act envisages should be the subject of a formal ministerial direction. The state GBE Acts and the federal CAC Act, for example, create formal mechanisms for ministers who seek to direct GBEs in particular ways. Moreover, the presence of such a formal direction has an important knock-on effect upon the scope and content of directors' duties, in the sense that directors of a GBE who comply with a lawful formal ministerial

direction cannot legally be held liable for breaching their primary obligation to act in their GBE's best interests by doing so. Accordingly, it is vital under such a statutory scheme that ministers (and those who act on their behalf) do not seek to achieve informally what the scheme envisages that they achieve by formal ministerial direction. Otherwise, both the basis of the conditioning of the office-holder's statutory duty to accommodate directed public interests and government policy (or their inclusion in corporate charters and community service obligations, and so on) and the underlying integrity of the statutory scheme are undermined.

It is no answer to these concerns to say that, in the real political world, ministers and their staff will want to 'have their cake and eat it too', and that the pressure will be overwhelming in many cases to exercise informal influence rather than go through more public formalities in exercising influence. The point being made is not naïve to the realities of politics but rather integral to them. The design, purpose, and balance of a statutory scheme regulating interactions between different governmental entities can be upset if things are done the wrong way, with flow-on consequences legally or otherwise for those entities. This point also identifies the need for supplementary guidance in the Uhrig Report's follow-up implementation phase, of a kind that addresses more fully the post-Uhrig dynamics of two-way relationships between ministers and governmental entities, the wider system of accountability and responsibility outlined here of which the Uhrig Report forms part, and the integration of structural and non-structural dynamics that are essential for boardroom success for those entities with a 'Board Template' (see below).

Equally, ministers and other office-holders equipped with statutory responsibilities, powers and discretions might need to exercise them properly (ie on the basis of proper information and according to proper considerations), in good faith, and non-capriciously. There are high-level judicial comments in various contexts that point to the power exercised by the executive government being conditioned in this way.⁶⁰ Examples like this highlight the reality that responsibility and accountability between ministers and governmental entities truly goes both ways. In that sense, ministerial capacity is conditioned and limited. Information, decision-making and accountability protocols governing the triangular relationship between such entities, their management, and their portfolio departments and ministers must be framed accordingly.

Board Effectiveness

Consider the structural and non-structural elements of corporate governance that determine the overall effectiveness of a corporate board, both generally and under the Uhrig Report's 'Board Template' in particular.⁶¹ Given his empirical studies of corporate boards across jurisdictions, along with co-author James Gillies, Professor Richard Leblanc from the Corporate Governance Program at the Schulich School of Business in Canada argues strongly that board effectiveness is a product of board structure (eg the size and range of committees), board composition (eg mix of directorial experience and skills), and board process (eg information-gathering, information-analysis, and decision-making activities), and that cognate director effectiveness is a product of director independence, director competence, and director behaviour.⁶² The dynamic interaction between structural and behavioural factors is crucial. In his view, it is not so much the independence of directors which is critical and which should be mandated in corporate governance regulatory reforms. Rather we need to understand that effective corporate boards need directors with certain qualities of independence and with certain competencies who choose to behave in particular ways, with

all of those elements needing to be present as a precondition for both director and board effectiveness. Leblanc's basic model is presented in Figures 1 and 2.

Figure 1

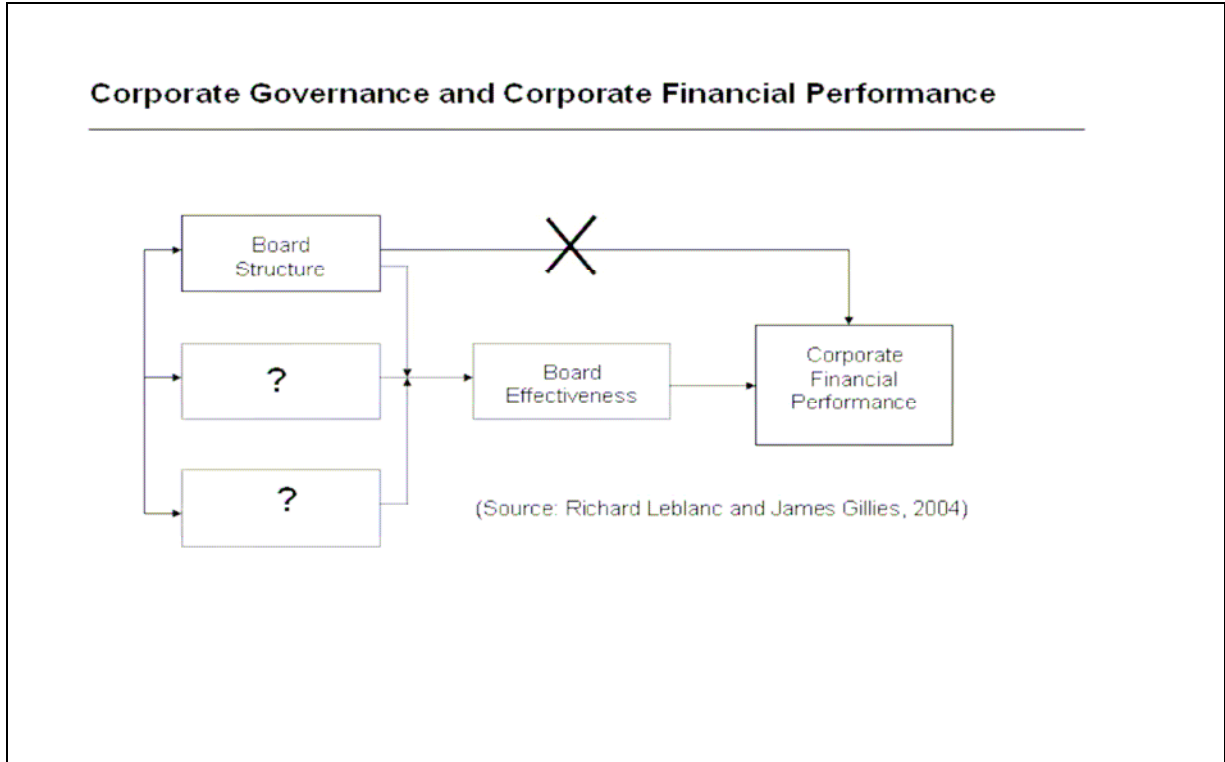
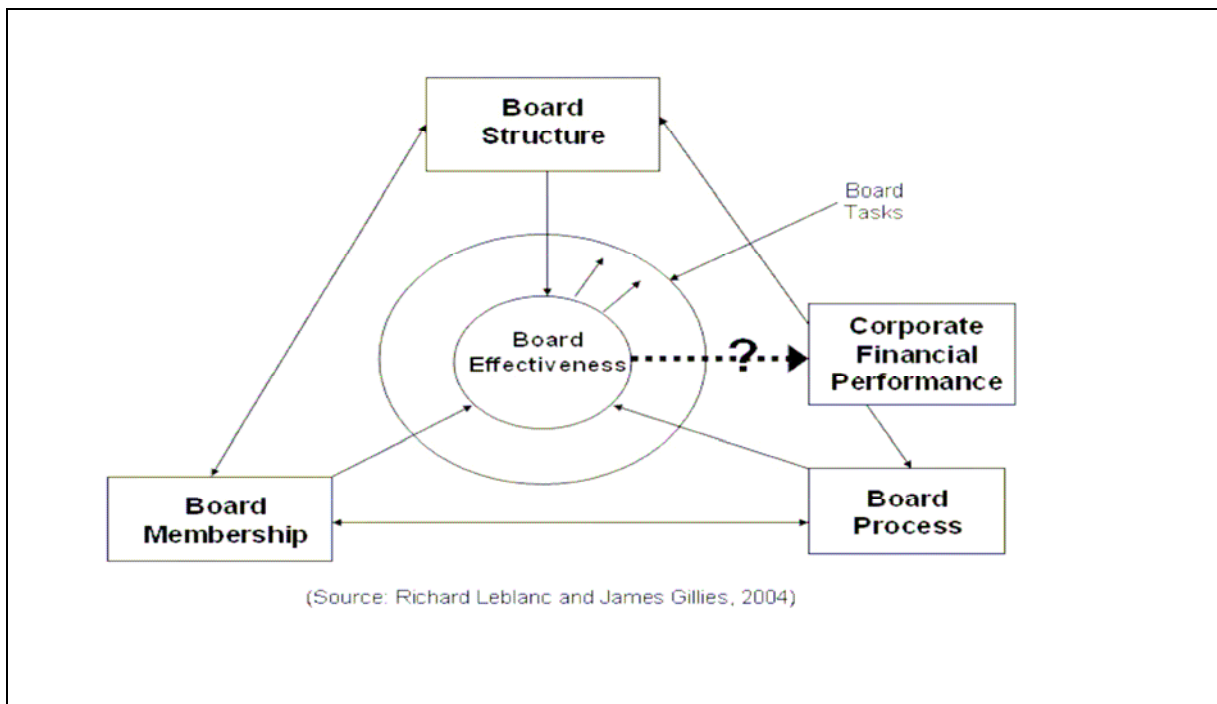
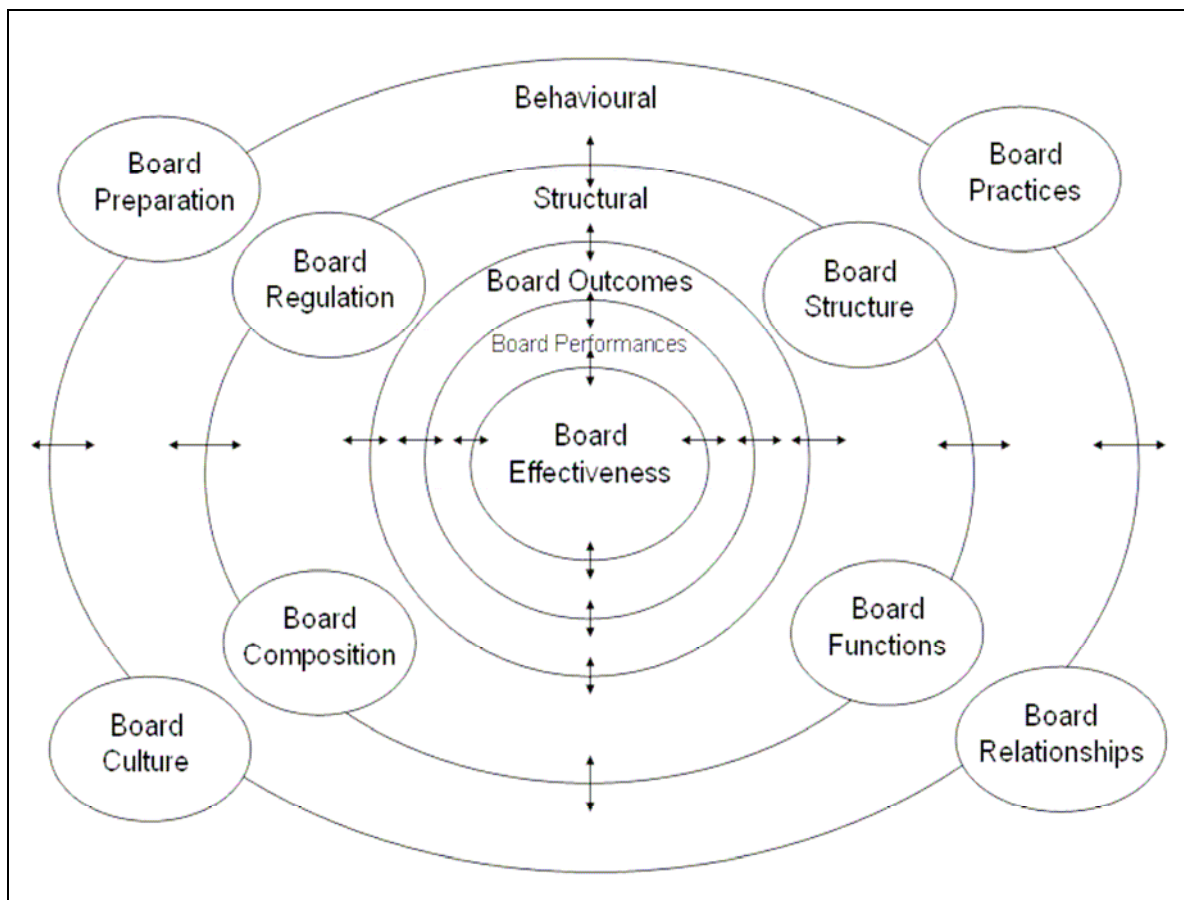


Figure 2



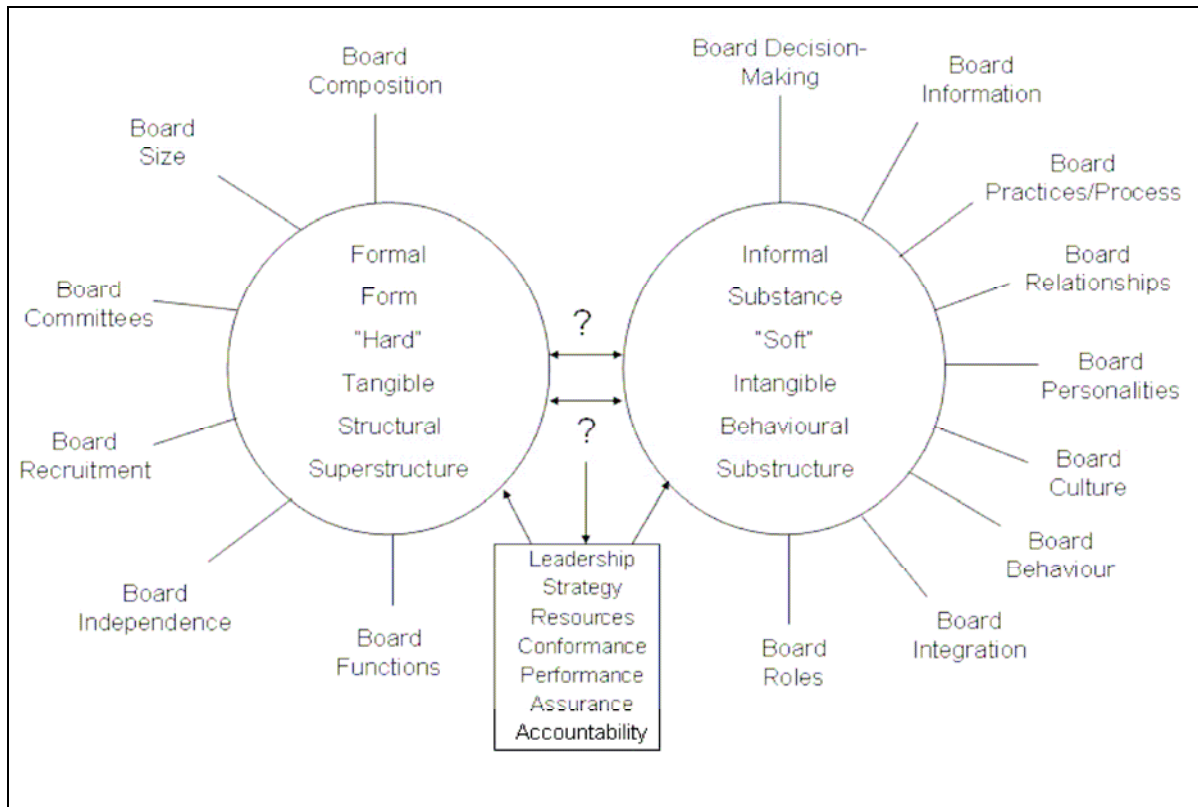
Other empirical work and interviews on corporate governance and performance across the public and private sectors might lead to a conceptualisation of ‘board effectiveness’ factors slightly differently, in ways that do not wrap up everything about board effectiveness into a product of board structures/frameworks, board composition/competencies, and board processes/ practices alone. Those critical factors interact with a few others that are worthy of equal prominence in any model of board effectiveness across both structural and behavioural dimensions, such as board preparation, board relationships, and board regulation, among others. This basic model can be modified and expanded to include such other key features as shown in Figure 3.

Figure 3



Of course, what is implicit within Leblanc’s three critical factors are things that are highlighted here expressly as separate and equally significant structural and behavioural factors. What is important about both models is that they demonstrate starkly that the kinds of recent regulatory reforms of corporate governance in the private sector domestically and internationally (eg under the Sarbanes-Oxley Act in the USA), which relate mostly to board structures and partly to board composition, do not offer a complete package to ensure greater board effectiveness and better corporate performance. Moreover, commonly accepted corporate governance elements like leadership, strategy, conformance, and performance have both ‘hard’ (or formal) and ‘soft’ (informal) dimensions and measures, as illustrated in Figure 4.

Figure 4



All of this is critically important in the implementation of the Uhrig Report and its recommendations. Other analyses and recommendations concerning corporate governance in the public sector here and overseas give equal prominence to such 'hard' and 'soft' elements of corporate governance, especially in connection with the effectiveness of corporate boards.⁶³ This is in contrast to the heavy emphasis upon 'hard' (ie structural and formal) aspects of governance in the Uhrig Report's owner-focused (cf participant-focused) conception of 'governance arrangements' and 'frameworks' across both of its two key templates, eg (p 24):

The most appropriate governance arrangements will depend on the nature of ownership and consequently the extent of separation and independence of the activity from the owner. The range of solutions in the 'governance tool kit' include the use of boards of directors, the mix of independent and executive directors, whether or not the chief executive chairs the board, the use of executive management in lieu of a board, whether or not the owner manages the activity or whether the situation demands the use of other mechanisms. Such arrangements will constitute a framework built from an array of elements of governance chosen collectively to suit the circumstances surrounding a given organisation.

This 'framework built from an array of elements of governance' will be incomplete in its design and implementation if it does not accommodate both 'hard' and 'soft' dimensions and elements of corporate governance.⁶⁴ Some 'soft' aspects of corporate governance also go to the critical behavior of ministers and those who act on their behalf in the way in which they exercise their power formally and informally, and in how they interpret and respond to guidelines and other constraints and influences operating upon them.⁶⁵ The Uhrig Report's professed governance framework (p 37) of 'understanding success (clarity of purpose), organising for success (structures, powers, and relationships) and ensuring success' is useful and yet is highly selective in what it covers in relation to each of those three strands of the framework, compared to what is highlighted in the wider governance literature. Similarly, the

attention to organisational cultures, values, and stakeholders in such a framework needs to include and also go beyond the relatively minor consideration (at least in the overall scheme of the Uhrig Report) of organisational cultures, values, and consultations encompassed by the Report's recommendation that 'Statements of Expectation and Intent should include those values central to the success of an authority, including those relating to its relationships with outsiders' (p 76). If successful governance responsibility and accountability of public sector entities truly includes, but also requires more than, what is outlined in the Uhrig Report, a 'tunnel vision' focus just on what is in the Uhrig Report and how to achieve that risks undermining the full preconditions for successful governance.

The Uhrig-based response here might be that the Uhrig Report has been a catalyst for many good improvements in the system of corporate governance in the Australian public sector, and that it cannot have been expected to paint all aspects of the corporate governance landscape. The former point can be conceded but not the latter point. Simply admitting the relevance and even the importance of non-structural and informal factors affecting board effectiveness in the 'Board Template' is not enough, if those factors are not mentioned and hence marginalised and not integrated with structural and formal factors, as is so often the case. That is part of the problem.

Whether you criticise the Uhrig Report for not considering both 'hard' and 'soft' dimensions of corporate governance, or whether you say that these 'soft' dimensions are important and yet beyond Uhrig's Terms of Reference, the outcome is the same. The Uhrig Report is selective in its conception of what corporate governance means and in its constituent elements. That selectivity flows through to its standpoint, emphasis, analysis, and recommendations. Its defenders can argue that it deals with the essential aspects of the structures and framework of governance and is not meant to be the complete or final word on corporate governance in the APS, or even a self-contained implementation manual (as distinct from a blueprint). Whatever your position on this, the point of ongoing relevance is the completeness and integration of governance aspects in the additional tools needed to support this 'framework built from an array of elements of governance'. What is in the Uhrig Report might be essential, but it does not go far enough.

Information and Communication Protocols – 'No Surprises' for Ministers

The Uhrig Report endorses what has been called a 'no surprises' approach to keeping ministers informed and advised about portfolio bodies. It recommends enhanced oversight of statutory authorities by portfolio departments and secretaries, as follows (p 11):

The role of portfolio departments, as the principal source of advice to Ministers, should be reinforced by requiring statutory authorities and office holders to provide relevant information to portfolio secretaries *in parallel to* that information being provided by statutory authorities and office holders to Ministers. (emphasis added)

What does 'in parallel to' mean in practice? As expert commentators and senior public service managers already realise, there are dangers if it simply or always means 'at the same time as', because otherwise oversight departments and secretaries have little time or capacity to provide ministers with meaningful analysis and advice on the information provided. As Professor Stephen Bartos warns, '(o)ne of the sleepers to my mind, that really portfolio secretaries in particular should be concentrating more on, is the recommendation that was accepted by the government from Mr Uhrig that information that goes to ministers from statutory authorities will at the same time be copied to portfolio secretaries ... (a)nd if

something goes wrong the portfolio secretary has nowhere to hide'.⁶⁶ Putting the matter more formally:⁶⁷

The first time a major administrative blunder, failed policy recommendation or embarrassing revelation about conflicts between a Minister and an authority comes to light it will be the portfolio secretary who shares the opprobrium. Ministers have well-developed mechanisms for avoiding blame ... Portfolio secretaries have no conveniently forgetful ministerial staff to hide behind. They, along with the authority concerned, will share responsibility for any failings. A defence of 'I did not have time to read the information sent to me', while an accurate reflection of the workloads placed on portfolio Secretaries, is unlikely to convince the inevitable inquiry or royal commission that follows an administrative disaster.

As the Secretary of the new Department of Human Services notes,⁶⁸ factors like the 'competitive space' and the 'collaborative space' occupied by service delivery bodies and CEOs, as well as the importance of 'knowing who is saying what to the Minister' in terms of harmonising such departmental 'synergies', combine to make reporting and coordinating through departmental secretaries a new ball game, many of whose operational implications are still to be worked through in the context of both service delivery and other activities. So, communication, information-sharing, and reporting protocols need developing to accommodate and enhance this triangular interaction between statutory authorities, portfolio departments and secretaries, and ministers (and their advisers). In some cases, this might mean adjustments and improvements to existing practices – both formal and informal – but, in other cases, completely new protocols will be necessary. All of this is also an aspect of the wider system of accountability and responsibility suggested here, and of which the Uhrig Report forms only one part, including communication and information protocols along with other responsibility protocols (eg protocols governing ministers and those through whom they act in their interactions with statutory authorities).

Uhrig, Board Chairs, and the Moving Goalposts

As other expert commentators note,⁶⁹ the Uhrig Report's emphasis upon the power balances and interactions between board chairs, CEOs, and ministers in the public sector puts board chairs in the spotlight at the same time that the courts are raising new questions about possible differences in the expectations and responsibilities of chairs and other directors in the business sector. Cases such as *ASIC v Rich* (2003) 44 ACSR 341 open the door to consideration of some board members (eg chairs) having special responsibilities beyond those of other directors because of their positions, qualifications, and expertise.⁷⁰ As the statutory duties of directors in the CAC Act mirror the equivalent directors' duties in the Corporations Act (but with suitable modifications for the public sector context), judicial exploration of such issues under one set of legislative provisions has flow-on relevance for the other set too. This aspect is the subject of another Issues Paper currently being developed by the Corporate Governance ARC project and is simply noted in passing here, because of its connection to implementation issues arising from the Uhrig Report.

Exceptions

One of the most important implementation issues arising from the Uhrig Report is the question of exceptions to its templates and the grounds justifying any exceptions. According to one critic, the terms of reference called for a template and 'even two templates are certain to prove insufficient to encompass the multiple purposes of statutory authorities'.⁷¹

In the media, political and academic debate surrounding the Uhrig Report, especially concerning the amenability of all Australian public sector entities to pigeon-holing neatly within one of the two basic 'Board' and 'Executive Management' templates, sometimes sight

is lost of what the Uhrig Report itself recognised as being outside the scope of its review. This point is important in the post-Uhrig environment, particularly in arguing for or creating any exceptions for certain kinds of statutory authorities. Strictly speaking, anything created or incorporated by statute might be categorised as a ‘statutory authority’. This includes the Reserve Bank (under the Reserve Bank Act 1959 (Cth)); the ANU (under the Australian National University Act 1991 (Cth)); statutory commissions and regulators like the ACCC and ASIC (respectively under the Trade Practices Act 1974 (Cth); and the Australian Securities and Investments Commission Act 2001 (Cth)), as well as statutory bodies expressly described as authorities, such as the Great Barrier Reef Marine Park Authority (under the Great Barrier Reef Marine Park Act 1975 (Cth)) and the new Australian Communications and Media Authority (under the Australian Communications and Media Authority Act 2005 (Cth)).

The Uhrig Report summarises the spectrum of ministerial involvement in governing statutory authorities as follows (p 33):

In summary a Minister’s involvement in the governance of a statutory authority will range from:

- extremely limited involvement (as in the case of the Australian National Audit Office where the Auditor-General has a high level of independence in the performance of functions)
- partially restricted levels of involvement, often establishing operational independence
- high levels of control, including comprehensive powers to direct activities, as would generally be the case where an authority’s main role is service delivery.

This typology of three different levels of ministerial involvement has strengths and weaknesses. Its strength is that it identifies things that are analytically distinct and usefully examined as such. Its weakness is that it might lead people into thinking that these different levels are absolute in their application to different kinds of authorities, in the sense that a completely different level of interaction is justified in the case of each statutory authority, according to its nature. As other commentators have noted, these levels of ministerial involvement are not absolute but context-dependent. A minister might have something at least akin to all of these levels of involvement in the one organisation in different matters and contexts at different times.

In citing the ‘extremely limited involvement’ of ministers in the governance of certain statutory authorities, the Uhrig Report expressly conceded that ‘the governance issues associated with the extremely limited level of ministerial involvement are beyond the scope of the review’ (p 33). So, in the application and extension of the Uhrig Report’s templates and recommendations, nothing in the Report itself directly mandates what should happen to statutory authorities that fit this category of limited ministerial involvement. That leaves room for argument about exceptions, modifications, and guidelines for making choices about governance arrangements that go beyond material in the Report itself. To the extent that the point above about the context-dependent nature of levels of ministerial involvement is correct, the Uhrig Report’s detailed focus upon only two levels of ministerial involvement is problematic.

Of course, both the Uhrig Report and the Federal Government’s formal response to it also accept that the basic templates might need adjustment or modification for particular public sector bodies and circumstances. In words pregnant with possibilities that allow exception-arguing lawyers and policy advisers some room to move, the government’s published response to the Uhrig Report says that ‘(a)s noted in the report, in applying the templates, consideration will be given to any unique factors that may require an adaptation of

the relevant template'. What counts as an adequately 'unique' justification for this purpose is another implementation issue.

As an example, the Uhrig Report templates that seem most apt for public service delivery, directed implementation of policy, and departmental advice and assistance to ministers might need modification in their application to a range of entities that all have one thing in common – namely their connection to the administration of justice and law enforcement (eg the federal courts, the DPP, ASIC etc). Whatever their connection to the executive arm of government, they either constitute (in the case of the courts) or else play key roles in the judicial arm of government, in ways that require special independence and autonomy. The Uhrig-based response that, however 'unique', such bodies could still answer through an executive manager or group, at least for financial administration and ministerial accountability purposes, still needs to confront how those bodies really function and what that means for other aspects of the responsibility and accountability equation. For example, while courts might be publicly funded and subjected to portfolio oversight for some purposes, the relationship between a chief justice of a court and judicial colleagues is neither equivalent to the relationship between a departmental secretary and their executive management group, nor equivalent to the relationship between the chair of a board and other directors. Nor is their relationship with their portfolio minister the same. What other 'unique' entities will this post-Uhrig process uncover?

Choice of Template – Flow-On Implications for Governmental Status and Immunity

The choice of Uhrig template has possible flow-on legal significance too. The points that follow refer mainly to legal dimensions and issues that might need consideration in the post-Uhrig implementation and monitoring phase, in terms of guidance for public sector entities in creating and restructuring public sector entities in light of the Uhrig Report. The point already made about the legal status and significance of non-statutory Statements of Expectation and Statements of Intent and their impact upon and interaction with statutory responsibilities is one such point. That point has other potential legal significance in the discussion that follows. These points simply flag issues for consideration and possible guidance and standard-setting. None of the discussion that follows touches upon the Uhrig Report having or generating legal problems.

Legislative drafting directions and practice aside, imagine that a federal statutory authority is created under legislation but without any clear and express statutory indication of whether or not it represents the executive government for some or all purposes and is entitled to some or all of its immunities. These include the particular immunity from legislation associated with the outdated notion of 'Crown immunity', now more accurately known as 'executive government immunity'). This is enshrined in the particular presumption of statutory interpretation that a relevant executive government and its agents are not bound by a statute unless they are bound expressly or by necessary implication. A court asked to decide whether that entity is liable under another statute must first ask whether that entity has the relevant executive government status and, if so, whether that statute exhibits the necessary legislative intention expressly or by necessary implication to bind the executive government. The judge-made tests for answering the first limb of that question historically focus upon factors like the entity's ownership, control and functions. This is only one of the ways in which the law might need to decide a public sector entity's governmental status and the legal implication of that status, as demonstrated by the various different contexts in which the High Court has recently considered such questions.⁷²

To the extent that the Uhrig reforms promote a particular choice of template by reference in part to broad distinctions between governmental and commercial functions, that choice and the material evidencing it in Uhrig terms – eg ministerial Statements of Expectation, and organisational Statements of Intent – might be considered by a court faced with the legal questions of whether a governmental entity has the relevant governmental status and immunity from legislative liability and compliance. This possibility is demonstrated by the fact that, in the first High Court case to consider governmental trade practices liability for conduct in connection with carrying on business, the High Court in *NT Power Generation Pty Ltd v Power and Water Authority* [2004]⁷³ made reference to and drew inferences from the authority's annual report in characterising its activities as business-like or business-related.

There are other possible legal dimensions and implications too, many of which turn upon distinctions between governmental and non-governmental/commercial functions and activities. Immunity from legislation is only one form of governmental immunity. There are others (eg public interest immunity). The doctrine of executive necessity arguably permits the executive government some freedom in breaching at least some kinds of contracts in circumstances where higher public interests are at stake. While the modern status and scope of that doctrine remains to be tested fully, and while governments can achieve a similar effect contractually by incorporating 'termination for convenience' clauses in their agreements, it still remains technically part of the law. Some statutes outline statutory exemptions and exceptions for public authorities and instrumentalities, where again such distinctions are relevant in characterising particular entities and what they do.

Federal and state 'Crown proceedings' laws have been interpreted to apply substantive liability to governmental entities under other laws, thereby equalising the legal positions for liability purposes of the government and citizens involved in litigation. These 'Crown proceedings' laws have exceptions that turn, in part, on the characterisation of affected interests as governmental or alternatively non-governmental/commercial in nature. Section 64 of the federal Judiciary Act 1903 says, for example:

In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

Finally, the distinction between governmental and non-governmental/commercial functions and activities (and publicly available material relevant to that distinction's application to a particular body under Uhrig requirements) is also critical for matters ranging from governmental ownership of intellectual property to governmental trade practices liability. Under section 2A of the Trade Practices Act 1974 (Cth), for example, and subject to presently irrelevant exceptions, that Act 'binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth'. This means that federal public sector bodies and personnel can be liable for governmental trade practices breaches involving misleading or deceptive conduct, unconscionable conduct, or anti-competitive conduct, for example. As recently interpreted by the High Court, the proscribed conduct is not limited to conduct that itself constitutes business conduct, but extends to other conduct in connection with whatever business is actually conducted by a particular entity.⁷⁴ One unresolved issue is whether this broad interpretation of conduct in connection with business catches governmental or regulatory actions (eg informal ministerial directions or departmental actions) that occur in connection with business but which are not themselves business conduct. If so, this has

implications for the establishment and interactions of different governmental actors with different functions across the spectrum of governmental and non-governmental functions.

One other legal dimension of relevance to the Uhrig Report and its implementation concerns the growing distinction between governmental programs and services delivered by governmental entities themselves and those that are contracted out to the private and civic sectors. Legal implications include the amenability of the latter to adequate public law remedies for affected citizens, and the remedying of any deficiencies on this level by reference to contractual and other accountability mechanisms.

The need to flag and consider such legal issues and dimensions in ongoing work in implementing the Uhrig Report and developing additional regulatory guidelines for that is evident in the *Governance Arrangements for Australian Government Bodies*. That governmental publication focuses attention upon 'Factors Influencing Governance Arrangements', including issues concerning interaction with other laws, such as those where issues of financial administration, privacy, judicial review, copyright, and 'Crown immunity' might arise.

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¹ This Issues Paper represents the views only of its academic authors and does not purport to represent the views of any of the other investigators and partner organisations in the Corporate Governance ARC Project.

² The current structure and contents of the Commonwealth Authorities and Companies Act 1997 (Cth) ('CAC Act'), for example, closely track successive CLERP reforms of relevant provisions of the Corporations Act. Other important Acts forming the background accountability framework within which the Uhrig Report sits, such as the Financial Management and Accountability Act 1997 (Cth) ('FMA Act'), are cited and discussed most recently by the High Court in a related but different federal public sector accountability context, in *Combet v Australia* [2005] HCA 61 (21 October 2005).

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⁴ Campbell and Halligan 1993

⁵ Wanna and Bartos 2003

⁶ Department of the Prime Minister and Cabinet 2003

⁷ Halligan and Adams 2004

⁸ Wiltshire 2005

⁹ Halligan 2003

¹⁰ Watt 2002: 43, 44

¹¹ Department of Finance and Administration 2003; Watt 2002

¹² Department of Finance and Administration 2003, 2004a

¹³ Halligan and Adams 2003

¹⁴ APSC 2004

¹⁵ APSC 2004

¹⁶ Bourkaert and Halligan 2005

¹⁷ APSC 2004

¹⁸ Howard 2001, 2002

¹⁹ Department of the Prime Minister and Cabinet 2003

²⁰ Shergold 2003a

²¹ MAC 2004

²² Shergold 2003a, 2003b

²³ Shergold 2003b

²⁴ Department of the Prime Minister and Cabinet 2004; Shergold 2004

²⁵ Shergold 2004

²⁶ Wettenhall 2004

²⁷ Uhrig 2003

²⁸ Department of Finance and Administration 2004b

²⁹ Shergold 2004

³⁰ Shergold 2004

³¹ Shergold 2004

³² See chapters in Christensen and Laegreid 2005

³³ Department of the Prime Minister and Cabinet 2004; see Wanna 2005

³⁴ Halligan and Adams 2004

³⁵ Shergold 2004

³⁶ Shergold 2005

³⁷ Shergold 2004: 6

³⁸ On these three phases, see: Ioannou, 2005

³⁹ These related but distinct internal and external dimensions might perhaps usefully be the subject of supplemental guidance in the ongoing post-Uhrig implementation and review.

⁴⁰ See the Uhrig-based comments and critiques in references listed at the end of this Issues Paper, especially: Bartos, 2005a; Bartos, 2005b; Wettenhall, 2004-5; Wettenhall, 2005; Gourley, 2004; Grant, 2004-5; and Kalokerinos, 2004. Some of the points summarised here draw collectively from these commentaries.

⁴¹ The scope and nature of internal and external consultation during the process of the Uhrig review has attracted comment and criticism. In *Appendix D – Consultations*, the Uhrig Report lists consultations with our colleague Professor Meredith Edwards from the National Institute for Governance. For the record, other members of the National Institute for Governance also attended a meeting with Mr John Uhrig at the University of Canberra during the Uhrig review.

⁴² Bartos 2005b: 96

⁴³ Bartos 2005b: 96

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- ⁴⁴ Eg *Corporate Governance in Central Government Departments: Code of Good Practice*, 2005, HM Treasury, UK; *The Good Governance Standard for Public Services*, 2004, The Independent Commission for Good Governance in Public Services, UK; *Review of the Governance Framework for Canada's Crown Corporations*, 2005, Report to Parliament, Treasury Board of Canada Secretariat, Canada; and *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, 2005, OECD.
- ⁴⁵ Uhrig 2005
- ⁴⁶ Wettenhall 2004: 67
- ⁴⁷ See also: Bartos 2005b
- ⁴⁸ *Hughes Aircraft Systems International v Airservices Australia* [1997] 558 FCA
- ⁴⁹ Wettenhall 2004-5: 67
- ⁵⁰ Williams 1998; quoting Webber 1996
- ⁵¹ Braithwaite 2002
- ⁵² Braithwaite 2003
- ⁵³ Professor Ronald Dworkin famously posits such a distinction between the kinds of legal standards that operate like 'rules', and the kinds of legal standards that operate like 'principles': see R. Dworkin, *Taking Rights Seriously*, 1978, Duckworth, London.
- ⁵⁴ Gath 2004
- ⁵⁵ Eg contrast section 181 (director's duty of good faith) and section 187 (duty of director of wholly-owned subsidiary) of the Corporations Act.
- ⁵⁶ Eg CAC Act, sections 27A and 28
- ⁵⁷ FMA Act, section 44
- ⁵⁸ Bartos 2005b: 97
- ⁵⁹ Financial Management and Accountability Act 1997 (Cth), section 44
- ⁶⁰ Eg *Hughes Aircraft Systems International v Airservices Australia* [1997] 558 FCA; and *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5, especially at [88]
- ⁶¹ Some of the following discussion draws upon material in: Horrigan 2005.
- ⁶² Leblanc and Gillies 2004
- ⁶³ Barker 2004
- ⁶⁴ For more on the relationship between 'hard' (ie structural/formal) and 'soft' (ie non-structural/informal) factors and the significance of this in the Australian public sector context, see: Edwards and Clough 2005.
- ⁶⁵ Eg Gourley 2004
- ⁶⁶ Bartos 2005a
- ⁶⁷ Bartos 2005b: 98
- ⁶⁸ Scott 2005
- ⁶⁹ Kalokerinos 2004: 612
- ⁷⁰ Austin et al 2005: [1.39]
- ⁷¹ Bartos 2005b: 96
- ⁷² Eg *Bropho v Western Australia* [1990] HCA 24; *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; *SGH Ltd v Commissioner of Taxation* [2002] HCA 18; *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48; and *McNamara (McGrath) v Consumer Trader and Tenancy Tribunal* [2005] HCA 55
- ⁷³ *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48 at [52]-[55]
- ⁷⁴ *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48