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THE GOVERNANCE FRAMEWORK

Introduction

2.1 The governance framework for Commonwealth GBEs comprises the *Commonwealth Authorities and Companies Act 1997* (the CAC Act), Corporations Law and the *1997 Governance Arrangements for Commonwealth GBEs* (the 1997 Governance Arrangements). In addition, some GBEs have their own enabling legislation.

2.2 A key objective of the inquiry was to test the appropriateness, effectiveness and continued suitability of the existing governance framework. The terms of reference for the inquiry ask whether additional parts of current GBE governance arrangements should be the subject of legislation. While there were some calls to strengthen legislation, most evidence rejected the need for such action. Part of the debate focused on whether it was more appropriate to remove GBEs from the application of the CAC Act and subject them solely to Corporations Law. Part of this chapter will address the merits of this argument.

2.3 Related to the previous issue is the status of GBEs. Of the 14 GBEs, 10 are companies, two are being corporatised and two will remain statutory authorities. The advantages of GBEs being companies will be discussed as there is a trend in this direction.

2.4 The final part of this chapter will discuss the application of administrative law to GBEs. A key recommendation in the Humphry Report indicated that GBEs should not be subject to any element of statutory administrative law. The Government's progress with the implementation of this recommendation will be examined.

The Legislative Framework

2.5 The legislative framework for the corporate governance of GBEs consists of the Corporations Law, the CAC Act and, in some cases, GBEs own enabling legislation. Corporations Law sets out the legal requirements for all companies including Commonwealth companies that are GBEs. In addition, the Australian Stock Exchange (ASX) *Listing Rules* specify additional requirements for listed companies. The Australian National Audit Office (ANAO) commented that 'these rules include a requirement for all listed companies to disclose their principal corporate governance practices in annual reports.'[1] At the date of this report, Telstra was the only Commonwealth GBE listed on the Stock Exchange.

2.6 The CAC Act 'was one of three pieces of legislation that replaced the *Audit Act 1901.*'[2] The other pieces of legislation that were introduced as part of this package include the *Financial Management and Accountability Act 1997* (FMA Act), and the *Auditor-General Act 1997.* The legislation came into effect on 1 January 1998. It deals with the financial management, accountability, and audit of Commonwealth agencies, authorities and companies. In addition, amendments were made to the *Public Accounts and Audit Committee Act 1951.* Through these amendments the JCPAA was made responsible for considering the operations and resources of the ANAO, the audit priorities of the Parliament and, in particular, approving or rejecting recommendations for appointment of the Auditor-General or Independent Auditor.

2.7 The CAC Act applies to bodies that have a separate legal status outside the Commonwealth Public Service. In most cases, these organisations have a structure similar to a publicly listed company with a board of directors responsible for the management of the organisation. In contrast, agencies governed by the FMA Act, such as Departments of State and statutory bodies, typically, have a single office holder, such as a departmental Secretary or CEO, responsible for the management of the organisation.

2.8 The CAC Act was introduced to complement Corporations Law and agencies' enabling legislation. It sets out standardised financial management, accountability and reporting requirements for all CAC entities, including GBEs. The ANAO stated that the primary objectives of the CAC Act are to:

- standardise the reporting, notification and auditing requirements for CAC bodies;

1 Australian National Audit Office, *Submission*, p. S8.

2 Explanatory memorandum to the *Commonwealth Companies and Authorities Act 1997*, p. 1.

- ensure that CAC bodies are appropriately accountable to the Parliament through the Minister;
- set standards for the conduct of officers of CAC bodies not incorporated pursuant to the Corporations Law; and
- provide a mechanism for the application of Commonwealth policies to CAC bodies.[3]

2.9 The explanatory memorandum to the CAC Act indicates that many of the CAC Act requirements 'are modelled on comparable areas of the Corporations Law and therefore, to the extent practicable, apply standards and principles applicable to private sector corporations'.[4] This is particularly relevant to Commonwealth authorities as they are not subject to Corporations Law. For Commonwealth companies, all of which are subject to Corporations Law, there are additional requirements including being subject to the Auditor-General Act, the tabling of annual reports in Parliament, the provision of corporate plans to the responsible Minister, and notifying the responsible Minister of significant events.

2.10 GBEs are a subset of Commonwealth companies and authorities whose operations are governed by the CAC Act. GBEs are prescribed by regulations made in accordance with the CAC Act. As noted in Chapter One, the following three criteria apply to GBEs:

- they are commercial;
- they trade outside the public sector; and
- and they are not primarily regulatory bodies.

2.11 The Department of Finance and Administration (DoFA) indicated that the key features of the corporate governance framework, comprising Corporations Law, the CAC Act and the 1997 Governance Arrangements, are:

- a reliance on the existing framework, Corporations Law, as much as possible;
- regular reporting of performance to shareholders; and
- boards are accountable to shareholders for GBE performance and shareholders are accountable to Parliament and the public.[5]

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3 Australian National Audit Office, *Submission*, p. S8.

4 Explanatory memorandum to the *Commonwealth Companies and Authorities Act 1997*, p. 2.

5 Department of Finance and Administration, *Submission*, p. S25.

The 1997 Governance Arrangements for Commonwealth GBEs

2.12 The 1997 Governance Arrangements go beyond the arrangements in Corporations Law. DoFA stated:

> While generally consistent with private sector governance principles, our governance arrangements do contain several requirements above those specified in Corporations Law. We consider that that is appropriate given the nature of government owned companies and the Commonwealth's desire to minimise commercial risk. Examples of those additional requirements are preparing a statement of corporate intent and keeping shareholders informed of risk management strategies.[6]

2.13 The 1997 Governance Arrangements help form the framework for the accountability of GBEs and set out key responsibilities for both boards and Ministers.

2.14 The following diagram (Figure 2.1) represents the GBE Accountability framework. The CEO and management team of a GBE are responsible to the GBE board. The board is responsible to the Shareholder Minister(s) who are ultimately responsible to the Parliament. Section 3.2 of the 1997 Governance Arrangements states that 'boards have absolute responsibility for the performance of the GBE, and are fully accountable for this to the Shareholder Ministers.'[7]

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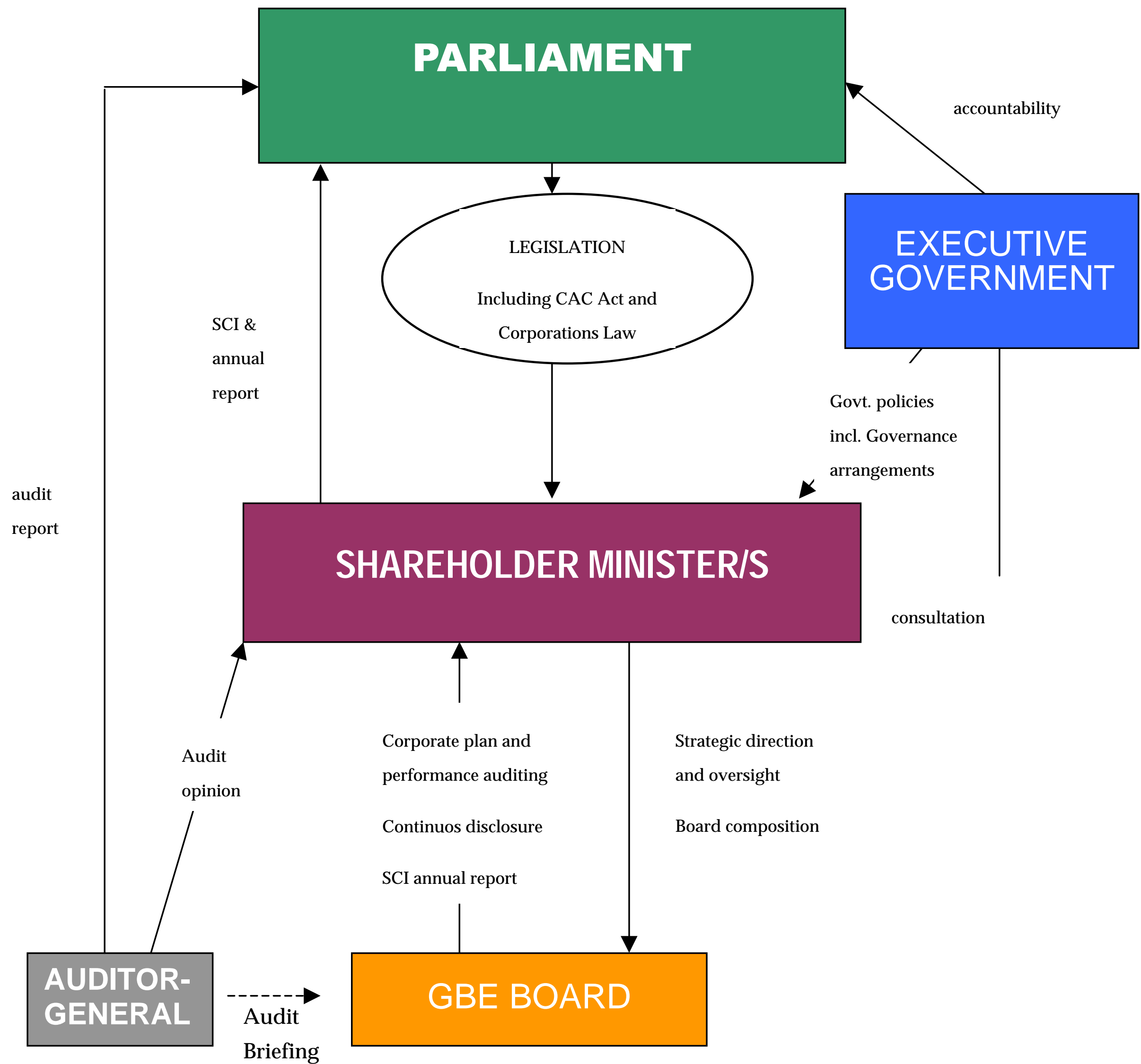
6 Ms Megan Coombs, Department of Finance and Administration, *Transcript*, p. 86.

7 *Governance Arrangements for Commonwealth GBEs,* June 1997, p. 8.

Figure 2.1 **GBE Accountability**



2.15 A key part of the governance arrangements is a joint Ministerial shareholder model in which the Commonwealth's ownership interest is represented by two 'shareholder Ministers', the portfolio Minister and the Minister for Finance and Administration. These arrangements are discussed in more detail in Chapter Three. DoFA stated:

> Shareholder Ministers exercise strategic control of GBEs consistent with their accountability to Parliament and the public. To facilitate this, a GBE has a board of directors, which is fully accountable for GBE management and performance to the shareholder Ministers.[8]

2.16 The 1997 Governance Arrangements apply to:

- GBEs that are wholly owned by the Commonwealth; and
- indirectly to subsidiaries of wholly owned GBEs through the governance arrangements that the wholly owned GBE has with its subsidiaries.[9]

2.17 The 1997 Governance Arrangements indicate that for 'partly owned GBEs, the extent to which the governance arrangements apply will be identified in legislation applying specifically to the GBE, and/or the GBE's constitution and/or shareholders' agreement.'[10]

2.18 DoFA described the general approach of the 1997 Governance Arrangements:

> A principles based approach is a key feature of the governance arrangements, which operate in conjunction with legislation, including the Corporations Law and the CAC Act. The arrangements provide governance guidelines for GBEs, but leave prescription to shareholder Ministers, allowing them to consider the circumstances of individual entities. The governance arrangements have been drafted to enable the government to manage its shareholder relationship with GBEs in a manner consistent with governance principles applied by the private sector. [11]

2.19 The guiding principles stated in the 1997 Governance Arrangements include:

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8 Department of Finance and Administration, *Submission*, p. S25.

9 *Governance Arrangements for Commonwealth Government Business Enterprises*, June 1997, Section 1.4.

10 *Governance Arrangements for Commonwealth Government Business Enterprises*, June 1997, Section 1.5.

11 Department of Finance and Administration, *Submission*, p. S25.

- shareholder Ministers exercise strategic control consistent with their accountability to the Parliament and the public;
- shareholder Ministers set clear objectives for GBEs;
- the directors of a GBE develop the business strategies and handle the day-to-day management policies;
- the directors of a GBE ensure that:
  - ⇒ the GBE's activities are conducted so as to minimise any divergence of interests between the GBE and the shareholders;
  - ⇒ GBEs are managed in the best interests of shareholders; and
  - ⇒ GBEs and their officers maintain the highest standards of integrity, accountability and responsibility;
- required standards of disclosure are satisfied. In particular, timely disclosure is to be made by GBEs of information:
  - ⇒ which may affect the shareholder value of the organisation;
  - ⇒ which may influence Government decisions in relation to a GBE; or
  - ⇒ in which the Government has a legitimate interest;
- information is produced for the shareholder and the community according to the highest standards; and
- shareholder Ministers must be consulted on matters of significance.[12]

2.20 Some of the specific requirements set out in the 1997 Governance Arrangements address:

- corporate plan and progress reports against this plan;
- statement of corporate intent (brief high level document tabled in Parliament);
- report on operations and financial statements (incorporated in an annual report tabled in Parliament);
- keeping shareholder Ministers informed;
- Board of Directors – responsibilities, appointments and removal;
- managing risks; and
- financial targets.

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12 *Governance Arrangements for Commonwealth Government Business Enterprises*, June 1997, Section 1.3.

The appropriateness of the *Commonwealth Authorities and Companies Act 1997*

2.21 The Committee received evidence from a range of groups regarding the appropriateness of the existing legislative framework. There was marginal support for increasing the breadth of legislation regulating GBEs. Professor Stephen Bottomley called for the introduction of a Government Owned Companies Act which would have a wider ambit than the CAC Act and would apply to all GBEs.[13] DoFA indicated that there was no need for additional legislation and stated:

> Providing for additional parts of the governance arrangements in legislation risks locking in practices that can become outdated. It is important that any corporate governance framework retains flexibility and ensures a performance rather than a conformance process.[14]

2.22 A range of government agencies supported DoFA's position. The Department of Health and Aged Care, for example, commented that it 'is concerned that enshrining further provisions of the governance arrangements in legislation may create inflexibility in the application of specific governance requirements'.[15] Australia Post argued that 'excessive legislative prescription would also limit flexibility and perhaps inhibit application of emerging best practice governance or limit the capacity of Ministers to tailor the principles to the particular circumstances of GBEs.'[16]

2.23 The majority of evidence was more concerned about the appropriateness of subjecting GBEs to the requirements of the CAC Act. Evidence to the inquiry was split between continuing with the current governance framework or seeking greater simplification and efficiency by subjecting GBEs solely to Corporations Law and removing them from the jurisdiction of the CAC Act. The Snowy Mountains Hydro Electric Authority (SMHEA) commented that, from a GBE's perspective, compliance with the CAC Act results in additional costs relative to private sector competitors and therefore is inconsistent with competitive neutrality provisions.[17]

2.24 Telstra was the most critical of the application of the CAC Act to its operations. Telstra commented that as a 'general rule, governance and accountability principles embodied in the Corporations Law and in the ASX *Listing Rules* should apply to Telstra who should, as a matter of first

13 Professor Stephen Bottomley, *Submission*, p. S43.
14 Department of Finance and Administration, *Submission*, p. S32.
15 Department of Health and Aged Care, *Submission*, p. S108.
16 Australia Post, *Submission*, p. S160.
17 Mr Vincent Good, Snowy Mountains Hydro Electric Authority, *Transcript*, p. 69.

principle, be subject to the same governance and accountability arrangements as its private sector, publicly listed competitors.'[18] In particular, Telstra identified the following requirements under the Telstra Act and the CAC Act that do not align with Corporations Law and which, in Telstra's view, should be discontinued:

- corporate planning requirements;
- requirements for additional financial statements for periods specified by the Minister;
- obligations for notification of significant events;
- reporting obligations of significant events;
- reporting obligations in relation to Telstra's own operations and those of its subsidiaries;
- the requirement for tabling of Telstra's annual report in the Parliament; and
- the mandatory use of the Auditor-General to audit Telstra's accounts.[19]

2.25 Mr Richard Humphry, Managing Director of the Australian Stock Exchange, indicated that there was logic in companies, whether government or privately owned, coming under the one set of rules. Mr Humphry stated:

> One of the frustration's I had when I went through and did the review of this was to find that many of the organisations in government had specific and unique pieces of legislation affecting their governance which I think is nonsense, and I said so in here. They should all come under the one set of rules which the parliament has approved, and that applies to all listed companies. I think that was adopted as being sensible to do.[20]

2.26 The Humphry Report recommended that the governance principles embodied in the *Listing Rules* for public companies and the Corporations Law should apply to GBEs.[21] The Department of Communications, Information Technology and the Arts (DoCITA) suggested that the Humphry recommendation would 'significantly reduce the need for the CAC Act.'[22] The Australian Society of Certified Practising Accountants

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18 Telstra, *Submission*, p. S75.

19 Telstra, *Submission*, p. S78.

20 Mr Richard Humphry, *Transcript*, p. 110.

21 Humphry, R, *Review of GBE Governance Arrangements*, March, 1997, p. 7.

22 Mr John Neil, Department of Communications, Information Technology and the Arts, *Transcript*, p. 78.

(ASCPA) also supported the sole application of Corporations Law to GBEs commenting that 'it cannot see any reason for overlaying that with other forms of regulations'.[23]

2.27 Weighed against these views was a range of groups supporting the objectives of the CAC Act and its application to GBEs. Employment National (EN) recognised that government requires additional information about their authorities and companies. EN suggested that 'there will be times when the Minister or the shareholder requires additional information'.[24]

2.28 DoFA acknowledged that the current governance arrangements 'do contain several requirements above those specified in Corporations Law.'[25] DoFA, however, considered this appropriate 'given the nature of government owned companies and the Commonwealth's desire to minimise commercial risk.'[26]

2.29 The ANAO commented that the 'current governance framework is quite robust and seems to be working quite well from our perspective'.[27] The ANAO identified a number of reasons, relating to Ministerial and Parliamentary oversight, which support the need for the CAC Act:

> One is that there are some important provisions in the CAC Act about the responsibility of the directors keeping the Ministers informed of significant events. It also allows the Minister under statute to design the accountability framework which best suits the Minister…
>
> Secondly, there are some provisions in there which seek to make sure that the Parliament is informed about particular operations of the GBEs, for instance the annual reporting requirements and the auditing requirements. One of the benefits of the CAC Act was that it actually legislated some of the prior government policy, which I think is of benefit for the Parliament, because governments can change their mind fairly quickly on particular circumstances without having to go back to the Parliament if it only has administrative arrangements in place on top of government companies. So I think there is an important protection for the Parliament in this legislation.[28]

23 Mr Colin Parker, Australian Society of Certified Practising Accountants, *Transcript*, p. 131.
24 Mr Rod Halstead, Employment National, *Transcript*, p. 8.
25 Ms Megan Coombs, Department of Finance and Administration, *Transcript*, p. 86.
26 Ms Megan Coombs, Department of Finance and Administration, *Transcript*, p. 86.
27 Mr Ian McPhee, Australian National Audit Office, *Transcript*, p. 28.
28 Mr Ian McPhee, Australian National Audit Office, *Transcript*, p. 31.

Conclusions

2.30 The *Commonwealth Authorities and Companies Act 1997* (the CAC Act) applies to company GBEs in addition to Corporations Law and the 1997 Governance Arrangements. The primary objective of the CAC Act is to standardise the reporting, notification and auditing requirements of CAC bodies. In addition it helps to ensure appropriate accountability to Ministers and the Parliament.

2.31 The inquiry examined the appropriateness of the CAC Act and, in particular, its continued application to GBEs. Some groups suggested that it would be more effective for GBEs to be subject solely to Corporations Law. The Snowy Mountains Hydro Electric Authority indicated that the CAC Act created additional compliance costs relative to private sector competitors and, therefore, was inconsistent with competitive neutrality provisions. Telstra echoed this view indicating that it should not be subject to more accountability arrangements than its competitors.

2.32 In contrast to these views, the Committee notes Employment National's comment that government will require additional information about its companies and authorities. The Australian National Audit Office (ANAO) indicated that the CAC Act strengthens Ministerial and Parliamentary oversight.

2.33 The Committee notes that there are cogent reasons why GBEs would, for market competition reasons, like to be on the same footing as their private sector competitors. At the same time, where public moneys are involved there is the need for additional accountability to Ministers and Parliament. For example, it should be noted that in 1998–99, GBEs generated revenues of nearly $25 billion, provided dividends of $4.5 billion and controlled assets of some $40 billion. In view of the significant responsibility in managing these assets, the Committee is not prepared to recommend any relaxation of the accountability requirements applying to GBEs. The Committee agrees with the ANAO and DoFA that the governance arrangements provide a robust and flexible framework for the management and accountability of GBEs. Therefore, the Committee does not support removing GBEs from their responsibilities under the CAC Act.

Authority or company? – the appropriate form for a GBE

2.34 One of the terms of reference for the inquiry focused on whether more GBEs should be companies. This issue was examined because there is a view that company status has certain advantages over authority status and, therefore, can result in greater efficiencies.

2.35 In recent times, there has been a trend towards company status GBEs. In 1999, of the 14 GBEs, 10 are companies, two are being corporatised and two will remain authorities. By comparison, in 1995, of the 20 GBEs only nine were companies. Chapter One provides a list of GBEs by company and authority status.

2.36 The Humphry Report recommended that GBEs should be public companies limited by shares and incorporated under Corporations Law.[29] Humphry identified the following advantages of company GBEs versus authority GBEs:

- enabling legislation does not need to be passed by Parliament to create a company. Although, in the event of establishing a company to fulfil a role previously undertaken by a Commonwealth department or authority, legislation may be required;
- alteration of the constitution is simpler – that is, altering the memorandum and articles of a company by a resolution of the shareholder is less involved than passing amendments to enabling legislation;
- a company form better facilitates sale onto the equity markets;
- removing directors can be done by resolution of shareholders in a company whereas enabling legislation for authorities usually provides for constraints and conditions on the appointment and removal of directors;
- the culture of a company is normally more 'commercial' than the culture of authorities;
- the clear separation of the roles of the company, the board and the shareholders, provides the basis for the Government to pass the responsibility and accountability for the day-to-day activities of a company GBE to its board and management;

29 Humphry, R, *Review of GBE Governance Arrangements*, March, 1997, p. 8.

- an established framework of legislation and common law exists for companies, whereas specific provisions need to be written into the enabling or other legislation for authorities; and
- companies provide a means of obtaining limited liability for the shareholder without having to stipulate for it in individual dealings.[30]

2.37 Currently, Australia Post and the SMHEA are in the process of being changed from authority status to company status. Australia Post noted that the government's intention to establish Australia Post as a company stems from its acceptance of the Humphry Report recommendation.[31] The SMHEA indicated that its shareholder governments, the Commonwealth, and the State Governments of New South Wales and Victoria 'have been pursuing a corporatisation process for the Authority for a number of years.'[32]

2.38 The Defence Housing Authority (DHA) and the Australian Government Solicitor (AGS) are the other two authority GBEs. These GBEs have specific reasons for not moving to company status. DHA indicated that its primary function of providing 'adequate and suitable housing' for the Department of Defence was not 'a commercial objective'.[33]

2.39 The AGS set out specific reasons relating to the provision of legal services which prevented it from moving to company status. First, it was suggested that the requirements of a board and the obligations of a director 'could impair the ability of the Attorney-General to meet his accountability in relation to the professional provision of legal services.'[34] Second, the AGS indicated that 'state and territory laws governing the ownership and organisation of lawyers generally restrict lawyers from incorporating their practices'.[35]

Conclusions

2.40 The Committee acknowledges the reasons put forward regarding the advantages of company status as opposed to authority status. These issues were identified in the Humphry Report and this led to Humphry recommending that GBEs should be public companies limited by shares and incorporated under Corporations Law.

30 Humphry, R, *Review of GBE Governance Arrangements*, March, 1997, pp. 34–35.
31 Australia Post, *Submission*, p. S160.
32 Snowy Mountain Hydro Electric Authority, *Submission*, p. S2.
33 Defence Housing Authority, *Submission*, p. S119.
34 Australian Government Solicitor, *Submission*, p. S89.
35 Australian Government Solicitor, *Submission*, p. S89.

2.41 The Committee is pleased to note that of the 14 GBEs, 10 are already companies and there is the intention that Australia Post and the Snowy Mountain Hydro Electric Authority will become companies. At the same time, the Committee notes that there are valid reasons why the Defence Housing Authority and the Australian Government Solicitor will remain as authority GBEs.

Administrative law

2.42 Government agencies that conduct administrative functions are subject to administrative law. The application of administrative law to GBEs may place them at a disadvantage against their private sector competitors. Key legislation that deals with administrative law includes the:

- *Administrative Appeals Tribunal Act 1975;*
- *Ombudsman Act 1976;*
- *Administrative Decisions (Judicial Review) Act 1977;*
- *Freedom of Information Act 1982* (FOI)*; and*
- *Privacy Act 1988.*

2.43 The Humphry Report examined the possible impact of administrative law on GBEs. Humphry argued that as 'GBEs have a role of trading goods and services in a market, consequently their activities are not administrative in nature.'[36] Humphry stated:

> …the application of any element of administrative law to any GBE, such as the application of the *Freedom of Information Act 1982* to Telstra, is not consistent with either the intent of administrative law or the establishment of a commercial framework for GBEs. No GBE should be subject to any element of statutory administrative law on the grounds that GBEs do not, and should not, undertake administrative functions, and their competitors, and other private sector organisations, are not subject to administrative law.[37]

2.44 In view of these concerns, the Humphry Report recommended that 'no GBE should be subject to any element of statutory administrative law.'[38] DoFA agreed with Humphry's conclusions and confirmed that 'when the governance arrangements were agreed, the government also agreed that

36 Humphry, R, *Review of GBE Governance Arrangements*, March, 1997, p. 39.
37 Humphry, R, *Review of GBE Governance Arrangements*, March, 1997, p. 39.
38 Humphry, R, *Review of GBE Governance Arrangements*, March, 1997, p. 40.

GBEs be exempt from statutory administrative law and Commonwealth purchasing policies except where otherwise agreed between shareholder Ministers in individual cases'.[39]

2.45 The Productivity Commission supported the Humphry recommendation and commented that given the extent to which GBEs 'are not involved in administration of government programs or policy, the application of administrative law seems a bit questionable.'[40]

2.46 The Committee's investigation showed that there were some GBEs that were still subject to aspects of administrative law. Telstra indicated that it is still subject to the Freedom of Information Act, the Commonwealth Ombudsman, the Administrative Decisions (Judicial Review) Act and the Archives Act. Telstra commented that 'the continued application of the Administrative Law package means that Telstra and private sector companies are not competing on a similar footing.'[41] Telstra suggested that the cost of complying with administrative law in conjunction with Senate Estimates and other accountability requirements above Corporations Law and ASX *Listing Rules* is 'several millions of dollars.'[42]

2.47 Telstra also indicated that it is 'subject to two Ombudsman schemes - the Commonwealth Ombudsman and the Telecommunications Industry Ombudsman, while its competitors are only subject to the latter'.[43]

2.48 Australia Post advised that it is subject to the Freedom of Information Act, the Ombudsman Act, the Administrative Decisions (Judicial Review) Act and the Archives Act. While Australia Post acknowledged that compliance with these Acts was not a 'huge cost burden', its competitors were not subject to these Acts.[44]

2.49 DoCITA, which is the portfolio department responsible for both Telstra and Australia Post, commented that the 'government has accepted the Humphry recommendation in relation to the removal, of certain administrative legislation.'[45] In relation to Telstra, DoCITA indicated that most of the administrative law requirements would have been removed if recent Telstra privatisation legislation had been passed by the Parliament.

39 Department of Finance and Administration, *Submission*, p. S32.

40 Mr Gary Banks, Productivity Commission, *Transcript*, p. 136.

41 Telstra, *Submission*, p. S81.

42 Mr John Stanhope, *Transcript*, p. 95.

43 Telstra, *Submission*, p. S81.

44 Mr Gerry Ryan, Australia Post, *Transcript*, p. 118.

45 Mr John Neil, Department of Communications, Information Technology and the Arts, *Transcript*, p. 78.

The Government is consequently reviewing its options on removing administrative law requirements.[46]

2.50 Some of the recently established GBEs were less concerned about administrative law requirements. For example, the AGS indicated that it is not subject to FOI, the information privacy principles contained in the Privacy Act, decisions under Part VIIIB of the Judiciary Act will be exempt from the Administrative Decisions (Judicial Review) Act, and it is intended the AGS will be excluded from the operation of the Ombudsman Act.[47]

2.51 EN indicated that its competitors are subject to the Privacy Act and FOI so there is no concern from an anti-competitive aspect. However, EN's status as a GBE means that it is subject to the Archives Act and the Ombudsman Act. Overall, EN suggested that costs of complying with administrative law were not significant.[48] Medibank Private indicated that it was only subject to the Archives Act which did not create an excessive workload.[49]

2.52 Mr Richard Humphry indicated that he was disappointed to hear that aspects of administrative law were still applying to GBEs. Mr Humphry stated:

> There is no physical reason why action could not have been taken to remove that requirement from those organisations. It is one of those things that I recommended, and I still hold the same view—that these organisations should be operating, as they have been intended to, as competitive entities within the marketplace and not subject to those processes.[50]

Conclusions

2.53 Government agencies that conduct administrative functions are subject to administrative law. The key administrative legislation includes the *Privacy Act 1988*, the *Freedom of Information Act 1982*, the *Ombudsman Act 1976*, the *Administrative Appeals Tribunal Act 1975* and the *Administrative Decisions (Judicial Review) Act 1977*.

2.54 The Humphry Report concluded that as GBEs generally trade goods and services in the market, their activities are not administrative. The Humphry Report recommended that GBEs be exempt from statutory

46 Mr John Neil, Department of Communications, Information Technology and the Arts, *Transcript*, p. 78

47 Australian Government Solicitor, *Submission*, p. S104.

48 Mr Rod Halstead, Employment National, *Transcript*, p. 24.

49 Mr Michael Whelan, Medibank Private, *Transcript*, p. 59.

50 Mr Richard Humphry, *Transcript*, p. 106.

administrative law. The Department of Finance and Administration confirmed that when the 1997 Governance Arrangements were developed, the government agreed that GBEs would be exempt from administrative law.

2.55 The Committee is not in a position to recommend that all GBEs now or in the future be exempt from statutory administrative law. Some aspects of administrative law should apply to GBEs depending on their responsibilities. For example, the Privacy Act applies to Employment National and its competitors because they are responsible for the security of client information. At the same time, it is not possible to determine now what aspects of administrative law should apply to government agencies that, in the future, may be corporatised. In view of this, each GBE should be examined on a case by case basis to determine what aspects of administrative law should apply. Therefore, the Committee recommends that the Minister for Finance and Administration review the applicability of administrative law to current and future GBEs on a case by case basis.

Recommendation 1

2.56 **That the Minister for Finance and Administration review the applicability of administrative law to current and future GBEs on a case by case basis.**