

## **Governance Obligations under the Commonwealth Authorities and Companies Act 1997 (the CAC Act)**

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My presentation seeks to provide an overview of key Governance principles applicable to Commonwealth authorities and companies under the CAC Act 1997. In advising clients with respect to obligations under the CAC Act, an understanding of the full context of public and corporate governance is always most important. Governance comprises not only legal rules, but also a wide range of voluntarily adopted principles in practice. As a result, two tensions underlie a consideration of Governance obligations under the CAC Act. A first tension arises in assimilating the duties and responsibilities of directors and officers in corporate law with their roles and responsibilities in practice. A second tension arises in the application of private corporate law and practice to Commonwealth authorities and companies.

The areas I seek to cover include:

- (1) The context of a disaggregated public sector prior to the Uhrig Review, within which the CAC Act 1997 was enacted;
- (2) Key provisions of the FMA and CAC Acts, and relevant Governance Practice Guidelines;
- (3) The Uhrig Review and its significance for Public and Corporate Governance; and
- (4) Emerging Issues and potential liabilities.

While most of the advice you may be called upon to give is likely to relate to compliance issues in the context of the post-Uhrig era, I suggest in this presentation that an important consequence of the Uhrig reforms is also the clarification of responsibilities and potential legal liabilities of those involved in the direction and management of CAC bodies. The potential liability and loss of reputation has been highlighted of course by the AWB case.

### **1. THE CONTEXT OF GOVERNANCE PRIOR TO THE UHRIG REVIEW**

Halligan and Horrigan summarise the era of public sector disaggregation in this way:

“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 main ones had largely moved out of the public sector).”<sup>2</sup>

There were other important consequences of this disaggregation for governance in the public sector. In a disaggregated public sector, the corporation becomes an attractive

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<sup>2</sup> Halligan J and Horrigan B, Reforming Corporate Governance in the Australian Federal Public Sector (Issue Paper No 2) at 1, a paper written for the ARC funded research project: *Corporate Governance in the Public Sector: An Evaluation of its Tensions, Gaps and Potential*. All papers are broadly distributed and are available online at [www.canberra.edu.au/corpgov-aps](http://www.canberra.edu.au/corpgov-aps).

vehicle for independence from government and for devolved authority and responsibility in business. The rationale for disaggregation shifts from time to time between improved efficiency and performance and independence from government. It also becomes a natural thing for the public sector to absorb principles of corporate governance from the private sector and, with this, the language of private corporate law. However, there are clearly difficulties in doing this. Importantly, the collective authority of a board of directors has a decision making power that derives from the private corporate constitution and is founded upon principles of private corporate law.

While the legal foundations for corporate governance in the private and public sectors remain fundamentally distinct, some driving forces for improved corporate governance in the private sector owe a good deal to public considerations. For example:

- (1) The rise of broadly funded pension funds as a dominant source of corporate capital and as active shareholders; and
- (2) The rise of wider “stakeholder” interests in public companies and corporate social responsibility;

Throughout the 1990s, there has been the supplementation of corporate law with a plethora of corporate codes of practice and codes of practice published by major shareholders. The developments reflected in these codes may be conveniently illustrated by reference to the ASX Corporate Governance Principles.

The ASX Corporate Governance Principles (2003) comprise the following 10 principles:

- (1) Lay solid foundations for management and oversight;
- (2) Structure the board to add value;
- (3) Promote ethical and responsible decision making;
- (4) Safeguard integrity in financial reporting;
- (5) Make timely and balanced disclosure;
- (6) Respect the rights of shareholders;
- (7) Recognise and manage risk;
- (8) Encourage enhanced performance;
- (9) Remunerate fairly and responsibly; and
- (10) Recognise the legitimate interests of stakeholders.

## **2. KEY PROVISIONS OF THE FMA AND CAC ACTS**

### **The Financial Management and Accountability Act 1997 (the FMA Act)**

The purpose of the FMA Act is to provide a framework for the proper management of **public money** and **public property**. These terms are defined in s. 5 to refer to money or property that is owned or held by the Commonwealth, including money or property held on trust.

### **Part 6: Control and management of public property**

Section 44

Subs. 44(1): A Chief Executive must manage the affairs of the Agency in a way that promotes the proper use of the Commonwealth resources for which the Chief Executive is responsible.

Subs. 44(3): In this section proper use means **efficient, effective and ethical** use.

### Section 53

Subs. 53(1): A Chief Executive may, by written instrument, delegate any of the Chief Executive's powers under the Act (including powers or functions delegated to the Chief Executive under s. 62)

### Part 7: Special responsibilities of Chief Executives

#### **Commonwealth Authorities and Companies Act 1997 (the CAC Act)**

The purpose of the CAC Act is to regulate certain aspects of the financial affairs of Commonwealth authorities. It contains detailed rules about the reporting obligations of authorities and their accountability. It also deals with the conduct of authorities' officers and with their banking and investment obligations. For Commonwealth companies, the Act contains reporting and other requirements that apply in addition to the *Corporations Act 2001*.

#### **Part 2: Definitions**

*director* means:

- (a) for a Commonwealth authority that has a council or other governing body—a member of the governing body;
- (b) for a Commonwealth authority that does not have a council or other governing body—a member of the authority; or
- (c) for a Commonwealth company—a person who is a director of the company for the purposes of the *Corporations Act 2001*.

*GBE or government business enterprise* means: a Commonwealth authority or company that is prescribed by the regulations for the purpose of this definition.

*officer*, in relation to a Commonwealth authority, means:

- (a) a director of the authority: or
- (b) any other person who is concerned in, or takes part in, the management of the authority.

#### **Part 3: Reporting Obligations for Authorities**

##### **Section 7: Meaning of *Commonwealth authority***

Subs. 7(1): In this Act, Commonwealth authority means either of the following kinds of body that holds money on its own account:

- (a) a body that is incorporated for a public purpose by an Act;
- (b) a body that is incorporated for a public purpose by: (i) regulations under an Act; or (ii) an Ordinance of an external Territory or regulations under such an Ordinance; and is prescribed for the purposes of this paragraph by regulations under this Act.

Subs. 7(2): None of the following are Commonwealth *Commonwealth authorities*:

- (a) Corporations Act companies;

(b) Aboriginal associations ...etc.

Section 9: Directors must prepare annual report

Section 15: Responsible minister to be notified of significant events

Section 16: Keeping responsible minister and Finance Minister informed

Section 17: Corporate Plan for GBE

### **Part 3, Division 4: Conduct of officers**

Section 21: Background to duties of directors, other officers and employees

Subdivision A: General Duties

Section 22: Care and diligence (a civil penalty provision-Schedule 2 sets out the civil and criminal consequences of a contravention)

Section 23: Good faith-civil obligations

Section 24: Use of Position-civil obligations

Section 25: Use of information-civil obligations

Section 26: Good faith, use of position use of information criminal offences

Section 27A: Compliance with statutory duties

Section 27B: Interaction of sections 22-26 with other laws etc

Section 27C: Disqualification order for contravention of civil penalty provision

Section 27D: Reliance on information or advice provided by others

Section 27E Responsibility for actions of delegate

Subdivision B Disclosure of, and voting on, matters involving personal interests

### **Part 4: Reporting Obligations for Companies**

#### **Division 1-Preliminary**

#### **Section 34: Meaning of *Commonwealth company* and *wholly-owned Commonwealth company***

Subs. 34(1): A *Commonwealth company* means a Corporations Act company in which the Commonwealth has a controlling interest (but not when that controlling interest is held through interposed Commonwealth entities)

Subs. 34(2): A *wholly-owned Commonwealth company* means any Commonwealth company, other than a company any of the shares of which are beneficially owned by a person other than the Commonwealth.

#### **Division 2 Reporting obligations**

##### **Subdivision A: Annual report**

##### **Subdivision B: Other reporting obligations**

Section 38: Interim reports

Section 39: Estimates

Section 40: Responsible Minister to be notified of significant events

Section 41: Keeping responsible Minister and Finance Minister informed

Section 42: Corporate plan for GBE

**Subdivision C: Miscellaneous**

Section 43: Compliance with general policies of Government

Section 44: Audit committee

**Schedule 1: Annual report for authority**

**Schedule 2: Civil and criminal consequences of contravening civil penalty provisions**

**3. THE UHRIG REVIEW AND ITS SIGNIFICANCE**

Halligan and Horrigan have characterised the Australian public sector, following publication of the Uhrig Review.<sup>3</sup> They note that the centralisation of delivery and implementation, the emphasis on coherence and whole of government issues, and the emphasis on performance and responsiveness to government policy:

“... shift the focus to some extent from the vertical to 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.”<sup>4</sup>

As a result, the authors identify four important elements in the emerging Australian model:

- (1) Resurrection of the central agency and control over departments;
- (2) Whole of government to express a range of forms of co-ordination;
- (3) Central monitoring of agency implementation and delivery; and
- (4) Departmentalisation through absorbing statutory authorities and reclaiming control of agencies with hybrid boards to accord with corporate governance prescriptions.

**4. EMERGING ISSUES AND POTENTIAL LIABILITIES**

It must be remembered that the Uhrig review concentrated upon the governance of a particular group of Commonwealth statutory authorities, paying particular attention to ‘those that impact on the business community’.<sup>5</sup> This focus is evident in the Review. However, questions remain as to how well other bodies might fit within the board and executive management templates suggested in the Uhrig Review.

One particularly significant development for corporate governance in the public sector (and one which has important implications for corporate governance in the private

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<sup>3</sup> Uhrig J, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, Canberra: Australian Commonwealth Government, 2003 at 1, and Appendix A..

<sup>4</sup> Note 2 at 2-3.

<sup>5</sup> Uhrig J Note 3 at Appendix B: The eight statutory authorities considered were: The Postal Corporation, the Reserve Bank of Australia, the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission, Centrelink, the Health Insurance Commission, the Australian Taxation Office and the Australian Competition and Consumer Commission.

sector) may be the evolution of the ‘purpose-built’ governance board with some very distinctive features. The authority of this board derives less from its corporate setting and more from its defined purpose within stated policy objectives. The authority of the board is likely to be enshrined in the constitution or charter and supported by other mechanisms of governance, such as Statements of Expectation and Intent.<sup>6</sup> This also sets the boundaries of business judgment for directors sitting on such boards. It may provide the foundation for the creation of statutory authorities in the future.<sup>7</sup>

### **Key elements in the governance of boards in the public sector**

The dominant role of the government in limiting the power and authority of governance boards and selecting board members identifies the key considerations for corporate governance in the public sector. These are:

- (1) Scope of board power and authority: determined by the enabling Acts and regulations, the CAC Act, Charters and Statements of Expectations and Intent;
- (2) Appointment Processes: Nomination of candidates, Ministerial control;
- (3) Board composition (Skills, experience, gaps, independence, interest representation on the board)
- (4) Dynamics of board decision-making: Chairmanship etc;
- (5) Relationship between the board and Ministers; and
- (6) Conflicts of Interest within the board.

### **CONCLUSION**

In advising clients as to what is good and poor governance, a thorough understanding of the context in law and practice within which issues of corporate and public governance now arise is essential. It is true that most advice to CAC Act bodies and their officers will concern compliance issues rather than liability issues. Those issues are now more complex and demand a simultaneous appreciation of both whole of government responsibilities and centralisation in policy implementation. Post-Uhrig, the particular character of corporate responsibility under the CAC Act is probably becoming clearer and the potential for legal liability and loss of reputation by the directors and officers of CACA bodies appears far more real following the AWB case.

The closer working relationship in practice between the board and government policy makers remains an important space to watch. In my view, it is forging a brand of corporate and public governance that is distinctive to the public sector and adding substantially to traditional concepts of good governance in the private sector. While the context of corporate governance in the private sector remains quite distinct, the principles of corporate governance evolving in the public sector, through the policy constraints and limited authority within which boards must act regardless of corporate form, focuses attention more keenly upon directors’ purposes and the roles they play in the exercise of their powers as directors. This focus may be identifying some common ground in corporate governance in the private and public sectors.

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<sup>6</sup> Uhrig J, Note 3 at 89, particularly at 91-2.

<sup>7</sup> Uhrig J, Note 3 at 57.