6. Board Governance in Authorities and Companies

As seen in chapter 4, governance across the public sector ‘system’ as a whole encompasses both departmental governance (chapter 5) and the governance of authorities and companies. The governance of these authorities and companies is the subject of this chapter. Although Commonwealth authorities and companies are an important arm of central government, their governance is founded upon the *Commonwealth Authorities and Companies Act 1997 (Cth)* (CAC Act) rather than the *Financial Management and Accountability Act 1997 (Cth)* (FMA Act). As a result, they are more likely than other public sector bodies to be influenced by principles of corporate law and governance drawn from the private sector. Importantly, the CAC Act’s treatment of directors is modelled on equivalent provisions of the *Corporations Act 2001*, transposed to the public sector context and modified accordingly. These foundations give rise to the unique features of public sector boards, and to some of the tensions that were considered in chapter 3.

Perhaps the most distinctive and significant feature of CAC bodies is the decision-making board that governs them. In terms of vertical positioning, within the horizontal and vertical planes considered in chapter 1, the ultimate responsibility of the body and its board to central government is established in several ways. Commonwealth authorities must be established for a ‘public purpose’ and companies are effectively ‘owned’ by government shareholders. Appointments to the board are generally made by responsible ministers, and the board is required to take account of government policy and meet a number of reporting requirements.

Despite these governmental controls however, CAC boards have been conceived as autonomous corporate boards, chiefly with a view to meeting government operational and commercial ends that might ultimately include privatisation through sale on the market. This gives rise to the idea that CAC bodies and their boards might also enjoy a degree of autonomy and independence from government that is absent in central and line agencies. The corporate features of CAC boards, particularly the potential to add external board members, also suggest that they have a valuable role in bridging the gap between government and outsiders to build important associations and partnerships. In addition, they suggest the importance of these bodies in fulfilling the key elements for a stronger Australian Public Service, which were foreseen in *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (AGRAGA 2010: 16; chapter 2, this volume).
As noted in chapter 3, providing ‘strong leadership and strategic direction’ (AGRAGA 2010: 20) will require continuing central control of authorities and companies while also building ‘essential’ horizontal strategic policy advice, which is founded upon collaboration between agencies and external groups such as academia, business and the broader community. Authorities and companies are likely to play a significant role in meeting and balancing these two objectives. Balancing vertical control and horizontal collaboration in these circumstances requires particular attention to the governance of CAC bodies and suggests the potential for developing a unique conception of corporate governance within the boards of these public sector bodies.

The roles of the board and management

Deep questions of political, economic and legal ideology inform assessments of appropriate corporate governance models for both the private and public sectors, especially in modelling from one sectoral context to the other (chapters 2 and 3). Accordingly, in the contemporary context of governmental policies of corporatisation and privatisation, there is an important question about ‘whether the private sector company model, and its associated governance mechanisms, is a theoretically viable governance structure for the commercial activities of the executive government and whether this model is able to deliver the efficiency and accountability benefits its adoption assumed’ (Grantham 2005: 181).

The importance of Grantham’s question is highlighted in current debates in corporate law concerning the allocation of power within the corporation and the roles to be played by directors, particularly in guiding and monitoring management. The issue of what can reasonably be expected of the directors of a large public company, particularly the non-executive directors, has received consideration recently in a series of ASIC enforcement proceedings against the directors of the James Hardie, Centro, and Fortescue Metals companies. Expert commentary on these cases points to an emerging gap in Australian law between a conception of boardroom responsibility grounded in prudential oversight of management and one grounded in ultimate responsibility of the board, even for critical aspects of operational management (Austin 2010, 2011).

In addition, these cases reopen debates about the extent to which directors can lawfully delegate their responsibilities and rely upon the information and advice of others, including that provided by senior management. These issues are also live under the equivalent provisions of the CAC Act. Indeed, clarification of the responsibilities of boards within government departments is an issue that has been raised again in CFAR’s Discussion Paper (DFD 2012b: 41). So, the impetus for reform of the legislative architecture for board governance can arise in both
public and private sector contexts, with commonalities as well as contrasts in their underlying difficulties, as exemplified by the CFAR and these landmark ASIC cases respectively.

In the context of the consideration of public sector boards in this book, such cases and legislation remind us of the very different considerations that are applicable to the allocation of powers and responsibilities between the board and executive management in a private corporation, compared to those applicable in a public sector authority or company. In the private corporation, the potential liability of directors rests upon maintaining the clarity of their roles and interactions vis-à-vis management in particular. This remains a vital division of roles and responsibilities, despite the clearer recognition of the legal liabilities of senior executive management since the recommendations of HIH report (HIH Royal Commission 2003: Vol 1: 116; 130).

In Commonwealth authorities and companies, however, the allocation of power is greatly complicated by the role of the minister in appointing directors to the board and the unclear lines of communication that may subsist between the minister, the chief executive and the chair. It is also complicated by the overlay of public service values and standards that bear upon those who manage and staff organisations regulated by the CAC Act. Moreover, boards under the CAC Act are legally obliged to decide and act in the best interests of their organisation, but within a whole-of-government setting in which their organisation also plays a part in serving the broader public interest.

These complications obscure largely unresolved questions as to the roles and responsibilities of ministers and boards in the relationships between those exercising powers in public sector authorities and companies. They help to explain the real difficulties that are now likely to be encountered in attributing legal liabilities to each in appropriate cases, and they suggest the reasons why difficulties will be experienced in considering whether ASIC should bring legal action against the directors of such bodies, as distinct from the finance minister authorising them. CFAR’s Discussion Paper raises the difficult question of maintaining enhanced portfolio arrangements and the control of the centre while also accommodating more flexible structures, (DFD 2012b: 32-36). These remain important considerations in the ongoing agenda for reform.

The legal framework for authorities and companies

As has been outlined in chapter 3, the CAC Act regulates the reporting requirements of Commonwealth authorities and the conduct of the directors and officers of such bodies. Significant authorities under the CAC Act include the Australian Broadcasting Corporation (ABC) and The Australian National University (Kalokerinos 2007: 14). An authority is a body corporate which has
been incorporated for a public purpose (s 5 and subs 7(1)(a)) and is able to hold money on its own account. This public purpose sets the distinctive public sector context within which directors’ duties in corporate law (such as the duty to act for ‘proper’ purposes) are now assessed under the CAC Act. In defining the legal duties of the directors of authorities and companies, the CAC Act adopts almost identical language to that adopted for private companies governed by the Corporations Act itself. It adopts, for example, the same key concepts of ‘good faith’ and ‘care and diligence’ in the assessment of directors’ primary legal liabilities.

The reporting obligations of authorities are set out in Part 3 of the CAC Act. In this respect, the directors must prepare an annual report (s 9). The responsible minister is to be notified of significant events (s 15) and both the responsible minister and finance minister are to be kept informed of their progress (s 16). In the case of a government business enterprise (GBE), the body must also provide a corporate plan (s 17). It is the requirement that authorities report to ministers that emphasises their public responsibilities, as distinct from the responsibilities of a private company. It is this reporting requirement that also helps explain why the boards of such bodies will adopt government policy as their starting point in exercising their authority as a board.

By contrast with authorities, a Commonwealth company is a company incorporated under the Corporations Act in which the Australian government holds a controlling interest (other than through interposed Commonwealth entities). Since a Commonwealth company is incorporated under the Act, the legal responsibilities that are applicable to the directors and officers of all private corporations apply equally to the directors and officers of Commonwealth companies. Accordingly, the directors of Commonwealth companies, like the directors of authorities, owe equivalent legal duties of care and diligence, as well as duties of good faith. They also owe civil duties to the company not to misuse their position, or information obtained in the course of performing their duties. Directors who breach their duties of good faith, or misuse their position or information, can be seen to have breached civil obligations and committed criminal offences.

Although lying closer than authorities to privately incorporated companies in their form, the same influence of the government over Commonwealth companies remains evident. The CAC Act specifically requires such companies to comply with the general policies of government once the minister notifies the directors of such policies (s 43). As for authorities, the CAC Act provides the essential levers for governmental control. It imposes reporting obligations upon Commonwealth companies, which include the requirement of an annual report, and the same reporting obligations that apply to authorities.
The adoption of the same legal liabilities and responsibilities that are applicable to the board and individual directors of corporations governed by the Corporations Act, imports the essential features of private corporate law and practice into the governance of boards of CAC bodies. It has also imported elements of the codes of practice, performance indicators and market judgments, at work in the private sector, to corporate boards within the public sector. The process has been reinforced through directors sitting on boards in both sectors bringing their experience to new roles on public sector boards. At the same time, the statutory requirements that companies adopt government policy and report (like authorities) to responsible ministers continue to add a distinctive public sector dimension to the governance of these boards.

The distinctive features of the corporate CAC board are critical to understanding the governance of the board in practice and the importance of this to the conceptions of corporate, public and public sector governance that are outlined in chapter 1. These same features influence individual directors in balancing their public and private responsibilities and the dynamics of decision-making within the board. Individual directors may, for example, acquire power within the board through their appointment by the minister to whom their board is ultimately responsible. In chairing the meeting and reaching collective decisions, the chair may be constrained by an awareness of this (Edwards, Nicoll and Seth-Purdie 2003: 40). These considerations for the autonomy and governance of the board are unique to boards of public sector authorities and companies.

The use of corporate bodies in the public sector

The use of corporate bodies within the public sector has been associated with the growth of new public management and its accompanying phases of privatisation, commercialisation, the outsourcing of government operations and efficiency drives in the public sector. Along with these developments, such bodies have been seen as convenient vehicles for providing a degree of operational and commercial independence from central government.

Following the release of the Review of the Corporate Governance of Statutory Authorities and Office Holders (Uhrig review) in 2003, however, there has been some retreat from the utilisation of authorities and corporations in the public sector (chapter 2), with many essential governmental functions having been returned to departments and central agencies. Both the Uhrig review, and the governance arrangements that were subsequently published by the then Department of Finance and Administration (Finance) in 2005, suggest that there may be less reason today than in the past for establishing corporate entities under the CAC Act (DFA 2005b). The creation of new CAC bodies is considered separately in chapter 8.
The 2009 *List of Australian Government Bodies and Governance Relationships*, published by Finance, reflected a reduction of 17 Commonwealth authorities that were then reporting under the CAC Act, this number falling from 81 in 2004 to 64 in 2009 (DFD 2009: xxiv–v). By February 2012, the number of Commonwealth authorities reporting under the CAC Act had fallen further to 62 (DFD 2012a) while, between 2004 and 2012, there was a roughly corresponding increase in the number of prescribed agencies reporting under the FMA Act from 64 to 87 (DFD 2012a). Although Finance also reports a significant reduction in the number of departmental bodies such as joint Commonwealth–state bodies, international bodies and advisory bodies, the overall reduction in the number of authorities and departmental bodies appears consistent with the strengthening and streamlining of central government.

The two Uhrig review templates, which were considered in chapter 2 (i.e. the ‘board’ and ‘executive management’ templates) provided an important stimulus for the reduction in Commonwealth authorities. They continued, for some time, to influence the post-Uhrig review governance arrangements and policy guidelines that were formulated for the formation of CAC bodies, which were subsequently adopted and published by Finance (DFA 2005b). The board template reflects an independent board, more akin to that of the board of a private sector company. This template also reflected the government’s view at the time that a statutory authority ought to be one in which it was appropriate for the board to have the necessary authority and power to appoint and remove the chief executive, to determine strategic direction and set corporate plans, to supervise management and hold management accountable for performance (Uhrig 2003: 27).

As a test of the independence of a public sector body, this formulation largely duplicates the legal authority and autonomy that is enjoyed by the board of a private corporation. It re-states an underlying assumption of board independence in both the Corporations Act and the CAC Act that may have been obscured in the widespread adoption of boards within FMA Act-reporting bodies as well as CAC bodies.

In their application to public sector boards, the Uhrig review templates emphasise the authority of the corporate-style board and its constitution operating in a setting quite removed from its origins in private corporate law. In the longer term, the Uhrig review templates may be seen to have begun shaping boards with a distinctive public sector character. This distinctive character derives primarily from the clearly defined governmental purpose of the body and an emphasis upon the particular skills, expertise and experience that is needed to fulfil that purpose. At the same time, even the Uhrig review templates are not immune from subsequent review and reform of governance architecture, as exemplified by the Commonwealth Financial Accountability Review (CFAR).
Finance’s governance arrangements

Following the Uhrig review, Finance published its *Governance Arrangements for Australian Government Bodies* (DFA 2005b). These arrangements greatly extended the earlier Australian National Audit Office guidelines which had set stronger policy foundations for the governance of CAC bodies by way of an advisory or governance board. The arrangements that were proposed by Finance generally favoured departmental control and FMA Act supervision rather than the establishment of a corporation or independent entity with a governance board. Given the corporate features of authorities and companies, the arrangements proposed by Finance and the requirements of the Uhrig review board template encounter difficulties in their application in practice.

Finance’s governance arrangements help to clarify the policy to be applied in establishing and regulating the creation of corporate bodies in the future. Their importance in this regard is considered in chapter 8. For the purposes of this chapter, however, the governance arrangements also suggest the factors that influence the governance of a body and whether a body should operate under the FMA Act or the CAC Act. These factors are said to be the purposes and functions of the body, its financial sector classification, whether a governing board would be effective, the appropriate employee coverage and the level of independence of the body (DFA 2005b: 32).

The Finance arrangements tend to identify the circumstances in which the board template should not be applicable, rather than those in which it should. One reflection of this, for example, is said to be that a governing board is ‘not an appropriate governance structure for an FMA Act agency’ (DFA 2005b: 38). To some extent, this leaning may reflect the concerns of John Howard’s Coalition government (1996–2007) when commissioning the Uhrig review for clarifying the role of those business regulatory authorities, which was the foundation subject of the review. Continuing to identify the essential features of the board template in the public sector, however, remains an important task in distinguishing these boards from the advisory and management boards that are used widely in FMA Act-reporting bodies.

While the governance arrangements favour a CAC body for undertaking a commercial enterprise, the CAC body is not otherwise generally favoured. The arrangements consider the independence of a body to be more the product of the terms of the enabling act, reflecting its essential purpose, than a question of its regulation under the FMA or CAC acts. They also tend to favour the use of a statutory authority under the CAC Act, rather than a company although, overall, the most significant reduction between 2004 and 2009 recorded in Finance’s *List of Government Bodies*, occurred in statutory authorities, with many of these being converted to statutory agencies (DFA 2005d; DFD 2009).
Those departments which appear most inclined to utilise the legal form of the company are the Department of Broadband, Communications and the Digital Economy (DBCDE), the Department of Immigration and Citizenship (DIAC), and Finance itself. The reasons for these departments utilising companies appear to be predominantly the extent of their commercial operations. Unsurprisingly, for example, the many CAC companies established within the portfolio of DBCDE are commercial subsidiaries of Australia Post and the ABC. The reasons for utilising such companies rest largely upon their commercial and administrative suitability and their ‘fitness for form’ (rather than their need for independence). In this respect, the Uhrig review board template has focused attention upon the critical decisions to be made by the board of particular bodies and the essential governance required of such a board.

For a time, in its application of the Uhrig review in practice, Finance appeared to consider the ‘interaction’ of a new body with existing bodies and the ‘synergies between bodies’ in assessing suitable governance structures for bodies (DFA 2005b: 33). This suggested the importance of administrative suitability and convenience as distinct from departmental control and ‘fitness for form’ as governance indicators. Upon this measure, important elements were the status of other bodies with which the subject body interacted closely and the cost of maintaining an independent body and a governing board. Such an approach echoed the early Organisation for Economic Co-operation and Development Principles of Corporate Governance, which emphasised the ‘relations’ between different decision-making groups as well as the structures and processes for decision-making (OECD 1999; 2004a). Indeed, the title of Finance’s List of Government Bodies and Governance Relationships now suggests the importance of relationships in determining the features of a body’s governance.

The relationships between bodies do provide a helpful administrative guide within government. They also represent, however, a shift in focus from the Uhrig review board template, which focuses more upon the essential purposes of the body, as expressed in the enabling act, when seeking to articulate the essential features of the governance board.

GBEs: CAC bodies with corporate autonomy

At one end of the spectrum of CAC bodies lie government business enterprises (GBEs), which in some instances are earmarked by the government for later privatisation. In this context, a GBE is a Commonwealth authority or Commonwealth company as defined by the CAC Act and prescribed as a GBE under the CAC Act regulations. Finance’s 2011 Commonwealth Government Business Enterprise Governance and Oversight Guidelines (DFD 2011b) provide guidance for the governance of GBEs. They are particularly instructive as to the essentially different perspectives that prevail in the public and private sectors, even in the case of those CAC bodies that are designated as GBEs.
A consideration of the governance of GBEs provides valuable insights into the different factors involved in the governance of CAC bodies more generally. In the first place, the conduct of the directors of wholly owned company GBEs is governed by the Corporations Act, while the conduct of the directors of authority GBEs is governed by the CAC Act (DFD 2011: 10). Secondly, in the case of GBEs that are not wholly owned Commonwealth companies, the GBE guidelines are to apply ‘to the maximum extent possible, consistent with minimising the risk of a potential oppression action by minority shareholders under s 232 of the Corporations Act’.

The ultimate control by ministerial shareholders of the strategic direction of both company and authority GBEs, (and the accountability of both to the minister shareholders) is achieved through an agreed statement of corporate intent that is reached with the directors, and statutory reporting requirements. The hallmarks of the public sector also remain evident in the three key interests of the minister shareholders, as stated in the GBE guidelines, namely: the performance and financial returns of the GBE, the reporting and accountability arrangements necessary to facilitate the active oversight of the GBE by the Commonwealth and the Commonwealth action needed to provide the strategic direction of its GBEs, in cases where it prefers a different direction from the one proposed.

For many years, successive Australian governments have been able to rely upon the privatisation of large public sector enterprises to relieve budget pressures. The most recent of such privatisations has been the sale of telecommunications organisation Telstra by the Howard government. Such GBEs represent the end result of years of investment and subsidisation by governments and taxpayers. They are CAC bodies that have reached the highest state of corporate development, enabling privatisation where appropriate through sale on the market. Presently, there are seven prescribed GBEs namely: ASC Pty Ltd; the Australian Government Solicitor; the Australian Postal Corporation; the Australian Rail Track Corporation Ltd; Defence Housing Australia; Medibank Private Limited and, the latest addition, the NBN Limited. There are also a further five entities which, although not prescribed, receive advice from the Government Businesses Advice Branch.

Upon their sale and privatisation, GBEs become corporations much like any other public corporations listed on the market. As such, they are equally subject to the general law, as nearly as is possible, as are individual citizens. Their officers are subject to the legal duties imposed upon all directors under the Corporations Act, to regulation by the Australian Securities and Investments Commission (ASIC), and to regulation by the Australian Securities Exchange listing rules and Principles of Good Corporate Governance and Best Practice Recommendations (ASX Corporate Governance Council 2010). In addition, they are subject to the judgments of the market itself. Painting this picture of the post-privatisation world of the GBE serves to remind us of the very substantial differences that exist in reality between corporate governance as conceived in the public and private sectors.
One difficult question Australia may need to consider more closely in the future is whether fattening the public sector calf for sale on the private market will always be possible. This is because GBEs have often evolved from the need for government to provide essential services and infrastructure — communications, transport and postal services being the obvious examples. Often, the high establishment and maintenance costs, and the national significance of these services, have earmarked them for provision by government rather than the private sector. However, partnerships between governments and the private providers of infrastructure and essential services (or the investment managers who now finance these services) have grown more sophisticated and the government is assuming a more direct role in establishing the investment funds (such as the Future Fund and nation-building funds) that are now required to finance major public developments. In these circumstances, the need for fully government-financed enterprises may be reduced over time.

There are also dangers in government embracing a closer relationship with private providers and financiers. As governments become more reliant upon large private corporations and financial investors to provide infrastructure and major services, departmental control of essential infrastructure becomes more problematic. In 2006, for example, the different expectations of the government and the market were clearly revealed during the highly political process for the privatisation of Telstra and the Telstra 3 sale. At this time, both the board of Telstra and the market supported Sol Trujillo, the then chief executive of Telstra, in rejecting government-nominated members on the Telstra board. The government, on the other hand, saw such nominations as vital to the representation on the board of regional users of Telstra facilities. These users of Telstra’s services were, at the time, publicly and politically important, although economically insignificant. In the final result, the government used its power of appointment to appoint Geoff Cousins — a director who the government felt would represent these interests — to the Telstra board.

Another supervening danger that looms in government–private sector relationships is the more active role now required of government in responding to the threats of transnational business. In an era of global markets, governmental control and sovereignty will increasingly rest upon difficult questions of corporate ownership and control associated with international competition and investment flows. In the 2006 bid for Qantas by Airline Partners Australia (APA), for example, the interests and motives of the private equity partners and hedge funds, upon which the success of the bid ultimately depended, remained unclear. Several of the private equity partners in the proposed bid have since collapsed. The temporary grounding of the entire Qantas fleet both domestically and internationally in late 2011 in the wake of industrial action by Qantas management and unions illustrates, in part, a corporate response to the pressures of global competitiveness.
Although Qantas is a private corporation, cases such as this suggest the problems that may be encountered in ensuring the continuity of core Australian industry and services, in the face of uncertain private foreign ownership of major public corporations, post-privatisation. Cases such as this also have implications for governments seeking to maintain a guiding hand in the governance of the boards of GBEs, post-privatisation.

The governance of CAC bodies in practice

At the other end of the spectrum, lie a number of important authorities and companies, governed by the CAC Act, which are utilised for service delivery and other government purposes. For these bodies, the emphasis may now be less upon their commercial and corporate independence, and more upon their capacity to integrate the vertical and horizontal elements that are inherent in providing both ‘strong leadership and strategic direction’ (AGRAGA 2010: 20). The corporate form of these bodies and their boards equips them particularly well within government for enhancing collaboration between agencies and with external groups, but renders them more difficult to control and direct within central government. This illustrates some of the institutional tensions that were canvassed in chapter 3.

The role of the board

At the time of the Uhrig review, and in its aftermath, those officials who were interviewed by the authors in 2005–07, whose agencies reported under the CAC Act, were often clearly conscious of where their board might ultimately be placed for the purposes of applying the Uhrig review board templates and regulation by the CAC Act or the FMA Act. In the governance arrangements published subsequently by Finance, one indicator of the governance arrangements most suitable for a body was the level of independence of the body (DFA 2005b: 32). In formulating the principles to apply in governing the boards of authorities and companies as independent commercial entities in the public sector, both the CAC Act and the Uhrig review drew heavily upon principles of private corporate law.

Furthermore, those reporting under the CAC Act at this time expressed some sense of disillusionment, reflecting their belief that there was no longer quite the same rationale, as once there may have been, for establishing CAC bodies as a business or commercial ‘arm’ of government. They referred to the ‘great’ boards they had established and to the care they had taken in finding members with the skills required to set up such boards. They often expressed ‘disappointment’ that these boards seemed to have made a less significant contribution in practice than they might have expected, rather than concern for uncertainty in their relationship with relevant portfolio departments and core agencies.
Many interviewees referred to the poor representation of core government agencies on the boards of CAC bodies, and to their lack of access to relevant governmental and policy information. As to departmental representation on CAC bodies, the evidence referred to in chapter 9 suggests that, while some secretaries consider representation on CAC bodies a part of their role, others reporting under the FMA Act held concerns for this. Senior public service representation on bodies outside their departmental structure can raise additional concerns about membership of the body, independence and conflict of interest (chapter 3).

The Uhrig review saw the legal status of a body established as a CAC body in terms of the authority, autonomy and capacity of its board. This test tends to emphasise the rationale of the enabling legislation in establishing the body and the essential purpose of the body. At the time of the Uhrig review, the ‘independence’ of the board was not seen to establish a particularly strong rationale for establishing or maintaining CAC bodies in the Commonwealth public sector. Rather, the independence of the board from government was seen to be achieved in other ways by experienced people, without the need for an independent body and decision-making board.

The board’s level of independence

The reporting and other requirements that are imposed on authorities and companies in the CAC Act suggest that the independence of the board proves difficult to achieve in practice. At the time of the Uhrig review, three elements were commonly seen to undermine the independence and capacity of the board in CAC bodies. These were the minister’s appointment of the chair and board members, the minister’s dealing directly in practice with the chief executive as well as the chair, and the appointment and consultation processes generally, all of which tend to ensure that the influence and expectations of the minister condition the judgments of the board.

One telling feature was the ready acknowledgment of participants in the authors’ research that in even the most ‘independent’ of CAC bodies the ‘business judgment’ exercised by the board is significantly circumscribed by the demands of government policy. Both the autonomy of the board, and the dynamics of board decision-making, are potentially undermined by this supervening influence and unwarranted ministerial intervention. While the process for the appointment of board members (chapter 9) may involve the relevant minister, the prime minister, the governor-general and the Commonwealth Executive Council (with assistance provided by cabinet, the Department of Prime Minister and Cabinet and other relevant departments), the relevant ministers are expected to make appointments on the basis of merit, and to take into account the skills, qualifications and experience of prospective directors (PM&C 2009a).
Although boards may or may not be involved in identifying the skills and experience required when vacancies arise, the boards of some CAC bodies do, in practice, present the minister with clear indications of the skills and experience needed on their board and potential candidates. Such an approach appears more likely to meet with a closer consideration by the minister of the needs of the board, and better outcomes, than an approach in which candidates were simply proposed to the minister.

At the time of the Uhrig review, directors of authorities and companies were generally keen to assert their independence of government. Directors rated their independence somewhere between ‘totally’ independent to ‘mainly’ independent or ‘heading towards’ independence. For example, one chair stated: ‘We are 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’.

Significant factors mentioned, or implicit in, responses at the time suggested that the board may be less independent in reality. The fact that board independence does not extend to the board’s independence of the minister and government was often taken for granted. For example, a CAC chairman said: ‘We are totally independent … absolutely independent. This is despite the fact that the board members are all mates with the PM’. This conclusion is reinforced by chief executives, who tend to be more equivocal about any perceived independence of the board.

For many of the same reasons that the board of a CAC body in the public sector lacks the authority and independence of a board in a private corporation, it also tends to lack many of the dynamics of collective decision-making that are apparent in a private corporate board. These dynamics are significantly influenced by the minister’s general hand in the appointment of board members and by the fact that the discharge of the functions and roles expected of the chair, the chief executive and other independent board members are likely to be fundamentally different in the public sector.

**Business judgment in the public sector board**

In Australia, the concept of a ‘business judgment rule’ was borrowed from American corporate law and redeveloped throughout the 1990s to provide a clearer defence for the directors of private corporations in seeking to discharge their legal duty to act with care and diligence. So long as the director makes a genuine and rational business judgment in the interests of the corporation, the defence may be open to them. However, the concept of ‘business judgment’ and the availability of the same defence to the officers of authorities and companies under the CAC Act invite closer consideration of precisely what the directors’ business judgment might mean in the public sector context.
The overarching public purpose of the board and the board’s adherence to relevant government policy are both taken for granted in practice. Directors believe that they must manage the affairs of the company only within the relatively narrow scope for their judgment that these policy constraints permit. This fact reminds us of the significant difficulties that arise in practice in transferring the statutory duties of the directors of a private company to the directors of a public sector body. The boards of Commonwealth companies are not responsible to shareholders in a general meeting, despite the fact that they are incorporated under the Corporations Act. The authority of the board of a private corporation is much wider and is constrained only by the relatively limited powers of the shareholders in general meeting, by any limitations expressed in the company’s constitution and by the law itself.

These constraints upon the exercise of their power are clearly understood by the directors of authorities and companies. Some evidence of this was seen in the authors’ interviews with CAC body representatives. For example, the chair of one authority commented: ‘It’s how we do business. Our board sees its independent 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’. Similarly, the chair of a GBE put it this way: ‘We are totally independent, very independent. We are at arms-length from government. We are also sensitive to government’s wishes however. Our corporate plan specifies what we do and it wouldn’t cross our mind to buck government policies’.

One important gloss upon the influence of government, as it is exerted on the boards of CAC bodies, is found in the rare occasions on which the CAC body might assist the minister in the formation of policy (see also Edwards, Nicoll and Seth-Purdie 2003). The chair of one CAC body in this position said: ‘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’.

**Board concern for government acting as shareholder and customer**

Another difficulty for the boards of CAC bodies arises when they must deal with government acting in different roles and capacities — particularly as shareholder, regulator and customer. In these circumstances, a charter setting out the expectations of both the government and CAC body was seen to be useful. Different examples of the importance attached to clarifying the body’s relationship with government arose in the course of the authors’ interviews.
For example, one representative of an authority said: ‘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’. Another said: ‘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’.

Although tending to require several different contractual foundations for the relationship between government and CAC bodies, these statements do reflect the various relationships that are now arising in practice and the need to clarify the different roles required of both government and CAC bodies when acting in different capacities.

**Directors’ views of corporate and board performance**

The responses of participants reflected different approaches in their assessment of board performance. In their approaches, participants often referred to their ‘informal’ and ‘subjective’ assessments of performance, as well as self-assessment mechanisms. Greater effort appeared to be being made to align performance more with corporate and strategic plans. For example, the chief executive of one CAC body said: ‘In future, we will align corporate strategy and corporate performance’. The director of another body said: ‘We have a complete performance management framework. This is tied to our business plan and ultimately to our strategic plan’. Finally, the chair of a CAC body stated: ‘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’.

As might be expected, these responses indicate that assessments of corporate and board performance in CAC bodies are tied closely to the business and strategic plans of the body, rather than to metric market measures (as in the private sector), and that performance assessments are supported by the self-assessments of board members.

**A focus on skills and experience rather than ‘independence’**

Several developments, which are associated with the need for greater collaboration between the public and private sectors, suggest the potential value in the augmented capacity of boards within departments and agencies. These developments invite consideration of the difficult conceptual question
of whether it may be possible in the future to design a board within FMA Act-reporting bodies which brings together very senior and diverse people from the private sector to provide collaborative and collective expert advice to the chief executive. As boards become more specialised, it may be found difficult to maintain the authority of the chief executive and central governmental control. The board of Infrastructure Australia, for example, was established in 2008, following the election of the Kevin Rudd’s Labor government (2007–10), in order to coordinate and prioritise various strands of private expertise and experience for the benefit of public capital expenditure. In this exercise, overall control and responsibility for the public interest resides with the chief executive and the minister, although the equal representation of very senior public and private interests on the advisory board appears to herald new dimensions of the public–private partnership within government. For these reasons, the board of Infrastructure Australia is considered in greater detail below.

The Uhrig review suggested that establishing clear purposes and clear individual authority will be essential to the success of organisations. Of course, the challenge in establishing boards for a particular purpose and their role lies in defining what that purpose and role should be. The more that governments attempt to define the purpose and authority of these bodies and their boards, the less scope there may be for genuine ‘decision-making’ by the board. Board members sitting on CAC bodies are arguably constrained in this way already, by their need to consider government policy at every point in their decision-making. Nevertheless, there is a sense in which an approach seeking to maintain governmental control also denies the potential value of a more broadly constituted decision-making board. The more the role and authority of the board is limited and refined, the more this potential may be denied. Some of these questions appear to have been raised from time to time in making appointments to certain boards such as, for example, in making appointments to the board of the Reserve Bank of Australia (chapter 8).

Improving the capacity of the public sector board

It has been suggested in this chapter that, of all the reasons for establishing a CAC board, perhaps the most compelling are that the board potentially offers a greater real capacity than individual departmental secretaries or chief executives in complex decision-making, a greater capacity to serve the public sector in vertical and horizontal integration, and a greater capacity to build partnerships and collaboration between government and outsiders.

This augmented capacity in decision-making appears to have been suggested in Ahead of the Game, which proposes maintaining ‘strong leadership and strategic
direction’ as a key objective (AGRAGA 2010: 20). Achieving this objective will require not only maintaining central control but also building ‘essential’ horizontal strategic policy advice, founded upon collaboration between agencies and external groups such as academia, business and the broader community. Authorities and companies are likely to play a significant role in meeting and balancing these two objectives. Situations may arise (for example, those in which boards are required to represent competing state interests) when board decisions must reflect the extended range of experience and expertise upon the board. In these circumstances there may need to be compromises made and the collective capacity and responsibility of the board provides significant additional capacity.

It also seems that the declining need for CAC Act-reporting bodies may be a product of the changing shape of the public–private relationship itself. Wettenhall and others have already noted at length the many and varied forms that the public–private partnership has taken, and the related difficulties that now arise in settling a typology for and protecting the public interest (Wettenhall 2003). Mention has already been made of Infrastructure Australia, a board considered in more detail below, which may hold significant decision-making power in practice, yet operates within the control of the chief executive of the Department of Infrastructure and Transport and its minister. Appointments to such a board by the minister might be used to establish a ‘tailored’ advisory or executive board in a way that is not generally possible in the private corporate board. In the authors’ research, CAC body interviewees often considered the skills and qualifications of board appointees a more significant issue than their independence. If this is so, then the exercise may be one of building the board that is best tailored for the purposes of government.

Of course, it takes courage on the part of ministers in making the right appointments to boards, without merely representing sectional interests, and a sophisticated understanding of government policy on the part of appointees. One common view expressed to the authors by experienced CAC body representatives was that the set of skills required on the board might be routinely put to the minister (as it often was) with the strong request that appointments be made to provide those skills. In such an approach, the board remains responsible for setting the threshold criteria needed for board membership to achieve the body’s overall purpose, while leaving it to the minister to appoint specific people. The issue here is, however, the extent to which the minister considers and acts upon the board recommendation.

This rather ideal approach seems to acknowledge the reality of the minister’s strong hand and active involvement in specific appointments, while also clarifying the responsibilities of the board and minister in the process. The
board is required to consider (and decide upon) the skills it requires and the minister is required to consider more clearly the suitable candidates within the range of the stated criteria.

Infrastructure Australia and public-private partnerships

In January 2008, Rudd announced the establishment of Infrastructure Australia. The new statutory Government and Business Advisory Council constitutes 12 members who are drawn from industry and government. Five members come from the private sector, one of whom is the body’s chair (Sir Rod Eddington’s appointment as the chair of Infrastructure Australia was subsequently announced in February 2008). Three members are appointed by the Commonwealth, another three by the states and territories, and one by local government.

It is clear that the board of this advisory body represents a different focus from that in the past, by providing the active agent for public–private partnerships. The purpose of the board of Infrastructure Australia has been to identify a steady stream, or ‘pipeline’, of projects to encourage private sector investment. The Government and Business Advisory Council advises the Office of Infrastructure Co-ordination within the Department of Infrastructure and Transport. This office provides policy recommendations through the Council of Australian Governments. More particularly, Infrastructure Australia has three key objectives: first, to conduct audits of nationally significant infrastructure, in particular water, transport, communications and energy; secondly, to draw up an infrastructure priority list involving billions of dollars of planned projects; and thirdly, to advise government investor and infrastructure developers on regulatory reform that is aimed at increasing the speed of projects.

The government retains effective control of Infrastructure Australia and the new board is essentially advisory in its capacity. The scale and importance of the new board, however, mark it for closer consideration. The idea itself is not new and derives in part from the extensive use of the Future Fund (chapter 8). Ideas for use of the Future Fund have ranged from university infrastructure funding, under the Howard government, to new suggestions such as a future fund for the financing of issues related to Indigenous Australians, and a sustainable fund for the arts, which was proposed at the 2008 Australia 2020 Summit. What is new, however, is the significance of this board in its representation of public and private interests within a single board in a core government agency.

The informal and social association of private and public representatives upon the board replaces the contractual association that might in the past
have been forged through negotiated agreement between government and a private provider. What is gained from this closer, more direct association within the board is greater flexibility. What may be lost is the clarity of legal responsibilities in a contractual relationship. It is true that the board remains advisory in function, but its size and significance are likely to mean that people of power and influence in the private sector will be appointed, and the line that is drawn between the board’s advisory role and its de facto decision-making power blurred. The intermingling of public and private interests within a board such as this may also mean that real questions of conflict of interest for the board’s members may arise.

While the purpose of the Infrastructure Australia board remains as presently stated, that is to undertake an infrastructure audit and identify infrastructure priorities, the advisory character of the board may be maintained. As serious financial decisions are made in the future, however, many critical questions as to how a decision-making board is to operate within core governmental agencies will be raised more pointedly. The issue has not really been addressed on this scale before within one single, government-controlled board.

It should be remembered that these plans for Infrastructure Australia may rest ultimately upon governments effectively harnessing for critical public purposes the estimated A$1.1 trillion that is currently in Australian superannuation funds. The management and governance of these private funds is itself emerging as a significant and challenging issue. A critical issue for new bodies such as Infrastructure Australia will be satisfying the market for corporate capital and private sector fund-managers that investment in particular projects is worthwhile and profitable for private trustees and investors. Whether private companies and private financiers see the same benefits as governments in the projects prioritised by the Infrastructure Australia board may prove an interesting question.

**Conclusion**

Enthusiasm for independent corporate entities may be waning in the public sector. Nevertheless, a review of the experience of corporatisation in the Australian public sector suggests the need for greater integration of corporate and commercial activity in central government, as well as the need for greater collaboration between central government and the private sector. Together, these needs highlight the potential value of CAC boards participating in more complex advisory, representative and management functions. In this respect, the fading of ‘corporate’ governance as a conceptual underpinning of governance generally within the sector may be accompanied by the evolution
of a unique form of public sector board — a board that is mindful of the needs of government and government policy in a rapidly changing environment for public sector governance.

Since the Uhrig review, there has been a retreat from the active use of Commonwealth authorities and corporations within the public sector, except in the case of the clearest commercial enterprises preparing for privatisation. The blurring of the line between governmental and commercial functions adds a further complexity. The legacy of the era of corporatisation and the adoption of corporate-style or ‘governance’ boards, however, has been to suggest the value of such boards within the public sector as a lynchpin for the vertical and horizontal integration of central and outer government. In so doing, it has also suggested the potential of such boards, in collaboration or partnership with outsiders, to enhance the capacity of decisions that are made by departmental secretaries and the chief executives.

At the same time, the use of boards in the management of CAC bodies continues to sit uneasily with the ultimate legal authority and accountability of the secretary or chief executive, so that balancing strong central leadership and external collaborations to enhance strategic direction remains a challenge. The choice between boards and other governing mechanisms in interjurisdictional and cross-sectoral contexts provides an interesting challenge in marrying organisational independence, governmental accountability and the public good, as signalled by the reforms flagged in Ahead of the Game and the CFAR. In the longer term, these more recent developments in the governance of boards in the public sector may be re-shaping the institutional relationship between government and the private sector as well as the character of public–private partnerships.