

IN THE MOONLIGHT? THE CONTROL AND ACCOUNTABILITY OF GOVERNMENT CORPORATIONS IN AUSTRALIA

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Government corporations have been an integral part of the Australian system of public administration since colonial times. Yet they have been mired in controversy over the years, including the large-scale banking collapses in Victoria and South Australia. Government corporations pose a tension between the independence of an arms-length body, in terms of managerial and operational freedom from government control, and accountability to the government that owns or controls the corporation. This article examines the control and accountability of statutory corporations and government-owned and -controlled companies in Australia, both in terms of internal controls via the structuring of these corporations and the operation of directors' duties, and external controls through legal, parliamentary, and financial accountability. It argues that the device of the statutory corporation should be preferred, as it possesses the virtues of an arms-length body within a more comprehensive governance and accountability framework.

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I INTRODUCTION

Government businesses have been a fixture in Australia since colonial times. They may be structured either as (1) statutory corporations, or (2) government-owned or -controlled companies established under the *Corporations Act 2001* (Cth) (*'Corporations Act'*).¹ In this article, the term 'statutory corporation' is used to refer to those in the first group, and 'Commonwealth company' to refer to those in the second. The term 'government corporation' encompasses both of these categories. Alongside departments, government corporations play an important role in the structure of the Australian system of public governance. All government corporations 'have a dual nature; they are instruments of national policy but they are autonomous units, with legal independence', handling 'aspects of commercial undertakings'.² As such, the regulation of these corporations must balance the tension between an independent corporation with managerial and operational freedom, and 'a "popular representative" (a Minister) exerting control over the independent board to harmonise its actions with public opinion', as the Minister is constitutionally responsible to Parliament.³

On the one hand, government corporations have been structured as arms-length bodies to remove an area of specialist activity from the partisan interference and short-termism exhibited by periodically elected officials, and to enhance efficiency in government operations. Herbert Morrison, a former Minister of Transport in Britain, stated:

[I]t is necessary that the management [of national undertakings] should be sufficiently free from those undesirable pressures associated with both public and private Parliamentary strategy, political lobbying, and electoral 'blackmail'. Subject to whatever Ministerial or other checks or appeals may be provided in the public interest, the management must be a responsible management and

¹ *Public Governance, Performance and Accountability Act 2013* (Cth) ss 89(2)–(3) (*'PGPA Act'*). See below nn 42–3 and accompanying text. See also *Ombudsman Act 1976* (Cth) s 3(1) (definition of 'Commonwealth-controlled company') (*'Ombudsman Act'*).

² W Friedmann, 'The New Public Corporations and the Law' (1947) 10(3) *Modern Law Review* 233, 236.

³ FA Bland, 'Some Implications of the Statutory Corporation' (1937) 15(4) *Public Administration* 393, 397.

must be able to stand its ground in the interests of the undertaking which is committed to its charge.⁴

On the other hand, complete insulation from political accountability effectively places significant power in the hands of a ‘small, unrepresentative, and often self-perpetuating group’ controlling the government corporation.⁵

Government corporations have not been without controversy in Australia over the years. In the 1950s, the Joint Committee of Public Accounts made findings of mismanagement by the Australian Aluminium Production Commission, a statutory corporation set up to ensure the production of aluminium resources for defence purposes.⁶ In the 1980s, the WA Inc Royal Commission investigated large-scale scandals involving the murky relationships between government and business, where the State government improperly utilised statutory authorities and government-owned companies to prop up the failing merchant bank Rothwells with public funds.⁷ The Commission found that senior politicians acted to elevate their personal or party interests above the public interest, which culminated in the jailing of two State Premiers, Brian Burke and Ray O’Connor.

The Commission noted that government-owned corporations were used as a device to evade accountability and disclosure to Parliament and the public:

The evidence showed that it was possible to use the limited accountability of a public sector agency, WAGH [West Australian Government Holdings Ltd], to protect from disclosure to the Parliament and the public a commitment of public funds. Furthermore, in that particular case, the exercise of governmental influence was not disclosed.⁸

In addition, the Commission found that incompetent people ‘with no apparent qualification to exercise the responsibilities entrusted to them’ were

⁴ Herbert Morrison, *Socialisation and Transport: The Organisation of Socialised Industries with Particular Reference to the London Passenger Transport Bill* (Constable & Co, 1933) 137–8, quoted in *ibid* 395.

⁵ Harold Seidman, ‘The Government Corporation: Organization and Controls’ (1954) 14(3) *Public Administration Review* 183, 185.

⁶ See generally Joint Committee of Public Accounts, Parliament of Australia, *Australian Aluminium Production Commission* (Report No 21, 2 June 1955) pt 1. See also LC Webb, ‘Statutory Corporations under Review’ (1955) 14(3) *Australian Journal of Public Administration* 158, 158.

⁷ *Royal Commission into Commercial Activities of Government and Other Matters* (Final Report, 12 November 1992) pt 2.

⁸ *Ibid* ch 3, 26 [3.14.6].

appointed to statutory authorities and were given control of large sums of public funds, but disregarded their legal and public duties.⁹

At the federal level in 1989, the Senate Committee on Finance and Public Administration was also critical about the rapid growth of the number of subsidiary companies formed by government corporations, as well as the growth of substantial minority government shareholdings in companies, which allowed these bodies to evade accountability to the legislature.¹⁰ The Committee expressed the concern that '[t]he veil of incorporation may be used to resist calls for ministers to be answerable for the conduct of government business', and found that the reporting and auditing arrangements of government companies were inadequate, therefore weakening the ability of Parliament to carry out its scrutiny functions effectively.¹¹

The collapse of both the State Banks of Victoria and South Australia in the 1990s are large-scale examples of mismanagement by government-owned financial corporations. The State Bank of Victoria was put in financial peril due to the weight of irresponsible lending made in the 1980s by its wholly owned merchant bank subsidiary Tricontinental. Tricontinental eventually collapsed with catastrophic losses of \$2.7 billion, which threatened the existence of the State Bank and led to its forced sale to the Commonwealth Bank.¹² The Royal Commission investigating the matter found that 'Tricontinental's management of credit risk failed at almost every turn',¹³ and some of Tricontinental's investment banking transactions gave rise to 'deep suspicions of warehousing, insider trading, and failure to disclose relevant interests in substantial shareholdings'.¹⁴ The Commission also remarked that government ownership of Tricontinental meant that its parent company, the State Bank, was not under the supervision of the Reserve Bank, and there was no informal 'supervision' by market forces of its ability to borrow funds or its share price.¹⁵ Nevertheless, the Commission found that the government properly refrained

⁹ Ibid ch 3, 29 [3.14.14].

¹⁰ Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Government Companies and Their Reporting Requirements* (Report, November 1989) 5–17 [2.1.1]–[3.3.6].

¹¹ Ibid 25 [4.2.15], chs 5–6. See also John Coates, 'Government-Owned Companies and Subsidiaries: Issues in Accounting, Auditing and Accountability' (1990) 49(1) *Australian Journal of Public Administration* 7, 10.

¹² *Royal Commission into the Tricontinental Group of Companies* (Final Report, 31 August 1992) vol 1, 67–73 [7.6]–[7.33], vol 2, 830–1.

¹³ Ibid vol 2, 839.

¹⁴ Ibid vol 2, 808 [19.137].

¹⁵ Ibid vol 2, 837.

from interfering with the State Bank's day-to-day commercial operations and absolved the government of responsibility for the collapse.¹⁶

In a similar vein, the State Bank of South Australia was in such a parlous financial condition that the taxpayers were forced to pay a \$3.1 billion bailout before the State Bank was sold to Advance Bank.¹⁷ The Royal Commission investigating the issue found that the then Treasurer deserved 'severe criticism' and should have exercised more control over the State Bank and monitored its dangerous lending but, at the same time, should have intervened less in the State Bank on political issues, such as interest rates at election time.¹⁸ The Commissioner also lambasted the board of the Bank for its incompetence and reckless lending of public money.¹⁹

These scandals illustrate the problems that arise from the use of the government corporation as an instrument of government policy. There is a risk of reduction of accountability to Parliament, combined with a lack of clarity about the level of monitoring or control that should be exercised by government over the activities of its corporations, which is then in tension with the level of independence from political interference that these arms-length bodies should possess.

Government corporations are thus of interest to public lawyers, as they may provide a way of operating a 'government by moonlight',²⁰ by performing public functions with low political visibility and, in non-wholly owned companies, with diluted accountability. Yet there is not much literature systematically examining the checks and controls that are applicable to these bodies, and much of what has been written is now dated,²¹ as much has changed since the introduction of the *Public Governance, Performance and Accountability Act 2013* (Cth) ('PGPA Act').

¹⁶ Ibid vol 1, 7 [2.10].

¹⁷ Greg McCarthy, 'Two and Two Make One: The Collapse of the State Bank of South Australia' [1995] (11) *Policy, Organisation and Society* 85, 88, 91.

¹⁸ See *Royal Commission into the State Bank of South Australia* (First Report, 13 November 1992) 389–90.

¹⁹ *Royal Commission into the State Bank of South Australia* (Second Report, 5 March 1993) 21, 164–5.

²⁰ Patrick Birkinshaw, Ian Harden and Norman Lewis, *Government by Moonlight: The Hybrid Parts of the State* (Unwin Hyman, 1990).

²¹ See, eg, Stephen Bottomley, 'Corporatisation and Accountability: The Case of Commonwealth Government Companies' (1997) 7(2) *Australian Journal of Corporate Law* 156; Richard Jolly, 'Government Owned Corporations: Public Ownership, Accountability and the Courts' (2000) 24 *AIAL Forum* 17.

This article seeks to redress this. It will first consider the classification, characteristics, and functions of government corporations at the federal level in Australia (Part II), and then examine their history and rationale (Part III). Following this, in Part IV, the article will analyse the control and accountability of government corporations, through both internal controls via the structuring of these corporations and the operation of directors' duties, as well as external controls through legal, financial, and parliamentary accountability. In doing so, it will grapple with the consequences of various forms of government ownership of corporations (ie full ownership with a statutory basis, full ownership of private companies, or control of private companies) for the accountability arrangements that apply to these corporations. This article is confined to analysing government companies at the federal level, but it should be noted that the states have their own separate regulatory regimes for government business enterprises.²²

II GOVERNMENT CORPORATIONS: CLASSIFICATION, CHARACTERISTICS, AND FUNCTIONS

A Commonwealth government corporation can be established in two ways: as a statutory corporation by a specific Act of Parliament, or as a registered company under the *Corporations Act* ('Commonwealth company'). Both types of corporations are separate legal entities from government.

For statutory corporations, the constituting statute may create a corporation 'comprising a board of directors, to be appointed by the executive, with defined tenure and conditions for removal'.²³ Through the Administrative Arrangements Order, which lists the matters handled by each department and allocates responsibility for legislation to Ministers, responsibility for the statutory corporation is allocated 'to the Minister in charge of the Department of State most closely related to the activities of the corporation'.²⁴ Thus, for statutory corporations, there is a defined chain of accountability to a Minister, who is in turn responsible to Parliament.

²² See, eg, *State Owned Corporations Act 1989* (NSW); *Government Owned Corporations Act 1993* (Qld); *Government Business Enterprises (Competition) Act 1996* (SA); *Government Business Enterprises Act 1995* (Tas); *State Owned Enterprises Act 1992* (Vic); *Statutory Corporations (Liability of Directors) Act 1996* (WA).

²³ Christos Mantziaris, 'Ministerial Directions to Statutory Corporations' (Research Paper No 7, Parliamentary Library, Parliament of Australia, 8 November 1998) 3 <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp07>, archived at <<https://perma.cc/6XMH-NXFC>>.

²⁴ *Ibid.* See generally Governor-General, *Administrative Arrangements Order* (29 May 2019).

A Commonwealth company may be wholly owned by government or partly owned by the private sector, with government control over the entity. To control a *Corporations Act* company, the Commonwealth may go through the processes stipulated in corporations law to incorporate a company and make Commonwealth officers (such as Ministers) shareholders with a controlling interest,²⁵ or acquire shares in an existing company to the extent that it acquires a controlling interest.²⁶ As we will see below, the *PGPA Act* also imposes on Commonwealth companies certain legislative responsibilities to their relevant Minister, who may be questioned in Parliament about the companies.²⁷

Government corporations are distributed across the full spectrum of governmental activity across all portfolios, and are located in various sectors, including the distribution of natural resources (eg environmental protection, rural industries, fisheries, grains, cotton, water, mining, and petroleum); transport (eg aviation and rail); monopoly supplies of goods and services (eg defence and postal services); public financial corporations (eg insurance corporations); cultural institutions (eg national museums, galleries, and broadcasters); and social services (eg indigenous affairs, health, education, and training).

The nature of the bodies also varies, and includes commercial enterprises delivering goods and services (eg Australian Postal Corporation); social welfare organisations (eg Australian Hearing Services); regulators administering statutory schemes (eg Australian Human Rights Commission); and cultural institutions (eg National Gallery of Australia and Australian Broadcasting Corporation).

There is little difficulty in identifying government corporations at the Australian federal level. A definitive list of these corporations is maintained and updated by the Department of Finance, alongside a flipchart of corporate and non-corporate government entities used across government.²⁸ In addition, the Australian Government Organisations Register provides detailed information

²⁵ See *Davis v Commonwealth* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ).

²⁶ See *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117, 137–8 (Gibbs J) ('*Kathleen Investments*').

²⁷ See, eg, *PGPA Act* (n 1) ss 91–9.

²⁸ 'Governance Structures', *Australian Government: Department of Finance* (Web Page, 3 July 2019) <<https://www.finance.gov.au/resource-management/governance/>>, archived at <<https://perma.cc/V277-39Y5>>.

on the function, composition, and origins of all Commonwealth corporate entities, and is updated quarterly.²⁹

There are a few different legal formats for federal government corporations — namely, statutory corporations, companies limited by guarantee, and companies limited by shares. As at July 2019, the predominant structure in Australia is that of the statutory corporation (of which there are 71), with only 10 companies limited by guarantee and eight companies limited by shares.³⁰

Cutting across the legal forms, there are two main categories of government corporations: one based on function (government business enterprises), and the other based on funding/financial structure (general government sector corporations, and financial and non-financial public corporations).

Nine government corporations with commercial service delivery functions are classified as government business enterprises ('GBE'), which are commercially run with managerial autonomy from government; two of these are statutory corporations (Australian Postal Corporation and Defence Housing Australia), while the rest are *Corporations Act* companies, with functions that include delivering national broadband, naval infrastructure, hydroelectricity provision, and freight services.³¹

The category of GBE reflects a *functional* approach of categorising entities that carry out commercial functions, without regard to the *legal form* of the entities (whether they are statutory corporations or Commonwealth companies). The distinction between commercial GBEs and social service entities reflects Prosser's identification of two visions of regulation: 'regulation as infringement of private autonomy', and 'regulation as a collaborative enterprise'.³² The idea of regulation as infringement of private autonomy is reflected

²⁹ 'Australian Government Organisations Register', *Australian Government Directory* (Web Page, 1 July 2019) <<https://www.directory.gov.au/reports/australian-government-organisations-register>>, archived at <<https://perma.cc/WA5X-UBZK>>.

³⁰ 'Types of Governance Structures', *Australian Government: Department of Finance* (Web Page, 1 August 2017) <<https://www.finance.gov.au/resource-management/governance/policy/structure-types/>>, archived at <<https://perma.cc/N6FG-EWJB>>; 'Flipchart of PGPA Act Commonwealth Entities and Companies', *Australian Government: Department of Finance* (Flipchart No 190, 3 July 2019) <<https://finance.gov.au/flipchart/>>, archived at <<https://perma.cc/JC8S-WB2B>> ('PGPA Act Flipchart').

³¹ The GBEs are the Australian Postal Corporation, Defence Housing Australia, ASC Pty Ltd, Australian Naval Infrastructure Pty Ltd, Australian Rail Track Corporation Ltd, Moorebank Intermodal Co Ltd, NBN Co Ltd, Snowy Hydro Ltd, and WSA Co Ltd: 'Current Government Business Enterprises', *Australian Government: Department of Finance* (Web Page, 3 July 2018) <<https://www.finance.gov.au/property/gbe/>>, archived at <<https://perma.cc/YW47-SFUR>>.

³² Tony Prosser, *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (Oxford University Press, 2010) 4–6.

in arrangements for regulation of commercial enterprises, which have the main aim of ‘maximizing ... economic efficiency’, with independence and freedom from government intervention being key in the design of institutional arrangements, thus justifying more limited ministerial control.³³ On the other hand, ‘regulation as an enterprise’ involves regulatory bodies undertaking social, economic, or redistributive goals; overlapping and shared responsibilities between government and the body; and accountability being ‘secured through public law mechanisms of proceduralization, Parliamentary scrutiny and judicial review.’³⁴ The regulatory arrangements that apply to government corporations will be discussed in Part IV.

The category of GBE allows for more specialised control mechanisms for entities carrying out substantial commercial activities. There is, however, limited provision for such differentiated control over GBEs within the main Commonwealth public governance legislative framework, the *PGPA Act*. However, the *Public Governance, Performance and Accountability Rule 2014* (Cth) (*‘PGPA Rule’*) specifies disclosure requirements for GBEs in their annual report, including changes in financial conditions and their fulfilment of community service obligations (*‘CSOs’*).³⁵ Most of the controls for GBEs are thus operationalised through non-statutory means, such as oversight guidelines issued by the Department of Finance³⁶ and agreements between the GBE and either the portfolio or Finance Minister (in the form of the Statement of Expectations, Commercial Freedoms Framework, and CSOs).³⁷

Yet another classification of government corporations is based on *fund-ing/financial structure*, ie their classification into public non-financial corporations, public financial corporations, and all other statutory corporations (*‘general government sector corporations’*). General government sector corporations are mainly financed by government, while public financial corporations are government-owned or -controlled corporations that mainly engage in financial intermediation or provision of auxiliary financial services (eg Reserve Bank of Australia, government-owned borrowing authorities, and insurance offices). Public non-financial corporations are those ‘mainly

³³ Ibid 4–5. See also Friedmann (n 2) 237.

³⁴ Prosser (n 32) 5–6.

³⁵ *Public Governance, Performance and Accountability Rule 2014* (Cth) ss 17BF, 28F (*‘PGPA Rule’*).

³⁶ Department of Finance (Cth), *Commonwealth Government Business Enterprises: Governance and Oversight Guidelines* (Resource Management Guide No 126, January 2018) (*‘Governance and Oversight Guidelines’*).

³⁷ See ibid 7 [1.8], 8 [1.11].

engaged in the production of market goods and/or non-financial services (eg Australian Postal Corporation, Airservices Australia and NBN Co Limited)³⁸. There are 75 general government sector corporations, 10 public non-financial corporations, and four public financial corporations.³⁹

Public non-financial sector corporations

differ from those in the general government sector in that all or most of their production costs are recovered from consumers, rather than being financed from the general taxation revenue of government. Some enterprises, however, do receive subsidies to make up for shortfalls incurred as a result of government policy, for example, in the provision of [CSOs] at concessional rates.⁴⁰

Like the GBE/non-GBE classification, the financial classifications cut across the statutory/company division, so again these categories do not refer to legal form, but rather the *funding/financial structure* based on statistical classification and financial reporting standards. Public non-financial corporations thus 'vary in their degree of "commercialisation", from those which are quite heavily reliant on parent governments for subsidies', such as rail transport, 'to those which are net contributors to government revenue'.⁴¹ These categories are for the purpose of the reporting of financial accounting and statistics, and are not reflected in the *PGPA Act*, meaning that they generally do not affect the control and accountability of government corporations.

The *PGPA Act* also differentiates between wholly owned and non-wholly owned companies. This marks a distinction between full government ownership and government control. Under s 89(2) of the *PGPA Act*:

The Commonwealth *controls* a company if, and only if, it:

- (a) controls the composition of the company's board; or
- (b) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the company; or
- (c) holds more than one-half of the issued share capital of the company (excluding any part of that issued share capital that carries no right to par-

³⁸ 'Governance Structures in the Public Sector', *Australian Government: Department of Finance* (Web Page, 21 December 2017) <<https://www.finance.gov.au/resource-management/governance/overview/>>, archived at <<https://perma.cc/5ECK-4EAS>>.

³⁹ Ibid; 'PGPA Act Flipchart' (n 30).

⁴⁰ Australian Bureau of Statistics, *Government Finance Statistics, Australia, 2016-17: Explanatory Notes* (Catalogue No 5512.0, 26 April 2018) [12].

⁴¹ Ibid [13].

icipate beyond a specified amount in a distribution of either profits or capital).⁴²

Section 89(3) further states that, without limitation, s 89(2)(a) is taken to include situations where the Commonwealth can appoint or remove all, or the majority, of the directors of the company.⁴³

This is a narrow definition of control; for instance, the Australian Bureau of Statistics supports a broader notion of government control, encompassing

the ability to determine the general corporate policy of the corporation ... [including] the key financial and operating policies relating to the corporation's strategic objectives as a market producer, but does not necessarily include the direct control of the day-to-day activities or operations of a particular corporation.⁴⁴

The separation between full government ownership and government control has allowed further differentiation in regulatory controls for these entities. As we will see in Part IV below, wholly owned government companies are subject to more stringent requirements compared to government-controlled companies in terms of financial reporting and internal audit committee requirements.

III HISTORY AND RATIONALE

Government businesses were used even in early Australian colonial government to enable state enterprise for developmental purposes, such as the management of railways.⁴⁵ Cranston characterised this historical development as the product of economic necessity and Australian geography: 'The distances to be covered, and the absence of large local capitalists, placed the onus on government to develop the railways and communications.'⁴⁶

⁴² *PGPA Act* (n 1) s 89(2) (emphasis in original).

⁴³ *Ibid* s 89(3).

⁴⁴ Australian Bureau of Statistics, *Australian System of Government Finance Statistics: Concepts, Sources and Methods* (Catalogue No 5514.0, 23 December 2015) 17 [2.68], citing International Monetary Fund, *Government Finance Statistics Manual* (2014) 28 [2.107].

⁴⁵ Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 58–61, 95–102, 128–32; Roger Wettenhall, 'Corporations and Corporatisation: An Administrative History Perspective' (1995) 6(1) *Public Law Review* 7, 13; Marco Bini, 'The Public Administration Act 2004 (Vic): A New Approach to the Liability and Duties of Directors on Government Boards and Authorities' (2008) 26(3) *Company and Securities Law Journal* 172, 173.

⁴⁶ Ross Cranston, *Law, Government and Public Policy* (Oxford University Press, 1987) 123.

Initially, the preferred vehicle for government business enterprises was the statutory corporation. One rationale for the extensive use of statutory corporations for governmental functions in the colonial era

was a desire to remove areas of administration from direct interference by the executive and to afford third parties dealing with, or damaged by, such bodies full remedies in contract and tort ... which at that stage would not have been available against the executive itself.⁴⁷

Thus, in Australia, the public corporation was not just seen as a mere step towards full privatisation; rather, there was a ‘historical relationship of state and private capital’ that ‘made Australia *both* a land of opportunity, *and* “the land of the public corporation”’.⁴⁸

The continuing focus on statutory corporations was implicit in major inquiries in the 1970s and ’80s, and explicitly stated in policy guidelines issued by the then federal Treasurer Peter Walsh in 1987: ‘Incorporation under companies legislation should generally be avoided, particularly because it is less satisfactory in terms of proper accountability to the Parliament.’⁴⁹ The preference for statutory corporations meant that, until the late 1980s, there was limited use of government-owned companies in Australia, with an exception being Australia’s major airline, Qantas.⁵⁰

In the late 1980s, however, following the move to a uniform system of company registration in Australia through the *Corporations Law*,⁵¹ government policy gradually changed to explicitly favour the vehicle of government-

⁴⁷ Darrell Barnett, ‘Statutory Corporations and “the Crown”’ (2005) 28(1) *University of New South Wales Law Journal* 186, 192. See also Finn, *Law and Government in Colonial Australia* (n 45) 58–61, 95–102, 128–32.

⁴⁸ AJ Brown, ‘Halfway House or Revolving Door? Corporatisation and Political Cycles in Western Democracy’ in Michael J Whincop (ed), *From Bureaucracy to Business Enterprise: Legal and Policy Issues in the Transformation of Government Services* (Ashgate, 2003) 9, 15 (emphasis in original), quoting WG McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979) 151. But see Kenneth Wiltshire, ‘Privatisation and Corporatisation’ in Randal G Stewart (ed), *Government and Business Relations in Australia* (Allen and Unwin, 1994) 202, 217.

⁴⁹ Peter Walsh, ‘Policy Guidelines for Commonwealth Statutory Authorities and Government Business Enterprises’ (Policy Information Paper, October 1987) 10; Roger Wettenhall, ‘The Rising Popularity of the Government-Owned Company in Australia: Problems and Issues’ (1998) 18(3) *Public Administration and Development* 243, 245 (‘The Government-Owned Company in Australia’).

⁵⁰ Wettenhall, ‘The Government-Owned Company in Australia’ (n 49) 245.

⁵¹ *Corporations Act 1989* (Cth) s 82, as amended by *Corporations Legislation Amendment Act 1990* (Cth).

owned companies. In 1988, the Minister for Transport and Communications indicated that a company structure was preferable for enterprises in direct competition with the private sector, while statutory corporation status was appropriate for enterprises with clear CSOs.⁵² This led to the transformation of a number of statutory corporations to company form in the diverse areas of shipping, airlines, telecommunications, film, superannuation, and serum laboratories.⁵³

A Senate Committee identified 388 Commonwealth government-owned companies and subsidiaries in 1989, 494 in 1991, and 551 in 1993; after peaking in 1995, the number decreased to 553 in 1996 due to a wave of privatisations, particularly in the transport portfolio.⁵⁴ The Senate Committee's 1989 list included 208 government-controlled companies, 55 associated companies, and government involvement in 58 companies limited by guarantee and 67 incorporated associations; they noted that their list may not be exhaustive.⁵⁵

The increased appetite for the device of the government corporation occurred in conjunction with the 'new public management' movement in the 1970s and '80s, which led to extensive restructuring of government to create more arms-length bodies from government departments, such as statutory corporations, alongside a wave of privatisations in the 1990s.⁵⁶

The 1993 report on *National Competition Policy* ('*Hilmer Report*'),⁵⁷ followed by the *Competition Principles Agreement*,⁵⁸ refocused national competition policy to encourage the commercialisation or corporatisation of a wide range of activities previously undertaken by governments or statutory

⁵² Gareth Evans, *Reshaping the Transport and Communications Government Business Enterprises* (Statement, 25 May 1988) 6.

⁵³ Wettenhall, 'The Government-Owned Company in Australia' (n 49) 245–6.

⁵⁴ See *ibid* 253. See also *Government Companies and Their Reporting Requirements* (n 10) 8 [2.2.1]; Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *List of Commonwealth Bodies* (Report, June 1991); Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *List of Commonwealth Bodies* (Report, June 1993); Senate Finance and Public Administration Legislation Committee, Parliament of Australia, *List of Commonwealth Bodies* (Report, June 1996).

⁵⁵ *Government Companies and Their Reporting Requirements* (n 10) 8 [2.2.1]–[2.2.2].

⁵⁶ John Marsden, 'Reforming Public Enterprises: Case Studies Australia' (Research Paper, Public Management Service, Organisation for Economic Co-Operation and Development, 1998) 13–14. But see Wiltshire (n 48) 210–11.

⁵⁷ *National Competition Policy* (Report, 25 August 1993) ('*Hilmer Report*').

⁵⁸ *Competition Principles Agreement*, Council of Australian Governments, signed 11 April 1995.

authorities.⁵⁹ The *Hilmer Report* considered administrative law review and Crown immunity to be ‘unnecessary impediments’ to neutral and hence effective competition with private sector businesses, as it opined that government and private firms should operate on a level playing field and thus a competitively neutral environment.⁶⁰ This sparked a further wave of corporatisations and privatisations, including the sale of the Commonwealth Bank of Australia and Telstra.⁶¹ In Australia, the corporatisation process has focused on government activities that are ‘business oriented, routine in nature, self-contained in administration, heavily focused on service delivery, and physically easier to separate’,⁶² including transport, communications, and electricity.

The use of government companies was further supported by the *Review of GBE Governance Arrangements* (‘*Humphry Report*’) in 1997, which took the view that government business enterprises should ideally be operating in the same way as private sector businesses, with a focus on adding shareholder value and competitive neutrality.⁶³ Accordingly, the *Humphry Report* unambiguously concluded that ‘all new GBEs should be companies’ and all existing GBEs in statutory form ‘should become companies.’⁶⁴ This was adopted as policy by the Department of Finance in its guidelines in 1997,⁶⁵ leading to a further increase in the numbers of Commonwealth companies.

⁵⁹ ‘Commercialisation’ is the introduction of ‘commercial arrangements, including the application of user fees’ but ‘does not necessarily involve a change in the formal structure of the organisation’. ‘Corporatisation’ refers to ‘the process of establishing a government business as a separate legal entity with more clearly specified objectives and usually a requirement to operate along private sector lines, including the payment of tax or tax-equivalent payments’: *Hilmer Report* (n 57) 12 n 28; John Quiggin, ‘Governance of Public Corporations: Profits and the Public Benefit’ in Michael J Whincop (ed), *From Bureaucracy to Business Enterprise: Legal and Policy Issues in the Transformation of Government Services* (Ashgate, 2003) 27, 27, 31–2.

⁶⁰ *Hilmer Report* (n 57) 296.

⁶¹ ‘Privatisation in Australia’ (December 1997) *Reserve Bank of Australia Bulletin* 7–10.

⁶² Wiltshire (n 48) 218.

⁶³ Richard Humphry, *Review of GBE Governance Arrangements* (Report, March 1997) 3, 5, 13, 34, 36.

⁶⁴ *Ibid* 34.

⁶⁵ See Joint Committee of Public Accounts and Audits, Parliament of Australia, *Corporate Governance and Accountability Arrangements for Commonwealth Government Business Enterprises* (Report No 372, December 1999) 2 [1.6]; Stephen Bottomley, ‘Government Business Enterprises and Public Accountability through Parliament’ (Research Paper No 18, Parliamentary Library, Parliament of Australia, 11 April 2000) 12 (‘GBEs and Public Accountability’).

However, the proliferation of both unincorporated and incorporated arms-length bodies did not go without criticism throughout the years. The Royal Commission on Australian Government Administration and the Administrative Review Committee both supported reducing the complement of statutory authorities (including statutory corporate and non-corporate entities) on the basis that Ministers, rather than statutory authorities, should develop policy.⁶⁶

The Howard government, when re-elected in 2001, vowed to review statutory authorities (both statutory corporate and non-corporate entities) and their impact on the business community, with a view to reforming statutory authorities towards a private sector model.⁶⁷ Accordingly, it set up the *Review of the Corporate Governance of Statutory Authorities and Office Holders* ('Uhrig Review') in 2003, which examined how different private sector governance models should apply to statutory authorities, and emphasised the importance of greater clarity around the relationships between Ministers and statutory authorities.⁶⁸ The government then went about assessing the need for all statutory authorities in each ministerial portfolio.⁶⁹ Following the *Uhrig Review*, the Department of Finance adopted a policy of reducing the 'unnecessary proliferation of Government bodies', and explicitly stated a preference for creating statutory authorities rather than government-owned companies.⁷⁰ As a result, the number of Commonwealth corporate bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth) (the predecessor of the *PGPA Act*) was reduced from 81 in 2004, to 64 in 2009, and to 62 in 2012.⁷¹ As at July 2019, there are 89 government corporations at the Commonwealth level in Australia, with the preponderant structure being that of statutory corporations (71), with only 10 companies limited by guarantee and eight companies limited by shares.⁷²

⁶⁶ Roger Wettenhall and Paddy Gourley, 'Sir Henry Bland and the Fraser Government's Administrative Review Committee: Another Chapter in the Statutory Authority Wars?' (2009) 68(3) *Australian Journal of Public Administration* 351, 359; *Royal Commission on Australian Government Administration* (Report, 1976) 82, 86–7.

⁶⁷ Roger Wettenhall, 'Statutory Authorities, the Uhrig Report, and the Trouble with Internal Inquiries' [2004–05] (2) *Public Administration Today* 62, 62 ('Statutory Authorities').

⁶⁸ *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Report, 27 June 2003) ('Uhrig Review').

⁶⁹ Wettenhall, 'Statutory Authorities' (n 67) 65.

⁷⁰ Department of Finance and Deregulation (Cth), *Governance Arrangements for Australian Government Bodies* (Policy Document, August 2005) 5; Meredith Edwards et al, *Public Sector Governance in Australia* (Australian National University E Press, 2012) 135–6, 181–2.

⁷¹ Edwards et al (n 70) 135–6.

⁷² See above n 30.

There has thus been a waxing and waning of the popularity of statutory corporations versus Commonwealth companies in Australian administrative history. The historical development of a preference for the statutory form compared to government companies was supplanted in the 1980s through a changed ideological base that sought to implement private sector governance structures in the public sector. More recently, however, there has been an attendant call to reduce regulatory 'red tape' and trim the number of government corporations, leading to a reduction of the numbers of these bodies from their high point in the 1990s. Nevertheless, there is still a large number of these bodies, and they remain significant and prevalent today.

IV CONTROL AND ACCOUNTABILITY ISSUES

Accountability for government corporations includes a combination of internal and external controls, and public and private law mechanisms. There are varying requirements in terms of accountability to

shareholders in the corporate entity, the portfolio Minister and other relevant Ministers (such as the Finance Minister), accountability agencies such as the Auditor-General and the Australian Securities and Investments Commission (ASIC), Parliament, customers and clients of the GBE, and the general public.⁷³

A Internal Controls

Government corporations are governed by a board of directors. There can be internal controls on government corporations in structuring the corporation itself (through the company's constitution or constituting legislation), or through the mechanisms of corporate governance in terms of incentive- and sanctions-based performance-related instruments, such as reporting (eg statement of corporate intent), the constitution of the board of directors, and directors' duties.

To balance the countervailing public interest objectives and temper pure profit-making, government corporations are subject to CSOs, which are requirements to supply goods or services at rates lower than on a commercial

⁷³ Bottomley, 'GBEs and Public Accountability' (n 65) 9-10.

basis, in the public interest.⁷⁴ CSOs are legally enforceable by legislation, ministerial direction, or contract between the government company and the responsible department.⁷⁵ An example is the requirement for Australia Post to provide mail services to rural areas at the same price as metropolitan areas, where a purely private enterprise would charge a higher rate for the larger cost of providing the service. CSOs are, however, less effective when specifying less quantifiable activities, such as that a ‘garbage collection enterprise should respond sensitively to community concerns about noisy garbage trucks.’⁷⁶ As more commercially oriented enterprises, GBEs are expected to ‘earn at least a commercial rate of return’ after ‘notional adjustments’ for CSOs, as well as ‘to price and operate efficiently.’⁷⁷ The cost of providing CSOs ‘is usually met out of the general government budget rather than by the GBE itself.’⁷⁸ Consumers are not able to seek judicial review to enforce CSOs directly against government corporations, as CSOs are worded in ways that confer very broad discretion to the government company, and thus do not create private rights of action.⁷⁹

The composition of the boards of government corporations is also key to their governance. The choice of board membership may be a matter of balancing efficiency and representational objectives, for example by staffing boards with a combination of corporate governance experts and community representatives to advise on the achievement of CSOs, particularly in the delivery of essential services or infrastructure.⁸⁰ Representational issues can also be resolved by including interest groups as part of an advisory board, rather than being part of the governing board itself. In addition, the government is able to exert control over government corporations by appointing

⁷⁴ See Industry Commission, ‘Community Service Obligations: Policies and Practices of Australian Governments’ (Information Paper, February 1997) 7–11 (‘CSOs Information Paper’).

⁷⁵ Nicolee Dixon, ‘Should Government Business Enterprises Be Subject to Judicial Review?’ (1996) 3(4) *Australian Journal of Administrative Law* 198, 209; ‘CSOs Information Paper’ (n 74) 15, 32.

⁷⁶ Quiggin (n 59) 38–9.

⁷⁷ *Governance and Oversight Guidelines* (n 36) 7 [1.8].

⁷⁸ Dixon (n 75) 199.

⁷⁹ See *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739, 749–50 (Burchett J) (Federal Court); Margaret Allars, ‘Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises’ (1995) 6(1) *Public Law Review* 44, 69–73.

⁸⁰ Michael J Whincop, *Corporate Governance in Government Corporations* (Ashgate, 2005) 195–6.

government officials to the board. However, this may create a conflict between the official's position in the department and their duty to act in the best interests of the corporate entity. Thus, for GBEs that are expected to operate with managerial autonomy, the appointment of government officials to the board will only occur 'in exceptional circumstances'.⁸¹

As a mechanism of internal risk management, the *PGPA Act* requires that both statutory corporations and wholly owned government companies (but not government-controlled companies) have an audit committee, with a majority of members who are not employees of the corporation, to review the entity's financial and performance reporting, system of risk oversight and management, and system of internal control.⁸² This enables risks to be more readily identified and dealt with within the corporation.

B *Financial Accountability*

From the point of view of accountability for finance, the use of resources, and performance more generally, the distinctions between different types of entities at Commonwealth level — from conventional departments to Commonwealth corporations — have been significantly reduced by the *PGPA Act*. This Act merged the separate accountability regimes formerly found in the *Financial Management and Accountability Act 1997* (Cth) and the *Commonwealth Authorities and Companies Act 1997* (Cth).⁸³ The latter Act was designed to cover corporate bodies (both established by statute and under the *Corporations Act*) which enjoyed ownership of the funds they used.⁸⁴ The new *PGPA Act* rejects this criterion as unsound on the ground that these, like other bodies, enjoy the use of public funds.⁸⁵ It makes distinct provision only for Commonwealth companies subject to the disciplines of the *Corporations Act*.⁸⁶

All other entities are classed either as non-corporate Commonwealth entities — such as departments and non-statutory agencies that are legally part of the Commonwealth — or corporate entities, that by reason of their legislative foundation enjoy separate legal existence (statutory corporations fall into this

⁸¹ *Governance and Oversight Guidelines* (n 36) 10 [2.8].

⁸² *PGPA Act* (n 1) s 92; *PGPA Rule* (n 35) s 17.

⁸³ Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (Cth) 1 [2] ('PGPA Bill Explanatory Memorandum').

⁸⁴ See *Commonwealth Authorities and Companies Act 1997* (Cth) ss 7, 34.

⁸⁵ *PGPA Bill Explanatory Memorandum* (n 83) 4 [27].

⁸⁶ *PGPA Act* (n 1) ch 3.

category).⁸⁷ Subject to minor differences reflecting legal status, the same accounting and reporting controls apply in relation to both types of body, as do many of the fiduciary-type duties relating to management of resources imposed on those controlling the entity's operations and on their staff.⁸⁸ The considerations that might have prompted resort to corporate status — such as the need for independence — are recognised by provision that government policies can override the governance duties of the boards of corporate entities only if imposed by a formal order made by the Finance Minister.⁸⁹

The *PGPA Act* imposes both *ex ante* (process accountability) and *ex post* (accountability as verification) requirements on government corporations, which differ based on the legal and ownership status of the corporation, ie statutory corporation, wholly owned government company, or non-wholly owned government company. The most onerous requirements apply to statutory corporations, with descending tiers of requirements that apply to wholly owned government companies and government-controlled companies.

In terms of process accountability, the directors of statutory corporations and wholly owned government companies have an overarching obligation to keep the portfolio Minister and Finance Minister informed about the operations of the entity — including any significant decisions or issues affecting the entity, such as in relation to expenditure or investment — as well as furnish the Ministers with any relevant supplementary interim reports and documents.⁹⁰ No such requirement applies to government-controlled companies. In terms of formal reporting requirements, statutory corporations and government-owned and -controlled companies are all required to prepare an annual corporate plan that covers at least four reporting periods including the current period.⁹¹ Statutory corporations and wholly owned companies (but not government-controlled companies) must also provide budget estimates to be delivered to the Finance Secretary each year.⁹²

In terms of *ex post* accountability, statutory corporations must provide an annual performance statement to be tabled in Parliament annually,⁹³ which allows for parliamentary scrutiny. There is no such reporting requirement for

⁸⁷ See *ibid* s 11.

⁸⁸ *Ibid* ss 12(2), 25–31, 41–2.

⁸⁹ *Ibid* s 22. No such orders have yet been made.

⁹⁰ *Ibid* ss 19, 91.

⁹¹ *Ibid* ss 35, 95; *PGPA Rule* (n 35) ss 16E, 27A.

⁹² *PGPA Act* (n 1) ss 36, 96.

⁹³ *Ibid* ss 38–9; *PGPA Rule* (n 35) s 16F.

government-owned or -controlled companies. Statutory corporations must also prepare an annual report following each reporting period and provide it to their portfolio Minister, who must then table the report in Parliament.⁹⁴ Government-owned and -controlled companies must furnish their portfolio Minister with the company's financial report, directors' report, and auditor's report as required under the *Corporations Act*, and the Minister is required to table this in Parliament.⁹⁵ Wholly owned government companies must provide their Minister with any additional information or reports that are prescribed by the *PGPA Rule*.⁹⁶

Statutory corporations must have their financial statements and those of their subsidiaries audited by the Auditor-General,⁹⁷ while government-owned and -controlled companies and their subsidiaries can appoint the Auditor-General or another person to fulfil the audit requirements under the *Corporations Act*,⁹⁸ however, where another person is appointed as auditor, the Auditor-General must nevertheless give a report on the company's financial statements.⁹⁹ In this way, the Auditor-General maintains oversight over all government companies.

In short, statutory corporations and Commonwealth companies have comprehensive reporting requirements that include parliamentary scrutiny. Directors of wholly owned government companies are subject to additional requirements compared to government-controlled companies: they must form an audit committee and keep their portfolio Minister and the Finance Minister informed about significant activities and decisions, as well as furnish any reports or documentation that the Ministers require; further, the Finance Minister may issue government policy directions to wholly owned government companies.¹⁰⁰

C *Directors' Duties*

The *PGPA Act* imposes a range of duties on all officials of Commonwealth statutory corporations that largely replicate those in the *Corporations Act*,

⁹⁴ *PGPA Act* (n 1) s 46.

⁹⁵ *Ibid* s 97.

⁹⁶ *Ibid* s 97(1)(b).

⁹⁷ *Ibid* ss 42, 44.

⁹⁸ *Ibid* ss 97(3), 98(1)(b), 99(3), (5).

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid* ss 91–3.

including the duty of care, duty to act in good faith and for a proper purpose,¹⁰¹ duty to avoid improper use of position and improper use of information, and duty to disclose to the other directors material personal interests in matters that relate to the affairs of the company.¹⁰² These *PGPA Act* duties do not apply to government-owned and -controlled companies.

The *PGPA Act* duties apply to a broader range of persons than in the corporate context, including directors, members, and statutory office-holders, as well as all staff of the statutory corporation.¹⁰³ These duties can be applied more broadly to contractors, consultants, or grant recipients by prescribing them as ‘officials’ under the *PGPA Act*.¹⁰⁴ Directors of statutory corporations have additional duties to govern statutory corporations in a way that ‘promotes the proper use and management of public resources’, ‘promotes the achievement of the purposes’ of the body, and ‘promotes the financial sustainability’ of the body.¹⁰⁵

Failure to meet legislative responsibilities by directors and officials, whether in the *PGPA Act* or a statutory corporation’s enabling legislation, can result in the termination of their employment or appointment.¹⁰⁶ Unlike the *Corporations Act*, however, there is no civil penalty or criminal liability for a breach of statutory duties under the *PGPA Act*.¹⁰⁷

Furthermore, the direct transposition of *Corporations Act* duties into the public sector context creates issues in terms of standing. Actions for breaches of directors’ duties are traditionally taken by the company itself,¹⁰⁸ although the company’s shareholders are now able to bring a derivative action, or the Australian Securities and Investments Commission (‘ASIC’) can bring an

¹⁰¹ The duty to act in good faith and for a proper purpose is not linked to acting in the best interests of the Commonwealth statutory corporation, which could be because accountable authorities are required to consider the effects of decisions on public resources generally, rather than just the entity itself.

¹⁰² *PGPA Act* (n 1) ss 25–9 (general duties of officials). See also at ss 15–19 (general duties of accountable authorities).

¹⁰³ *Ibid* s 13.

¹⁰⁴ *PGPA Rule* (n 35) s 9(1); Department of Finance (Cth), *Guide to the PGPA Act for Secretaries, Chief Executives and Governing Boards (Accountable Authorities)* (Resource Management Guide No 200, December 2016) 30 [121]–[126].

¹⁰⁵ *PGPA Act* (n 1) s 15.

¹⁰⁶ *Ibid* s 30.

¹⁰⁷ See *Corporations Act 2001* (Cth) ss 184, 1317E (‘*Corporations Act*’).

¹⁰⁸ *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189, 202 (Wigram VC).

enforcement action.¹⁰⁹ However, the *PGPA Act* is unclear about who has standing to bring an action for breaches of duties; there is no precedent on this question.

Directors of Commonwealth-owned and -controlled companies are subject to similar directors' duties under the *Corporations Act*, with the additional duty to avoid insolvent trading,¹¹⁰ and the duty to act in good faith expressly linked to acting in the best interests of the company.¹¹¹ However, it is unclear how the directors of government companies have interpreted this duty to act in the best interests of the entity, particularly in determining whose interest should be protected — whether it is the entity's interest, the Minister's or government's interest, or the broader public interest.¹¹² In addition, the duty of care in the context of a government-owned and -controlled company under the *Corporations Act* is circumscribed by the 'business judgment' rule, which means that directors will have been taken to meet the duty of care if they made the judgment in good faith and for a proper purpose without a material personal interest, informed themselves of the subject matter of the judgment to the extent they believed appropriate, and rationally believed that the judgment was in the best interests of the company.¹¹³ There is no equivalent protection for *PGPA Act* duties that applies to statutory corporations, which means that the duty of care is on its face more lenient for government-owned and -controlled companies.

The statutory duties under the *Corporations Act* are civil penalty provisions, which are enforced by ASIC. ASIC is able to seek a pecuniary penalty of up to \$1.05 million or three times the benefit derived and detriment avoided because of the contravention, whichever is greater;¹¹⁴ a compensation order where the company has suffered damage as a result of the contravention;¹¹⁵ or an order disqualifying the director from managing companies for a period of

¹⁰⁹ *Corporations Act* (n 107) ss 206C, 236–7, 1317(1). See also *Edwards v Halliwell* [1950] 2 All ER 1064, 1067 (Jenkins LJ).

¹¹⁰ *Corporations Act* (n 107) s 588G.

¹¹¹ *Ibid* ss 180–3, 191.

¹¹² Marco Bini, 'The Duty to Act in the Best Interests of the Public Entity in Victoria: Legal and Empirical Meanings' (2015) 33(3) *Company and Securities Law Journal* 144. See also Bryan Horrigan, 'Governance, Liability and Immunity of Government Business Enterprises and Their Boards' in Michael J Whincop (ed), *From Bureaucracy to Business Enterprise: Legal and Policy Issues in the Transformation of Government Services* (Ashgate, 2003) 143, 156–8.

¹¹³ *Corporations Act* (n 107) s 180(2).

¹¹⁴ *Ibid* s 1317G.

¹¹⁵ *Ibid* s 1317H.

time the court considers appropriate.¹¹⁶ ASIC may also refer criminal proceedings for breaches of duties to the Director of Public Prosecutions where ASIC believes the requirements for a criminal action are satisfied.¹¹⁷

Besides statutory requirements, there are also general law obligations that apply to company directors generally that are characterised as fiduciary duties. Although there is no direct Australian or United Kingdom authority that holds that a director of a public entity is a fiduciary,¹¹⁸ there are indications in Australian case law that directors in the public sector may owe fiduciary duties.¹¹⁹ In *Bennetts v Board of Fire Commissioners (NSW)*,¹²⁰ although the New South Wales Supreme Court did not decide on the nature of the duties of a member of a statutory board, Street J held that:

The consideration which must in board affairs govern each individual member is the advancement of the public purpose for which parliament has set up the board. ... Once a group has elected a member he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of the board ... With this basic proposition there can be no room for compromise.¹²¹

Although this has not been tested, it could potentially be argued that a Minister is liable for a board's decision if the Minister acts as a 'shadow director', whose instructions and wishes the board is accustomed to act in accordance with, particularly where the power of direction by the Minister is strong.¹²²

There are hence a range of statutory and general law provisions that apply to statutory corporations (*PGPA Act*) and government-owned and -controlled

¹¹⁶ Ibid s 206C. See Rosemary Teele Langford, Ian Ramsay and Michelle Welsh, 'The Origins of Company Directors' Statutory Duty of Care' (2015) 37(4) *Sydney Law Review* 489, 491.

¹¹⁷ *Memorandum of Understanding: Australian Securities and Investments Commission and Commonwealth Director of Public Prosecutions*, signed 1 March 2006, 3 [5.1].

¹¹⁸ Marco Bini, 'Foss v Harbottle: Alive and Well in the Public Sector?' (2014) 88(6) *Australian Law Journal* 406, 407.

¹¹⁹ See, eg, *Bennetts v Board of Fire Commissioners (NSW)* (1967) 87 WN (NSW) (Pt 1) 307, 310–11 (Street J) ('*Bennetts*'). Likewise, in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 ('*Hughes*'), Finn J held that a director of a statutory authority 'undoubtedly' owed a fiduciary duty: at 237. See also Justice Paul Finn, 'Public Trusts, Public Fiduciaries' (2010) 38(3) *Federal Law Review* 335, 346–7.

¹²⁰ *Bennetts* (n 119).

¹²¹ Ibid 310–11.

¹²² Marco Bini, 'Generic and Specific Approaches to the Liability and Duties of Directors on Government Boards and Authorities' (2004) 22(7) *Company and Securities Law Journal* 460, 476.

companies (*Corporations Act*), which are largely similar with minor differences.

D Parliamentary Accountability

Statutory corporations are clearly subject to a greater level of parliamentary scrutiny compared to government-owned companies, as they are created in Parliament, their enabling legislation is directly subject to parliamentary scrutiny, and any amendments to their legislative structure require parliamentary authorisation. Furthermore, requirements for the presentation of all entities' budget statements, annual reports, and financial statements within the documentation provided by each portfolio within the budget cycle means that parliamentary capacity for scrutiny of the activities of statutory corporations should not differ significantly from that applicable in relation to departments. Parliamentary committees may also conduct investigations of agencies outside the budget framework,¹²³ and Ministers can be asked questions in Parliament about the operation of statutory corporations within their portfolio.

On the other hand, government-owned companies within the remit of the *Corporations Act* can more readily escape parliamentary scrutiny. For one, there is no formal opportunity for Parliament to scrutinise the company before it is established, although Parliament must be notified after the event through tabling of a *PGPA Act* s 72 notice (a requirement that Ministers notify Parliament when the Commonwealth forms, acquires the controlling interest in, or disposes of a company).¹²⁴ In addition, the aims of a company, contained in its constitution, may ordinarily be amended by its members by a special resolution, again limiting direct scrutiny by Parliament.¹²⁵ Despite this, indirect scrutiny through parliamentary questions to the responsible Minister is possible.

A Commonwealth company under the *Corporations Act* also has broad management powers, and is able to raise funds, borrow, or invest through the financial markets without consultation with Parliament (although, as best practice, GBEs are expected to notify either their portfolio Minister or

¹²³ See, eg, Senate Finance and Public Administration References Committee, Parliament of Australia, *Inquiry into the Administration of Health Practitioner Registration by the Australian Health Practitioner Regulation Agency (AHPRA)* (Report, June 2011).

¹²⁴ *PGPA Act* (n 1) s 72.

¹²⁵ *Corporations Act* (n 107) s 136(2).

Finance Minister).¹²⁶ By contrast, statutory corporations that wish to borrow, either through the Commonwealth budget or privately, need ‘express authorisation by or under an Act, or by the Finance Minister in writing, or by the *PGPA Rules*’.¹²⁷

At any rate, parliamentary accountability can be subverted by obfuscation of Ministers due to the fragmentation of responsibility between Ministers and government corporations. For instance, Graham Taylor remarked that the message that came through from ministerial replies in New Zealand was: ‘If it’s bad news it’s commercially sensitive and I’ll refuse to answer; if it’s good news or trivial it’s not sensitive and I’ll take the credit; if I’m not sure which it is I’ll refer it to the corporation.’¹²⁸

E *Legal Accountability*

1 *Judicial Review*

Thus far, the ambit of judicial review in Australia has not extended to corporate entities, which means that the public is largely deprived of the opportunity to challenge decisions made in the public sphere by government companies.

There are two main forms of judicial review in Australia: via statute under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), and via s 75(v) of the *Constitution*. For the *ADJR Act*, courts have adopted a test based on the legal form, rather than function, of bodies. In *NEAT Domestic Trading Pty Ltd v AWB Ltd*,¹²⁹ a majority of the High Court held that a decision made by a non-statutory corporation was not judicially reviewable under the *ADJR Act*, as it was not made ‘under an enactment’, despite operating as a condition precedent to the decision of a statutory authority.¹³⁰ The Court reasoned that the company’s power to make decisions derived not from the statute, but from its incorporation and the applicable companies legislation.¹³¹ Accordingly, decisions of government-owned and -controlled companies incorporated under the *Corporations Act* are not subject to statutory

¹²⁶ *Governance and Oversight Guidelines* (n 36) 28 [4.23].

¹²⁷ *Ibid*; *PGPA Act* (n 1) ss 56–7.

¹²⁸ G Taylor, ‘State-Owned Enterprises’ Accountability to Parliament’ (1987) 10(16) *Capital Letter* 1.

¹²⁹ (2003) 216 CLR 277.

¹³⁰ *Ibid* 296–9 (McHugh, Hayne and Callinan JJ).

¹³¹ *Ibid*.

judicial review unless expressly authorised by statute. This can be contrasted with the more dynamic test for judicial review in the United Kingdom, based on *R v Panel on Take-Overs and Mergers; Ex parte Datafin plc* ('Datafin'),¹³² which focuses on the public function of bodies. Although the *Datafin* test has been criticised for being vague and indeterminate,¹³³ it does enable the review of functions of government corporations that are of a public nature.

Most decisions by statutory corporations are likewise not susceptible to statutory judicial review, as the *ADJR Act* only applies to decisions of an administrative character made under an enactment,¹³⁴ meaning that decisions made under contract (or even decisions made under a statutory power to contract) are not covered.¹³⁵ Despite this, improper tender decisions can be adjudicated through private law, as the Federal Court has held that there is a 'process contract' governing the conduct of a tender before award.¹³⁶ Further, the *Government Procurement (Judicial Review) Act 2018* (Cth) provides for judicial review in the Federal Court or Federal Circuit Court for breaches of the *Commonwealth Procurement Rules 2019* (Cth) by specified statutory corporations or wholly owned government companies.¹³⁷

Corporate entities, including statutory corporations and *Corporations Act* companies, are largely not susceptible to common law judicial review, as they have been held not to be 'officers of the Commonwealth' under s 75(v) of the

¹³² [1987] 1 QB 815, 838 (Donaldson MR), 847–8 (Lloyd LJ), 852 (Nicholls LJ).

¹³³ Mark Elliott, 'Judicial Review's Scope, Foundations and Purposes: Joining the Dots' [2012] (1) *New Zealand Law Review* 75, 88–90, 95–7; Paul Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 (October) *Law Quarterly Review* 551, 559, 566–7.

¹³⁴ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1) (definition of 'decision to which this Act applies') ('*ADJR Act*'). One specified statutory corporation (the Canberra Commercial Development Authority) is exempted from the duty to provide reasons for its decisions under the *ADJR Act* for its commercial activities: at s 13(11), sch 2 para (k).

¹³⁵ *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164, 173 (Davies and Einfeld JJ); *Australian National University v Burns* (1982) 64 FLR 166, 174 (Bowen CJ and Lockhart J) (Federal Court); *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 51 FCR 329, 337 (Neaves J). But see *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121, where the Victorian Court of Appeal found that there is a possibility of judicial review of the exercise of non-statutory and non-prerogative power: at 133–6 (Tadgell J), 148–9 (Ormiston J), 159–61 (Eames J).

¹³⁶ *Hughes* (n 119) 197 (Finn J). Damages can be awarded for breach of a process contract. However, the process contract is often excluded by the Commonwealth government: Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 6th ed, 2018) 373.

¹³⁷ *Commonwealth Procurement Rules 2019* (Cth), as at 20 April 2019. Specified statutory corporations are listed in *PGPA Rule* (n 35) s 30.

Constitution: courts have read in a requirement of a formal appointment of a natural person, and an exclusion of artificial persons.¹³⁸

A statutory corporation, however, might be subject to judicial review under s 75(iii) of the *Constitution* if it is considered to be part of ‘the Commonwealth’,¹³⁹ but this avenue is not available to government-owned or -controlled companies formed under the *Corporations Act*.¹⁴⁰ Statutory corporations will be considered to be part of the Commonwealth and thus susceptible to judicial review where the statute evinces an intention that the Commonwealth operates in a particular field through a corporation created for that purpose, which depends on the degree of control that the Commonwealth has over the body and the purpose of the body.¹⁴¹ Government control in this context is not the strictly defined test in the *PGPA Act*, but rather a broader set of considerations. For instance, entities have been held to be part of ‘the Commonwealth’ if the following non-exhaustive factors are met.¹⁴²

¹³⁸ Bodies held not to be officers of the Commonwealth include the National Companies and Securities Commission, the Australian Telecommunications Commission, and the Australian Postal Commission. See, eg, *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437, 452 (Isaacs J); *Broken Hill Pty Co Ltd v National Companies and Securities Commission* (1986) 61 ALJR 124, 127 (Dawson J) (High Court); *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499, 500 (Gummow J) (Federal Court); *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563, 575 (Davies J) (Federal Court); *McGowan v Migration Agents Registration Authority* (2003) 129 FCR 118, 126 [26] (Branson J); *Australasian College of Cosmetic Surgery Ltd v Australian Medical Council Ltd* (2015) 232 FCR 225, 233–4 [40]–[43] (Katzmann J). See also Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 49–51.

¹³⁹ Section 75(iii) of the *Constitution* confers original jurisdiction on the High Court for actions in which the Commonwealth is a party, including some statutory corporations. See *Maguire v Simpson* (1977) 139 CLR 362, 389 (Gibbs J), 391 (Stephen J), 398–9 (Mason J), 407 (Murphy J).

¹⁴⁰ *Commonwealth v Bogle* (1953) 89 CLR 229, 267–8 (Fullagar J) (‘*Bogle*’). See Administrative Review Council, ‘Administrative Review of Government Business Enterprises’ (Discussion Paper, 1993) 31 [3.33].

¹⁴¹ Bodies held to be within the jurisdiction of s 75(iii) include the Commonwealth Trading Bank of Australia, the Repatriation Commission, and the Australian Atomic Energy Commission: *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334, 337–8 (Kitto J) (‘*Inglis*’); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 274–5 (Rich and Williams JJ), 322 (Starke J), 367–8 (Dixon J) (‘*Bank of NSW*’); *Repatriation Commission v Kirkland* (1923) 32 CLR 1, 20 (Rich J) (‘*Repatriation Commission*’); *Kathleen Investments* (n 26) 133 (Barwick CJ). See also Barnett, ‘Statutory Corporations and “the Crown”’ (n 47) 194–9, 214–17; Seddon (n 136) 167–79.

¹⁴² Darrell Barnett, ‘The Commonwealth: A Multitude of Manifestations — Federal Jurisdiction under s 75(iii) of the Constitution’ (2007) 81(3) *Australian Law Journal* 195, 201–2.

- the Commonwealth executive, as opposed to only the Minister, is able to exert a large degree of control over the body;¹⁴³
- the Commonwealth executive has the power to appoint directors to the board;¹⁴⁴
- there are no shareholders or corporators;¹⁴⁵
- the income of the corporation is paid into the consolidated revenue fund and the consolidated revenue is appropriated to meet expenses and liabilities of the body;¹⁴⁶
- the body is subject to the scrutiny of the Auditor-General;¹⁴⁷ and
- the body's functions and objectives have a public character, for example the role of a regulator or administering a statute.¹⁴⁸

Of these factors, the degree of direct and indirect control by the Commonwealth is the most significant.¹⁴⁹

Thus, with very limited exceptions, the public is completely deprived of the opportunity to challenge decisions made in the public sphere by Commonwealth companies, and there are limited prospects of judicially reviewing decisions of statutory corporations.

2 *Crown Immunity*

In a further reduction of legal accountability, government corporations with a close proximity to the Crown may enjoy the shield of the Crown in certain circumstances. If a government corporation can claim Crown immunity,

¹⁴³ *Superannuation Fund Investment Trust v Commissioner of Stamps* (SA) (1979) 145 CLR 330, 347–9 (Stephen J), 354 (Mason J), 371 (Aickin J) (*'Superannuation Fund Investment Trust'*); *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 69–70 [22] (Gleeson CJ, Gaudron, McHugh and Hayne JJ) (*'SGH Ltd'*). This is also a consideration for whether a body is the 'Crown': *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282, 288–9 (Gibbs CJ) (*'Townsville Hospitals Board'*).

¹⁴⁴ *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639, 645 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ) (*'State Bank of NSW'*).

¹⁴⁵ *Ibid* 644; *Bank of NSW* (n 141) 274 (Rich and Williams JJ); *Inglis* (n 141) 339 (Kitto J).

¹⁴⁶ *SGH Ltd* (n 143) 85 [73] (Gummow J).

¹⁴⁷ *Inglis* (n 141) 341 (Kitto J).

¹⁴⁸ *State Bank of NSW* (n 144) 651 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Townsville Hospitals Board* (n 143) 288–9 (Gibbs CJ).

¹⁴⁹ *Superannuation Fund Investment Trust* (n 143) 347–9 (Stephen J), 354 (Mason J), 371 (Aickin J); *SGH Ltd* (n 143) 69–70 [22] (Gleeson CJ, Gaudron, McHugh and Hayne JJ). This is also a consideration for whether a body is the 'Crown': *Repatriation Commission* (n 141) 13 (Higgins J). See also Barnett, 'Statutory Corporations and "the Crown"' (n 47) 215.

effectively this means that it enjoys immunity from statute and can avoid contractual liability to the public.

Statutory corporations may be able to claim Crown immunity if the statute evinces an express intention that they enjoy this immunity.¹⁵⁰ Where the statute does not express an intention, the court will consider if such an intention is implied through a control test (if there is a high degree of governmental control over the body), or a functions test (if the functions of the body can be characterised as ‘public’).¹⁵¹ In an era of privatisation and contracting out, the notion of ‘public’ functions has become contested and unclear, meaning that the control test might become dominant.¹⁵² A statutory corporation may be able to claim Crown immunity for some purposes, but not others.¹⁵³ The scope of Crown immunity for government bodies is thus convoluted and fact-dependent.

It is also possible for private bodies with a close connection to government, such as government-owned or -controlled bodies, to claim Crown immunity through the principle of derivative immunity.¹⁵⁴ This is granted to bodies carrying out governmental purposes, as opposed to commercial pursuits, if denying relief will adversely affect the Crown,¹⁵⁵ although there is mixed precedent on this front.¹⁵⁶ Given that these bodies were commercialised, it is undesirable to give them the shield of the Crown to evade their responsibilities. The most recent tendency is for the High Court to minimise findings of Crown immunity on the basis that statutory bodies, and private bodies dealing with statutory authorities, should not be accorded special privileges unless it is clearly the intention of the legislature.¹⁵⁷

¹⁵⁰ *Townsville Hospitals Board* (n 143) 288–9 (Gibbs CJ).

¹⁵¹ Seddon (n 136) 175–9; Steven Churches, ‘The Shield of the Crown in England and Australia: The Need for Statutory Interpretation That Applies the Principle of Legality’ (2011) 22(3) *Public Law Review* 182, 193.

¹⁵² Seddon (n 136) 175.

¹⁵³ *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 132–3 (Barwick CJ); *Superannuation Fund Investment Trust* (n 143) 350 (Stephen J).

¹⁵⁴ Seddon (n 136) 183–92.

¹⁵⁵ *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107, 123–4 (Gibbs ACJ), 129 (Stephen J), 136–8 (Mason and Jacobs JJ).

¹⁵⁶ For example, Crown immunity has been extended to government contractors: *New South Wales Bar Association v Forbes Macfie Hansen Pty Ltd* (1988) 18 FCR 378, 383–4 (Einfeld J); *Roberts v Ahern* (1904) 1 CLR 406, 420 (Griffith CJ for the Court). Crown immunity has also been denied to a government-owned company: *Bogle* (n 140) 267–8 (Fullagar J). See also Seddon (n 136) 180–3.

¹⁵⁷ See, eg, *Townsville Hospitals Board* (n 143) 291 (Gibbs CJ); *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646; *Australian Competition and Consumer*

The hybrid nature of government corporations has thus enabled them to reap the benefits of their association with the Crown by claiming special immunities and privileges normally reserved for Crown entities in some circumstances, although concomitantly a closer relationship with the Crown also increases the likelihood of judicial review.

3 Other Legal Mechanisms

Despite the scarce availability of judicial review against government corporations, there are other public law accountability mechanisms that constrain them. Parliamentary committees may choose to scrutinise the activities of government corporations. The Commonwealth Ombudsman has jurisdiction to investigate Commonwealth-owned and -controlled companies; control in this context is defined identically to the narrow definition in the *PGPA Act*.¹⁵⁸

Additionally, the Commonwealth Auditor-General has jurisdiction to conduct annual and performance (or ‘value for money’) audits of statutory corporations and government-owned and -controlled companies, with broad powers to compel the production of documents from government corporations and to enter the premises of these corporations.¹⁵⁹ However, as noted above, government-controlled companies can opt to use a private auditor for their financial audit through the *PGPA Act*, although the Auditor-General must still produce a financial statement.¹⁶⁰ In addition, the Auditor-General is only able to conduct performance audits of GBEs or their subsidiaries at the request of the Joint Committee of Public Accounts and Audit, which reflects a further differentiation based on a functional approach.¹⁶¹

Enhanced external oversight has been accompanied by increased disclosure requirements. Ministers are required to publicly disclose details of

Commission v Baxter Healthcare Pty Ltd (2007) 232 CLR 1. See generally Seddon (n 136) 167–79.

¹⁵⁸ *PGPA Act* (n 1) ss 89(2)–(3); *Ombudsman Act* (n 1) ss 3(1) (definitions of ‘Commonwealth-controlled company’, ‘prescribed authority’ paras (a)–(ba)), 5(1)–(2). The Ombudsman can also investigate private entities that provide goods and services to the public under a contract with a government department or Commonwealth-controlled company: at ss 3(4B), 3BA, 5(1).

¹⁵⁹ *Auditor-General Act 1997* (Cth) ss 11, 17, 32–3 (*‘Auditor-General Act’*). The Auditor-General is a competent auditor under the *Corporations Act* (n 107) for Commonwealth companies and their subsidiaries, and Commonwealth-controlled entities: *Auditor-General Act* (n 159) s 21.

¹⁶⁰ *PGPA Act* (n 1) ss 97–9.

¹⁶¹ *Auditor-General Act* (n 159) s 17(2).

government contracts under a Senate Order,¹⁶² while the Commonwealth Auditor-General is required to annually audit and report to Parliament about any inappropriate use of confidentiality clauses in a sample of government contracts.¹⁶³

The coverage of freedom of information ('FOI') legislation for government corporations is patchy. Statutory corporations that are established for a public purpose are covered by FOI legislation.¹⁶⁴ There are, however, statutory corporations carrying out commercial functions that are exempt from the *Freedom of Information Act 1982* (Cth) ('FOI Act') in relation to certain types of documents.¹⁶⁵ These include: the ABC and SBS for program material;¹⁶⁶ the Reserve Bank of Australia for its banking operations and exchange control matters;¹⁶⁷ the Australian Statistician for documents containing information collected under the *Census and Statistics Act 1905* (Cth);¹⁶⁸ and bodies such as Australia Post, Comcare, CSIRO, and Medicare for documents in respect of commercial activities.¹⁶⁹ Apart from this, FOI requests may be stymied by commercial-in-confidence claims.¹⁷⁰

Since 2010, the *FOI Act* has provided that agencies must contract with government service providers to ensure that agencies have access to documents held by the providers relating to government contracts.¹⁷¹ However, this provision may be ineffective, as it does not provide a public right to access

¹⁶² *Senate Standing Orders: Procedural Orders of Continuing Effect* (Cth) ord 11.

¹⁶³ See, eg, Auditor-General (Cth), *Confidentiality in Government Contracts: Senate Order for Departmental and Entity Contracts (Calendar Year 2014 Compliance)* (ANAO Report No 4, 30 September 2015).

¹⁶⁴ See *Freedom of Information Act 1982* (Cth) s 4(1) (definition of 'prescribed authority') ('FOI Act').

¹⁶⁵ *Ibid* s 7(2), sch 2 pt II.

¹⁶⁶ Program material means a document

which is the program and all versions of the whole or any part of the program, any transmission broadcast or publication of the program, and includes a document of any content or form embodied in the program and any document acquired or created for the purpose of creating the program, whether or not incorporated into the completed program.

Australian Broadcasting Corporation v Herald & Weekly Times Pty Ltd [2012] AATA 914, [57] (Kerr P and Senior Member Britton).

¹⁶⁷ *FOI Act* (n 164) s 7(2), sch 2 pt II div 1.

¹⁶⁸ *Ibid* s 7(2), sch 2 pt II div 2.

¹⁶⁹ *Ibid* ss 7(2), (3), sch 2 pt II div 1.

¹⁷⁰ See generally Seddon (n 136) 500–8.

¹⁷¹ *FOI Act* (n 164) s 6C, as inserted by *Freedom of Information Amendment (Reform) Act 2010* (Cth) sch 6 cl 19.

information; rather, the agency has a contractual right of access (if it remembers to negotiate this in the contract) and the public are excluded from claiming directly by the doctrine of privity of contract.¹⁷² Any possible enforcement would have to be through the agency seeking a mandatory injunction from the court, which is not cost-effective.¹⁷³ In addition, the provision is limited to government corporations that are service providers.¹⁷⁴ Otherwise, Commonwealth companies are excluded from the ambit of the *FOI Act*, with the sole exceptions being Aboriginal Hostels Ltd and NBN Co (although NBN Co is exempt in respect of its commercial activities).¹⁷⁵

Thus, statutory corporations are largely subject to the FOI regime while, apart from two discrete exceptions, government-owned and -controlled corporations are generally exempt.

There are also possible options in private law. Tort law may be a useful accountability mechanism for outsourced functions or functions carried out by government corporations immune from judicial review. In *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,¹⁷⁶ Finn J held that the Commonwealth owed a non-delegable duty of care to immigration detainees, including for their psychiatric care, even though the functions had been outsourced to a private corporation.¹⁷⁷ The existence of such a duty had, however, been conceded by the Commonwealth.¹⁷⁸

V CONCLUSION

Government corporations are an integral part of the system of Australian public administration. Australia has a sophisticated public finance and governance system that distinguishes between the *function* of the government corporation (with special provision for GBEs carrying out commercial functions), the *funding/financial structures* (public financial, public non-

¹⁷² Seddon (n 136) 491–3.

¹⁷³ Ibid 492.

¹⁷⁴ *FOI Act* (n 164) ss 4(1) (definitions of ‘Commonwealth contract’, ‘contracted service provider’), 6C.

¹⁷⁵ Aboriginal Hostels Ltd is the only ‘prescribed authority’ under the *Freedom of Information (Prescribed Authorities, Principal Offices and Annual Report) Regulations 2017* (Cth) s 6. NBN Co is listed as a ‘prescribed authority’: *FOI Act* (n 164) s 4(1) (definition of ‘prescribed authority’ para (aa)); it is also subject to a targeted exemption ‘in respect of its commercial activities’: at ss 7(2), (3A), sch 2 pt II div 1.

¹⁷⁶ (2005) 143 FCR 217.

¹⁷⁷ Ibid 259 [205], 261 [213], 271 [263], 272 [265].

¹⁷⁸ Ibid 259 [205], 261 [213].

financial, and general government sector corporations) and *ownership structures* (wholly owned government companies versus government-controlled companies). It is thus possible to apply differentiated levels of control for each of these different categories of bodies. Given the significant changes in the regulatory landscape since the enactment of the *PGPA Act* in 2013, there would be significant benefits in future empirical research, based on case studies, that might illuminate the consequences of the differential regimes that apply to statutory corporations, Commonwealth companies, and GBEs.

From the traditional perspective of ministerial accountability for all matters within their portfolio, statutory corporations and government-owned and -controlled companies involve a loss of power or control by Parliament, corresponding to the loss of comprehensive ministerial control through a departmental hierarchy. However, such comprehensive ministerial control may be more imaginary than real, and its loss may be amply compensated by freedom from inappropriate political pressure, reinforced reporting requirements, enhanced audit supervision, and better-focused activities under clear statutory mandates. Statutory corporations, in particular, are subject to extensive audit requirements, combined with strong parliamentary accountability, similar to that of departments — although the availability of judicial review is markedly more limited.

It is clear, however, that the use of Commonwealth companies in Australia has allowed the subversion of legal accountability mechanisms in terms of exemptions from traditional administrative law mechanisms such as judicial review and the *FOI Act*, as well as the ability to opt out of audit by the Auditor-General in favour of a private auditor. There is also a diminution of parliamentary accountability — Commonwealth companies are more readily able to escape parliamentary scrutiny, whereas statutory corporations are subject to a more comprehensive parliamentary disclosure and reporting regime. The public law regulatory system has been slowly adapting to encompass Commonwealth companies — for instance, through the expansion of the jurisdiction of the Ombudsman — but these trends remain the exception rather than the norm.

The conception of government ownership of corporations in Australia is multi-layered and multifaceted, with variable accountability requirements that apply based on the level of government ownership and control. The most onerous accountability requirements apply to statutory corporations, due to their full government ownership combined with a statutory foundation that leads to parliamentary accountability. There is a graduated reduction in

accountability for wholly owned government companies, followed by even weaker accountability requirements for government-controlled companies.

A central fulcrum that brings together the financial and legal accountability framework is the concept of government control. The legislative frameworks under the *PGPA Act* and *Ombudsman Act 1976* (Cth) define control in formalistic, narrow terms, while judges tend to adopt a wider, criterion-based concept of control that encompasses both direct and indirect control. In a modern landscape of corporatisation, outsourcing, and privatisation, the conceptualisation of what is a 'public' or 'governmental' function will become more difficult to sustain, which may cause the 'public function' test to descend into incoherence. What will be increasingly important in the future is the fine-tuning of the conception of government control, and perhaps a melding of the divergences between legislative and judge-made conceptions of governmental control. In this respect, a broader conception of control is preferable, as it will enable the regulation of a broader range of government corporations.

To sum up, government corporations are a useful administrative device when appropriately used. However, given the significant exemptions in terms of legal and parliamentary accountability, excessive use of Commonwealth companies — as opposed to statutory corporations — may still represent a dangerous deviation from constitutional rectitude. Thus, these structures should be used sparingly — in exceptional situations where the commercial imperative is strong, and where governmental intervention should be judicious. The device of the statutory corporation strikes the best balance between achieving an arms-length separation from government within a framework of financial, parliamentary, and legal accountability, and should thus be the preferred vehicle for achieving the government's multifarious needs for corporate structures within a comprehensive legal, governance, and accountability framework.