

Chapter 2

Background to the proposed changes to Austrade

2.1 Austrade is only one of many statutory authorities established by the Commonwealth Parliament.

What is a statutory authority?

2.2 A statutory authority in the Commonwealth sphere is a generic term for a body established through legislation for a public purpose.¹ Such bodies undertake functions of government or provide services to the community on behalf of government. There are over 160 Commonwealth statutory authorities, many of which do not share the same characteristics. Differences are found in their governance structures, their status as legal entities separate from the Commonwealth, the extent of their independence from political influence and departmental controls, their level of accountability to government and the Parliament and the financial management legislation that applies to them.² Enabling legislation enunciates the specific set of arrangements under which a statutory authority will operate.³

2.3 Mr Shaun Gath noted that the statutory authority has been a favoured legal structure in Australian public administration. He wrote, however, that a statutory authority is, in some senses, a strange legal entity. In his view:

It is neither the 'fish' of a department of state nor is it the 'fowl' of a traditional company. Rather, it is an entity vested with corporate form (and hence a capacity to contract and interact with other persons in a legally-binding way) by, or pursuant to, an act of Parliament other than through the incorporation provisions of the *Corporations Act 2001*.⁴

2.4 In recent years concerns have been expressed about the proliferation of statutory authorities, the appropriateness of their structure for their given functions, the selection process for board members and office holders, their relationship with the

1 Australian Government, Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, August 2005, p. 4.

2 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 16.

3 See *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 16.

4 Shaun Gath, 'Good Governance and Whole of Government: The Challenge of Connecting Government', *Public Administration Today*, July–October 2005, p. 18. See also Christos Mantziaris, *Ministerial Directions to Statutory Corporations*, Parliament of Australia, Parliamentary Library, Research Paper 7 1998–99, 8 November 1998, p. 3. He wrote that statutory corporations possess governance structures which are idiosyncratic.

relevant Commonwealth department and their minister and the financial framework and accountability regime governing such bodies.⁵

2.5 During the election campaign in October 2001, the Prime Minister, the Hon John Howard MP, acknowledged that the government has 'an obligation to ensure its dealings with Australian business are efficient, fair and transparent'. He announced that a re-elected Coalition government would 'focus on improving the structures and the governance practices of its Statutory Authorities and Office Holders, with particular attention being paid to those that impact on the business community'.⁶

The Uhrig Report

2.6 In November 2002, the government commissioned a review of the corporate governance of statutory authorities and office holders. The main objective in undertaking this review was to improve the performance of statutory authorities and office holders and their accountability frameworks.⁷ Mr John Uhrig, a well known business leader and former Chairman of Rio Tinto and Westpac, was appointed to conduct the review. He was to analyse the existing governance arrangements for statutory authorities and office holders and to identify reforms that might assist in improving the performance of these bodies, without compromising their statutory status.⁸ The review was to address the selection process for board members and office holders, the mix of experience and skills required by boards, their development and their relationship to government.⁹

2.7 The terms of reference expected the review to develop a broad template of governance principles and arrangements that the government might wish to extend to statutory authorities and office holders. In determining the most appropriate structure and governance arrangements, it was to have regard to the 'unique status of the Commonwealth as owner or shareholder, as the sovereign government and the source of regulatory authority.'

5 In general this concern accompanied similar concerns sparked by a number of high profile corporate failures in the private sector. See introduction to Parliamentary Joint Committee on Corporations and Financial Services, *CLERP (Audit Reform and Corporate Disclosure) Bill 2003, Part 1, Enforcement, executive remuneration, continuous disclosure, shareholder participation and related matters*, June 2004, pp. 1–3.

6 Prime Minister, 'Securing Australia's Prosperity', 15 October 2001.

7 The Hon John Howard, Prime Minister of Australia, Media release, 'Review of corporate governance of statutory authorities and office holders', 14 November 2002.

8 Press release, the Prime Minister, the Hon. John Howard, 14 November 2002 and *Securing Australia's Prosperity*, 2001 and Media Release, Senator the Hon Nick Minchin, Minister for Finance and Administration, 'Australia Government Response to Uhrig Report', 12 August 2004.

9 The Hon John Howard, Prime Minister of Australia, Media release, 'Review of corporate governance of statutory authorities and office holders', 14 November 2002.

2.8 The government wanted statutory authorities and office holders assessed against these principles and then to implement reforms that would be taken on a whole-of-government basis.¹⁰

2.9 The review produced two governance templates which clearly delineated between statutory authorities whose major activities were commercial and those undertaking regulatory and service provision operations.

Board template

2.10 In considering whether boards would provide effective or appropriate governance for statutory authorities, the Uhrig Report found that for a board to perform effectively, the government must delegate to it the full power to act. It stated:

In addition to internal strategy setting, the board should be responsible for the supervision of management, the oversight of risk and the ability to appoint and terminate the CEO. In situations where it is feasible to delegate the full power to act, such as commercial operations, a board will provide an effective form of governance.¹¹

2.11 Thus, the board template was judged to be better suited to operate under a management structure that requires powers akin to those of a publicly-listed company board.¹² In Mr Uhrig's view, a board did not provide the appropriate governance structure for statutory authorities operating as service providers or regulators.¹³

2.12 He noted that there are a number of circumstances in which Parliament and government may choose not to provide a wide-ranging power to act, instead, establishing a narrow set of outputs to be delivered by a statutory authority. He explained that:

In these circumstances a parallel can be drawn to closely held companies where a limited delegation of power, and the influence of a limited number of parties controlling the entity, indicate that an independent board may not provide the best governance. In circumstances where government is not providing a broad delegation it is likely that holding either chief executives or commissioners directly accountable for performance will produce better governance.¹⁴

10 The Hon John Howard, Prime Minister of Australia, Media release, 'Review of corporate governance of statutory authorities and office holders', 14 November 2002.

11 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 35.

12 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 54.

13 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 54.

14 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, Executive Summary, p. 5.

2.13 The report recommended that governance boards should be utilised in statutory authorities only where they can be given the full power to act.

2.14 Mr Uhrig then sought to identify an alternative governance structure for statutory bodies where it was deemed not proper or possible for the minister to delegate full responsibility. The Uhrig Report developed an executive management template to accommodate such statutory bodies.

Executive management template

2.15 The executive management template has a more limited governance structure headed by a Chief Executive Officer (CEO) who is directly responsible to the relevant minister. It recognises that the role of the Minister in the governance of some statutory authorities may be considered to be equivalent to that of a single owner of an organisation who would retain the right to direct the management on critical success factors, making a board redundant.¹⁵ It assumes that full delegation of power is not appropriate and that the executive management group will be governed by the minister with support and advice from the department. The CEO bears the full responsibility and accountability for the governance and management of his or her agency.

2.16 Mr Uhrig explained in full:

Where it is not feasible for the Minister and/or Parliament to delegate the full power to act, a governance board is not practical. This is particularly the case in those authorities where Ministers play a key governance role through the determination of policy and strategy. In these statutory authorities the issues to be addressed are limited to the efficient and effective performance of the activities specified through legislative parameters. This is essentially a management-oriented task. The optimum governance structure for most non-commercial authorities is that of an executive management that reports directly to the responsible Minister. The executive management structure may be headed by either one or more commissioners or a CEO. An executive management structure provides a direct line of communication between the Minister and those performing legislated functions, and the clearest and most direct line of accountability to the Minister.¹⁶

2.17 He stated:

Bearing in mind the accountability of Ministers under the Commonwealth system of government (derived from the Westminster system) for many of the functions performed, it is impractical to delegate full power to act in governance terms, particularly to individuals who are neither accountable through elections nor through employment in the public service. The

15 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 35.

16 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 67.

responsibility of governments to govern and the role of Ministers in supervising authorities highlight the importance of establishing governance arrangements that reflect these requirements.¹⁷

The Uhrig Report also looked at the financial framework governing statutory authorities.

The Commonwealth Authorities and Companies Act 1997(CAC) and the Financial Management and Accountability Act 1997 (FMA)

2.18 The two relevant pieces of legislation covering the financial management of Commonwealth bodies are the CAC Act and the FMA Act. They are structured differently and impose different requirements on officers. When introduced into Parliament in 1996, the then Minister for Finance, the Hon John Fahey MP, spelt out the distinction between the two pieces of legislation:

In relation to financial administration, every Commonwealth body falls into one of two categories, according to the basic legal financial status that each body has. It either has the legal capacity, in its own right, by virtue of its incorporating legislation, to acquire ownership of money or other assets coming into its possession; or the body will function only as a financial and custodial agent for the legal entity that is the Commonwealth, without acquiring separate legal ownership of the money and assets it deals with on the Commonwealth's behalf.¹⁸

2.19 Thus, the CAC Act applies to the operations of bodies that are intended to be financially autonomous incorporated Commonwealth bodies that can acquire legal ownership of money in their own right. This act contains reporting, accountability and other rules that apply to Commonwealth authorities and companies. On the other hand, the FMA Act applies to bodies that are, financially, agents of the Commonwealth. It establishes the regulatory, accounting and accountability framework for dealing with and managing the money and property of the Commonwealth.¹⁹

2.20 The Uhrig Report also noted the significant differences between the CAC and the FMA acts. These included:

- CAC Act authorities are bodies corporate with separate legal identities to the Commonwealth and hold money and other assets in their own right.
- CAC Act authorities do not have to comply with government policy, including as it relates to the use of resources (for example, Commonwealth

17 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 35.

18 John Fahey, Second Reading Speech, Financial Management and Accountability Bill 1996, 12 December 1996, p. 8344.

19 John Fahey, Second Reading Speech, Financial Management and Accountability Bill 1996, 12 December 1996, p. 8344.

procurement policy), unless specifically required under sections 28 and 44 of the CAC Act.

- The CAC Act is drafted to accommodate a board structure, whilst the FMA Act assumes an executive management structure.
- The FMA Act provides for clear lines of accountability to the Minister for Finance and Administration in relation to use of public money and other Commonwealth resources.²⁰

2.21 These differences have direct implications for the appropriate governance structure for statutory authorities. The Uhrig report found that the FMA Act provides an appropriate framework for the proper management of public money and property where these assets are owned or held by the Commonwealth.²¹ It stated:

The Act is concerned with bodies that form part of the core Commonwealth financial framework and in comparison to the CAC Act, allows government to more readily direct aspects of the financial management framework of an entity.

The structure of an authority subject to the FMA Act is generally not well suited to the inclusion of a governing board as the Act vests authority and places responsibility on a single chief executive as the head of the statutory authority. It can however, accommodate an advisory board structure where the board might advise the chief executive in a non-binding manner or with a relationship where it is subordinate to the chief executive.²²

2.22 The Uhrig report recommended that the financial frameworks generally be applied based on the governance characteristics of a statutory authority, that is:

- The Commonwealth Authorities and Companies Act 1997 be applied to statutory authorities where it is appropriate they be legally and financially separate from the Commonwealth and are best governed by a board. They fit the Board template.
- The Financial Management and Accountability Act 1997 be applied to statutory authorities where it is appropriate they be legally and financially part of the Commonwealth and do not need to own assets. (Typically, this would mean Budget-funded authorities.). They fit the executive management template.

2.23 In enunciating the government's principles for determining the most appropriate structure and governance arrangements for Australian government bodies,

20 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 45.

21 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 70.

22 *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, 2003, p. 71.

the Department of Finance reinforced the findings of the Uhrig Report. It stated clearly that the government's policy shows a preference to curb unnecessary growth of government bodies. It advised that if there is a persuasive policy reason to form a new body, 'it is preferable that bodies operate under the FMA Act':

These bodies are financially part of the Commonwealth, holding public money that can only be spent under the authority of an appropriation from the Australian Parliament. The FMA Act should especially apply to primarily budget-funded bodies, regulators and bodies that raise public money under a Commonwealth law.²³

Criticism of the Uhrig Report

2.24 The Uhrig report came under some fierce criticism, mainly from a number of academics.²⁴

2.25 One of the main criticisms relevant to this inquiry is that the report failed to take account of the many different functions and tasks carried out by statutory authorities in the public sector. Professor Wettenhall stated that the report showed 'a very limited appreciation of the great variety of public tasks that are undertaken by statutory authorities and other types of non-departmental public body in this country'.²⁵ He was concerned about the generalisation arising from a study of just eight cases.²⁶ It should be noted that Austrade was not one of these cases. Professor John Halligan and Bryan Horrigan also referred to concerns about the 'amenability of all Australian public sector entities to pigeon-holing neatly within one of the two basic 'Board' and Executive Management' templates.²⁷

Independence of statutory authorities

2.26 Another major criticism of the Uhrig report was the lack of consideration given to the appropriate degree of independence allowed to statutory authorities. Mr Paddy Gourley was of the view that the report paid 'inadequate attention to the need for independence of functions performed by statutory authorities and the course now

23 Department of Finance and Administration, Executive Summary, *Governance Arrangements for Australian Government Bodies*, August 2005.

24 See for example, *Public Sector Informant*, 'Recommendations not worth the wait', 7 September 2004; John Halligan and Bryan Horrigan, *Reforming Corporate Governance in the Australian Federal Public Sector*, Corporate Governance ARC Project, Issues Paper Series no. 2, December 2005, p. 10. See also Professor Roger Wettenhall, *Submission P1*.

25 Roger Wettenhall, 'Statutory Authorities, the Uhrig Report, and the Trouble with Internal Inquiries', *Public Administration Today*, December–February 2004/05, p. 66.

26 Roger Wettenhall, 'Parliamentary Oversight of Statutory Authorities: a Post-Uhrig Perspective', *Australasian Parliamentary Review*, vol. 20, no. 2, Spring 2005, p. 45.

27 John Halligan and Bryan Horrigan, *Reforming Corporate Governance in the Australian Federal Public Sector: From Uhrig to Implementation*, University of Canberra, Corporate Governance ARC Project, Issues Paper Series, no. 2, December 2005, p. 28.

being consequentially pursued by the Government risks their politicisation'.²⁸ Professor Wettenhall also commented that the report 'grossly underestimated the need of several groups of authorities other than the commercials and multi-ownership cases for a degree of independence from ministers that must take them far from direct ministerial governance'.²⁹ Professor John Halligan and Professor Bryan Horrigan asked:

How do you balance any need for operational autonomy and independence for a statutory body with both departmental oversight and appropriate ministerial policy influence and direction of it?³⁰

2.27 The relevance of this question with regard to Austrade is taken up in the following chapter.

Government response to the Uhrig Report

2.28 The government supported the two templates developed by Mr Uhrig. According to the Minister for Finance and Administration, Senator the Hon Nick Minchin:

Both templates detail measures for ensuring the boundaries of responsibilities are better understood and that the relationship between Australian Government authorities, Ministers and portfolio departments is clear.³¹

2.29 He announced that the government would implement the governance templates recommended in the report. The aim was to establish 'effective governance arrangements for statutory authorities' and achieve 'clarity in roles and responsibilities'. Ministers were directed to assess the statutory authorities within their portfolios against the governance templates. Senator Minchin explained that the selection of the appropriate template would depend on the degree to which the authority 'has been delegated full power to act'.³²

2.30 Deputy Prime Minister and Minister for Trade, Mr Mark Vaile MP, assessed Austrade against the principles and recommendations of the Uhrig Report. The assessment found that Austrade as primarily a service delivery organisation that is

28 Paddy Gourley, former public servant, 'All quiet, sort of, on the Uhrig front, *Public Sector Informat*, December 2005.

29 Roger Wettenhall, 'Statutory Authorities, the Uhrig Report, and the Trouble with Internal Inquiries', *Public Administration Today*, December–February 2004/05, p. 67.

30 John Halligan and Bryan Horrigan, *Reforming Corporate Governance in the Australian Federal Public Sector: From Uhrig to Implementation*, University of Canberra, Corporate Governance ARC Project, Issues Paper Series, no. 2, December 2005, p. 14.

31 Media Release, Senator the Hon Nick Minchin, Minister for Finance and Administration, 'Australia Government Response to Uhrig Report', 12 August 2004.

32 Media Release, Senator the Hon Nick Minchin, Minister for Finance and Administration, 'Australia Government Response to Uhrig Report', 12 August 2004.

largely budget funded aligns closely with the executive management template. The joint submission from DFAT and Austrade noted:

In accordance with that template, the assessment's key recommendations were to: change Austrade's governance arrangements from a governing board structure to an executive management structure; change Austrade's financial framework from the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to that of a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA); and employ Austrade staff under the *Public Service Act 1999* (PS Act).³³

2.31 Subsequently, on 5 January 2006, the Minister announced that Austrade would move to executive management.³⁴ The following chapter examines the specific provisions of the bill enabling that transition in light of the recommendations of the Uhrig report and the criticism levelled at its findings.

33 *Submission P3*, p. 1.

34 Governance Implementation Update (Uhrig Report) How is the Assessment Process Progressing?, 2006/01–February 2006.

