

CORPORATE GOVERNANCE IN THE PUBLIC SECTOR FROM THEORY TO PRACTICE

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Governance in the Public Sector: Lessons from the Research

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WHAT IS A GOVERNANCE BOARD ANYWAY?

BACKGROUND TO EMPIRICAL STUDY

First, it is important to note that the Principal Investigators in the present project would hope to interview a good many more representatives of Commonwealth authorities and companies, so that the views expressed by them today are by no means concluded views. Rather, the views expressed attempt to identify some points of particular relevance that seem to be emerging from the interviews to date.

Second, it should also be noted that the questions addressed in the present empirical study were conceived independently of the Uhrig Review, and some time before the *Uhrig Review* was announced.¹ The focus of our study is upon the essential character of boards in the public sector and their suitability for the purposes for which they are established. We seek to extract general principles from a wider range of bodies than those having an impact on the business community. For this reason, we are examining the relationship between these bodies and other arms of government, and the relationship between these bodies and the public. For us, questions of board efficiency and performance are likely to depend upon these foundation principles.

While not focussing directly upon the same issues set out in the Terms of Reference for the Uhrig Review, we are able to add some of our own findings to those of the Review. In some respects, our findings tend to confirm the findings of the Review. However, we would also hope to develop principles of more general application for the wide range of boards in the Commonwealth public sector. 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'.² This focus is evident in the Review.³ However, a question remains as to how well other bodies are likely to fit within the board and executive management templates suggested in the Uhrig Review.

A) Board and Executive Management Templates:

- (1) The requirements of the *Commonwealth Authorities and Corporations Act 1997* and the *Financial Management and Accountability Act (1997)*

¹ The empirical study undertaken for this ARC funded project followed upon the findings of an earlier study undertaken for the National Institute for Governance. That report assembled some empirical evidence of a number of tensions and gaps that were emerging in the functioning of boards in the Australian public sector at that time. See Edwards M, Nicoll G and Seth-Purdy R, *Tensions and Gaps in Boards of the Australian Public Sector*, Canberra: University of Canberra, 2003.

² Uhrig J, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, Canberra: Australian Commonwealth Government, 2003 at 1, and Appendix A.

³ Uhrig J Note 1 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.

- (2) The authority of the Government agent versus the authority and autonomy of the board;
- (3) Collective decision-making and the board concept; and
- (4) Governmental and corporate responsibility.

B) Some Empirical Evidence (see below):

- (1) Independence from government is claimed by CAC interviewees, but is not always the reality;
- (2) Business judgment is subject to the constraints of Government policy, and corporate and strategic plans reflecting that policy;
- (3) Corporate and Strategic Plans tend to define corporate and board purpose;
- (4) Directors express different views as to whom they owe their legal duties (strictly, these are owed to the body under the Act);
- (5) The appointment process may undermine board independence; and
- (6) The Government shareholder may undermine independence.

C) Some Initial Thoughts on the Empirical Evidence:

- (1) The form of the board evolving in the public sector may be ‘purpose-built’ (built upon an overriding public purpose, defined by policy and reflected in a de facto ‘constitution’);
- (2) The Purpose-Built Board seems to accord with the Uhrig Review’s Statements of Expectation and Intent, and with Finance’s ‘Charters’;
- (3) The Purpose-Built Board seems to accord with the need for particular director skills and a coherent board, rather than ‘independence’ alone;
- (4) The Purpose-Built Board seems to accord with the decline of ‘representative’ boards generally in both public and private sectors.

A tentative conclusion on the empirical evidence gathered to date for the present study may be that a ‘purpose-designed’ board in the public sector is emerging. In terms of the Uhrig Review, clearly defined purpose, enshrined in the constitution or charter and supported by other mechanisms of governance, such as Statements of Expectation and Intent,⁴ seems to provide a valuable foundation for the creation of statutory authorities in the future.⁵ It may be what will most clearly define the ‘independence’ of these boards from government.

A purpose-built board may also be what ultimately distinguishes these boards and corporations in the public sector most clearly from those in corporate law generally. This is because the purpose-built board also accords with modern developments in corporate law (the legal duties of officers in the *Corporations Act* 2001 owed to the corporation or to the corporation ‘as a whole’, and legal duties to act ‘for proper purposes’).

⁴ Uhrig J, Note 1 at 89, particularly at 91-2.

⁵ Uhrig J, Note 1 at 57.

EXAMPLES FROM THE EMPIRICAL EVIDENCE

Independence of CAC Bodies from Government:

Board members of Authorities and Companies are generally keen to claim their independence of government. Ratings ranged from 'totally' or 'absolutely' independent to 'mainly' independent or 'heading towards' independence. CEOs are more equivocal about this.

[Chair]: 'Totally independent. This is because we have built in representation from both sides of politics. We can't be a rubber stamp for the Minister without the other side of government knowing all about it.'

[Chair]: 'Totally independent. Absolutely independent, despite the fact that the board members are all mates with the PM.'

[CEO]: 'I think if you look at organisations across the Commonwealth there is a fairly random distribution of CACs and FMAs. I'd find it hard to argue the reason we are a CAC at the moment. Authorities are good at giving focus to service delivery, and there is some value in small decisions being at arm's length from government. However, despite our technical status, I see us as being like a subsidiary of News Corp. If you sacked Rupert Murdoch's son, you'd soon go out of business.'

Business Judgment Exercised by the Board:

The business judgment of the board is defined within the constraints of government policy. Corporate and strategic plans define the body's autonomy and 'independence' For example:

[Chair]: 'We are totally independent. Very independent. We are at arms length from government. We are also sensitive to government's wishes. Our corporate plan specifies what we do and it wouldn't cross our mind to buck government policies';

[CEO]: 'There is an issue with government sometimes being a shareholder and sometimes a customer. So, I've changed my view a bit from simply referring people to the Act. I agree that a charter that spells out roles etc. could be useful, particularly in the face of possible ministerial change.'

[Chair]: 'It's how we do business. Our board sees its independence business judgment as its expertise on the organisation's business. The Government director often remains silent on the actual business. But, of course, the board is incredibly sensitive to the government's requirements/policy.'

Government Policy, Corporate and Strategic Plans:

[CEO]: 'We have a reasonably formal approach. The Government is a customer, so we need a 'customer service strategy' as well as a strategic plan and corporate plan. This is what we'll

do in the future. Government policy is reflected in the corporate plan and the 5-year strategic plan, which are given to the Minister.’

[Chair]: ‘We develop a policy for the institution and give this to the Minister. There are no government guidelines as to the sorts of things we can do. The Government can set policy and direction within a framework of serving the people. A good Chair and board can lead the government.’

Skills Competencies Independence:

[Chair] ‘I think its skills and competencies. Skills are important. Independence is a given.’

Legal Duties to the Body:

The responses of interviewees to this question revealed considerable variety in the range of persons to whom CAC directors owe their legal duties. This may be indicative of uncertainty in the essential character of these corporate entities in the public sector. For example:

[CEO]: ‘I have a legal responsibility as a member of the board to act in the interests of the board. But, I would balance that with my responsibility to act in the interest of the Minister and the Australian Government.’

[Chair]: ‘I am primarily responsible to the public. The Chair has to ensure public safety and security. This leads to public confidence in the process. I am also responsible to the ministerial Council.’

Cross-Portfolio Board Representation:

[Managing Director]: ‘It’s specified in our Act that 5 or 6 board members are to be from the Department/related agencies. It’s helpful to have some representatives from government, but not this many. If there weren’t any representatives on the board we would use a consultative mechanism, which could be just as effective.’

Performance:

[CEO]: ‘In future, we will align corporate strategy and corporate performance’.

[Director]: ‘We have a complete performance management framework. This is tied to our Business Plan and ultimately to our Strategic Plan’.

[Chair]: ‘We have started a process of self-assessment of the Board as a whole. This has been instituted to line up the organisation’s performance with Board performance’.