

# PARLIAMENTARY OVERSIGHT OF STATUTORY AUTHORITIES: A POST- UHRIG PERSPECTIVE

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[12.8.05]

Paper presented to the 2005 Australasian  
Study of Parliament Group conference.

## **Abstract**

*The Uhrig Report on the Corporate Governance of (Commonwealth) Statutory Authorities and Office Holders, released just before the October 2004 federal election, has raised many questions about the relationship of statutory bodies to government, parliament and community. While commentators have speculated about whether the report is a 'damp squib' or a 'ticking timebomb' (from Bartos 2005a), its effect has been sufficient to create considerable concern among statutory authorities as the most populous group of Australian non-departmental public bodies (NDPBs). Generally the government wants more control, and it is easy to see the report and related changes as threatening the autonomy and ongoing operations of federal agencies. Then there is the question of the parliamentary interest, which has received little attention in the discourse to date.*

*This paper will seek put the inquiry in context and then to identify areas of concern for parliament and its committees. It will note particularly the situation of agencies whose charters and roles require a high degree of autonomy and a defence against cramping efforts by government, such as the ABC and the Human Rights and Equal Opportunity Commission. Is parliament capable of providing such defence?*

## **Introduction**

The Uhrig Report on the Corporate Governance of Statutory Authorities (Uhrig 2003), and the waves it has created since its August 2004 release, relate particularly to the Commonwealth jurisdiction. I do not know how much the report and its reception have been noticed in the Australian state and territory jurisdictions. But I do know that New Zealand has been working through its own version of NDPB reform, with a new Crown Entities Act passed in 2004 to deal with a mass of administrative bodies having a good deal in common with Australia's statutory authorities (SSC 2005). However much Uhrig has been noticed or not noticed elsewhere, I believe his report raises issues that have relevance for other jurisdictions. This presentation is made in that spirit.

The first section deals very briefly with the establishment of the inquiry and looks at what the resulting report says about the parliamentary interest, which is not much! The second section gives some outlines of what it does say, and considers how it has been received. The third and longest section asks what are the legitimate interests of legislatures generally in the operations of statutory authorities and other NDPBs,<sup>1</sup> and looks particularly at the case of statutory authorities whose charters and roles bring them into conflict from time to time with 'owning' governments. It asks whether parliaments are capable of offering the required protections.

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## The Uhrig Report and the parliamentary interest

### *Establishment of the review, and approach of the reviewer*

As one early reviewer put it, the review 'was the product of direct lobbying by a business community unhappy about being badgered by high profile regulators such as Alan Fels and the Australian Competition and Consumer Commission' (Holland 2004: 64). Prime Minister Howard used the opportunity of a November 2002 address to the Australian Chamber of Commerce and Industry to announce the appointment of well-respected businessman John Uhrig to conduct an inquiry already foreshadowed before the 2001 election. His mission was to review the corporate governance of Commonwealth statutory authorities and office holders, with a particular focus on a select group of agencies with critical business relationships (Howard 2002a, 2002b: LNP 2001; Wettenhall 2004: 62). These agencies, which came to be known as 'the Uhrig 8' (Ioannou 2005: 15), are identified in Box 1.

#### **BOX 1: 'THE UHRIG 8'**

Australian Competition and Consumer Commission (ACCC)  
Australian Postal Corporation  
Australian Tax Office  
Australian Prudential Regulatory Authority (APRA)  
Australian Securities and Investments Commission (ASIC)  
Centrelink  
Health Insurance Commission  
Reserve Bank of Australia

Uhrig began his review in January 2003 and submitted his report in June 2003. That the government did not release it until 14 months later was itself a cause for comment (Gourley 2004). When release came in August 2004, it was immediately clear that the recommendation that an Inspector-General of Regulation be appointed had been rejected. By the time Howard was re-elected and formed his Fourth Government in October 2004, however, it was equally clear that other Uhrig recommendations were in line with, and helped give form to, the Howard Government's own thinking (Bartos 2005a: 97, Briggs 2005).

Uhrig was totally clear about his approach: it drew on knowledge and wisdom in the private sector, which comes from the accumulation of its practical experience of when there are robust governance arrangements in place and when there are not (2003: 2).

It is apparent from his subsequent reflections that he has a unilinear appreciation of what governance is about. Thus, 'governments must govern'; you can't 'let... government itself off the hook'. Thus again, 'governance can't exist successfully if those with the responsibility for governance don't have all the power necessary to carry it out, and carry it out under all circumstances'. He understands that others may have 'more complex views', but he is unrepentant. On the business analogy, 'the purpose of government is to secure the success of the enterprise'—so, 'if you're going to reach the right conclusions you must see all of the issues from the point of view of

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the owners', and 'the framework of governance [therefore] has to give support to ministers' (Uhrig 2005: 6-7; also Vandenbroek & Bartos 2005).

Of course ministers can't do everything, so there must be delegations. But successful governance begins with clear and understandable delegations ... the more independence, autonomy in decision making and separation of powers, the greater is the need for governance and for, in fact, strong governance. ... The more power you hand to somebody else, then the more you need governance to ensure that power is not improperly used and is in fact used in a constructive way (Uhrig 2003: 6).

Not surprisingly on this view, the use of statutory authorities is fraught with danger: all of the problems that are experienced in [them] in terms of governance begin on the day the decision is made to have a statutory authority. And if you think about that carefully you might see that there are some occasions when you shouldn't have one (Uhrig 2003: 7).

Uhrig saw governance as encompassing 'the arrangements by which owners, or their representatives, delegate and limit power to enhance the entity's prospects for long term success' (2003: 21). All the recommendations in his report were therefore designed to enhance the minister's power to govern in this sense.<sup>2</sup> There was no bottom-up view that looked at issues from the point of view of authority boards and managers. And, though the terms of reference required Uhrig to consider the 'relationship between statutory authorities and office holders and portfolio Ministers and Departments, *the Parliament* and the public, including business' (Uhrig 2003: 106, emphasis added), he did not have much to say about the parliamentary interest.

#### *Scant attention to the parliamentary interest*

To begin with, no consultations were held with anyone representing that interest other than ministers – whose interests obviously focus mostly on executive government demands.<sup>3</sup>

The report did of course recognise that the charters of individual statutory authorities are set in legislation, and that statutes determine the degree of autonomy authorities enjoy and the extent of limits on the room for ministerial intervention in their affairs; indeed, it made the assumption that 'the legislative framework protects the operational independence of an authority', so that, presumably, it saw no need to do that itself (Uhrig 2003: 34; also pp.5, 9, 16, 31, 33, 34, 58, 67). It recognised that ministers have accountability 'obligations' to parliament, and saw departments as advising and supporting ministers in fulfilling those obligations; the whole exercise of reforming areas of governance had the broad objective of giving parliament confidence in the way executive government operates (pp.31, 63, 72). And providing for the annual reports of authorities, and the statements of intent he wanted them to furnish in response to ministerial statements of expectations, to flow through ministers to parliament was an important way of supporting that objective (p.8, 52, 62). Again, ignoring a mass of earlier discourse about parliamentary questioning of statutory bodies, ministers could respond to questions asked in parliament as though the authorities were integral parts of their departments (pp.17, 62).

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So all this is through ministers. As for direct authority/parliament connections, there is a major obstacle: since the (poor! – my interpolation) minister has full responsibility 'for legislation and resourcing', 'statutory authorities should advise [him/her] of proposed interactions with parliament prior to establishing any contact' (p.62). In other words, an authority will be sinning if it deals in any way with parliament except with the minister's approval! Only the Auditor-General, who joins in the scrutiny of other authorities and reports directly to parliament, is excluded from these prescriptions (p.8).

There really is nothing more – for example, no reference to the important work of parliamentary committees in the scrutiny of statutory authorities. A couple of the early commentators criticised Uhrig for this neglect. Thus former super-regulator Fels and his biographer Brenchley (2004), supporting the government's rejection of the proposal for an Inspector-General of Regulation, proclaimed that 'Uhrig overlooked one of the most powerful constraints on rogue regulators –parliamentary scrutiny'. And Holland, a parliamentary officer himself, argued that departmental secretaries 'shouldn't routinely be in the business of looking over the shoulder of statutory agencies. That is Parliament's job' (Holland 2004: 65).

So what did the report do, and what were the major responses?

### **Main thrusts of the report and its reception**

#### *Core recommendations*

The core of the Uhrig recommendations was the proposition that statutory authorities needed to be sorted into two categories, with governance arrangements designed accordingly. First was the *board template*, appropriate where it has been determined that the governing board should have 'full power to act', including power to appoint and remove the CEO, determine directions, approve policies and corporate plans, and oversee management; this is likely to apply where the function is commercial, or where there are multiple accountabilities because the Commonwealth is not sole owner. Second was the *executive management template*, where full delegation of power is not appropriate and an 'executive management group ... is governed directly by the Minister with departmental support and advice'; this is likely to apply to authorities undertaking regulatory or service provision functions (Uhrig 2003: ch.5). The implication was that it is not appropriate for authorities in the second group to have boards at all – rather their executives should stand face-to-face with ministers.<sup>4</sup>

Even in the first group, however, the minister would set strategic directions for the authority and, effectively as owner, hold the board responsible for performance. To this end, and generally across both groups,<sup>5</sup> the recommendations proposed the issue of, and making public of, statements of expectations by ministers and statements of intent by authorities; and, importantly, they built the portfolio departments and their secretaries into the supervisory process as 'principal source of advice to Ministers'. There should also be, within the bureaucracy, 'a centrally located group to advise on the application of appropriate governance and legislative structures when establishing or reviewing statutory authorities' (pp.11, 12).

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While Uhrig accepted that statutory authorities exist to provide objectivity or promote efficiency, and are given 'separation' and 'a degree of operating independence' from ministers and departments in order to achieve these purposes (pp. 7, 31), he never seemed to consider that they may need protecting too. To repeat, his concern was always that it is the minister who may be disadvantaged, and these recommendations were all designed to strengthen the minister's hand in exercising the governance role.

A further important set of recommendations concerned what Uhrig regarded as the proper functioning of boards, to apply in authorities coming under the board template.<sup>6</sup> Then there was the proposal that an Inspector-General of Regulation be created, as a way of pulling the business regulators into line. But these matters are of no further concern here.

### *Responses I: The commentators*

Of those outside government whose responses I have seen, corporate lawyers have been kindest to the report, at least in the sense of proclaiming its likely strong reformative impact. One saw it as 'heralding a new approach to public-sector corporate governance arrangements' (O'Callaghan 2004). For another, it has 'the potential to fundamentally reshape the way in which government services are delivered' (Gath 2004).

Mostly, however, commentators have been less supportive, with criticisms focusing on a variety of perceived problems such as the style of writing; inadequate consultations; excessive reliance on private sector models; subservience to business; lack of concern with relevant history, academic research and overseas experience; massive generalising from just eight cases; failure to see that government is often the problem rather than the authorities themselves; a general unconcern with political realities; and, as already noted, a disregard of the parliamentary interest. These concerns are identified in more detail in Box 2.

**BOX 2: SOME CONCERNS RAISED BY THE CRITICS**

- The report is full of jargon and clichés (Gourley 2004) and has an 'abundance of (unacknowledged) normative theory' (Bartos 2005a: 96).
- It was prepared with inadequate consultation, and inadequate attention to relevant academic literature, relevant history and relevant overseas (or even Australian state) experience (Fels & Brenchley 2004, Gourley 2004, Holland 2004: 66, Wettenhall 2004: 65-69).
- Because it ignores the history, it fails to see that these issues have been dealt with previously and that there are already sets of guidelines in existence, and therefore fails to consider why they are not better observed (Gourley 2004, Wettenhall 2004: 67); it offers just 'restatements, clarifications or further procedures to strengthen existing ... arrangements' (Bartos 2004).
- It is just a 'business wish-list' reflecting its origins, and fails to deal with issues such as regulatory timidity and regulatory capture (Fels & Brenchley 2004).
- It draws almost exclusively on private sector models and assumes they are always best, fails to see that the public sector is different in important ways, fails to see that there has been good public sector experience deserving attention, and fails to see that governments are often to blame for problems rather than the statutory authorities and to address that issue (Gourley 2004, Holland 2004: 65, Wettenhall 2004: 66,68).
- It ignores important relevant issues such as probity, ethics and the role of statutory authorities in managing risk (Bartos 2005a: 95), whether statutory authorities should be staffed under the Public Service Act; and how they should be viewed in relation to other forms of non-departmental organisation (Wettenhall 2004: 67).
- Its special concern was with only eight authorities, even that far from case-study treatment, yet it generalises from those eight showing insufficient appreciation of the great variety of tasks performed by statutory authorities (Bartos 2005a: 96, Wettenhall 2004: 66).
- In its views about boards and board and CEO appointments, it fails to appreciate their vital political importance to ministers and to community interests seeking representation (Bartos 2005a: 96, Wettenhall 2004: 70).
- Without seeming to understand, it projects huge new problems for portfolio secretaries (Bartos 2005a: 98).
- It was an inquiry internal to the government, not in any sense an open *public* inquiry (Wettenhall 2004: 70-72).

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*Responses II: Reorganising government*

In releasing the report, Senator Minchin (as Minister for Finance and Administration) indicated that all its recommendations except that proposing the Inspector-General of Regulation had been accepted; the government would now apply the 'Uhrig templates', with ministers assessing all statutory authorities and similar bodies within their portfolios against the templates. The 'Uhrig 8' would be done first, but all the others (thought to be about 170) would be covered by March 2006. Minchin was given 'responsibility for monitoring and coordinating, facilitating and encouraging implementation', and to support him – and in line with one of the Uhrig recommendations – a Government Structures Branch was established within his department (Minchin 2004; Ioannou 2005: 14).

Under Minchin, the Department of Finance and Administration (DOFA) had been busy on another front as the Uhrig inquiry was progressing. As one of the outcomes of an earlier but very relevant exercise that Uhrig failed to notice – one taking off from the work of the Coombs Royal Commission on Australian Government Administration – the Senate Standing Committee on Finance and Public Administration in its various guises inquired into the statutory authority sector, made many sensible suggestions, and began the compiling and publishing of lists of Commonwealth bodies. These lists continued through to 1996, and provided valuable information for those interested in tracking developments in government organisation. This Committee also claimed to have instigated the requirement that departments should provide data about related non-departmental bodies in their annual reports. But the Committee lists ceased in 1996, and the requirement about departmental reporting was also dropped; as to the latter, the Committee now reported that the Department of Prime Minister and Cabinet (DPMC), which set the annual reporting guidelines, cited 'a low level of interest' as a reason for removing the requirement. It was hard to ignore the conjunction of these changes with the advent of the Howard government, and I suspected that they pointed to its dislike of transparency. Then, with the appointment of Minchin to the Finance portfolio in 2001, there was cause for satisfaction that the government itself was now to resume publication of the lists. The work went on within DOFA, and the new *List* appeared more-or-less contemporaneously with the release of the Uhrig report.<sup>7</sup>

I welcomed this development as reviving the useful informational work of the Senate Committee (Wettenhall 2004: 32, 2005: 79). But it was soon apparent that there was another objective in view. Central agency officials were now speaking openly about the need to move to 'whole of government' approaches to national administration, and it was increasingly obvious that they regarded the mass of autonomous and semi-autonomous NDPBs as an obstacle to achieving that purpose. Indeed, the DOFA *List* went further: it trawled the whole federal public sector, counting separately parliamentary bodies including committees (which are political, not administrative), Commonwealth-state structures including ministerial councils (again political, not administrative), international agencies with Australian representation, advisory committees, departmental functions 'with distinct branding', 'business operations' lacking clear organisational identity – coming to a frightening total of 955 (DOFA 2004: xi). This was good ammunition for those wanting to streamline and simplify the system, but it was deceptive not only because it included

political and inter-governmental items but also because many items listed separately lacked significant autonomy and represented functions and activities that would be needed in any well-run system of government. Of course ministers and senior officials were careful to say that there were only 170 or 180 statutory authorities, but the broader collation stood by their side to suggest incoherence and capacity to obstruct.<sup>8</sup>

The Administrative Arrangements Order that established the Fourth Howard Government, issued on 22 October 2004, brought six agencies including two of the 'Uhrig 8' (Centrelink and Health Insurance Commission) into a new Human Services portfolio, all to lose their own boards in favour of a single portfolio advisory board;<sup>9</sup> and abolished two other statutory authorities and three executive agencies, all their functions coming back into the relevant ministerial departments (Howard 2004).<sup>10</sup> Howard was asked at the time whether his thinking was influenced by the Uhrig inquiry, and responded: 'It's been influenced by it, yes. I thought Uhrig had a lot of very sensible things to say' (quoted in Bartos 2005b: 3). Soon afterwards, Peter Shergold, DPMC Secretary, spoke enthusiastically of these changes, and *Canberra Times's* public service columnist Paul Malone, reporting his speech, commented: '[t]hankfully, the pendulum is being pushed back to the centre by Dr Shergold' (Shergold 2005: 4; Malone 2004b).<sup>11</sup> Soon another senior central agency official, Public Service Commissioner Lynelle Briggs, was describing the reviews under way, with 'responsible ministers assessing relevant statutory authorities and officeholders within their portfolios against the Uhrig templates'; she believed the Uhrig Report would have 'a profound effect on the governance arrangements of Australian government entities', and wanted to extend the process by bringing agencies not already covered by the Public Service Act into such coverage (Briggs 2005).<sup>12</sup> For Bartos (2005a: 98), the government's adoption of the Uhrig proposals – providing the implementation is seriously conducted -- 'signals an end to the insistence on devolution to line managers that has been part of public sector organisational design since the early 1980s' – and, in view of our very long history of using statutory authorities, I would add for at least a century longer in this area of our public governance.

An early consequence of these changes was the 'shock resignation' of Sue Vardon, the well-respected CEO of Centrelink, just three weeks after Howard announced the first of them (Malone 2004a). Mid-2005 discussions with senior officials from several other authorities suggest that DOFA is aggressively pursuing the cause of moving non-commercial authorities into the more closely controlled area of the Financial Management and Accountability Act, with weakening or disappearance of boards the likely corollary. Resigned to this 'fate' and recognising that DOFA is driven mostly by financial management considerations, some authorities are focusing on gaining statutory protection against ministerial intervention in their regulatory decision-making activity. It seems the Uhrig 8 are in the front line, but there is a belief that the government's business backers who procured the Uhrig inquiry, now annoyed by the rejection of its proposal for a super-regulator to stand over the regulatory authorities, are pressing the government in other ways, and that the political agenda has thus shifted somewhat from the organisational issues. Outside the regulatory group, one view is that authorities are 'alert but not alarmed'. Through mid-2005, Canberra workshops and breakfast briefings conducted by the University of Canberra's

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National Institute for Governance and the law firm Blake Dawson Waldron, all aimed at assessing the consequences of Uhrig, have been well-subscribed or over-subscribed.

## The legitimate interests of the legislature

### *Statutory authorities involve different accountability arrangements*

Back in 1993 I made four relevant points in a presentation in the Senate Department's Occasional Lecture Series (Wettenhall 1993). First, I noted that the now widely-held assumption that we can no longer rely on the conventions of Westminster relating to ministerial responsibility and so on had created much ambivalence about the accountability process. It was argued, on the one hand, that accountability is only meaningful when it is structured into vertical, hierarchical arrangements demanding undiluted responsiveness to ministers who are in turn responsive to the legislature; on the other, that accountability should be conceived as a more open and multidimensional process with sideways and downwards as well as upwards components, with responsiveness due also to many stakeholders such as auditors-general, ombudsmen, courts and tribunals, the press, user groups and, certainly not least, the legislature and its committees.

Second, I noted how even the older Westminster tradition had developed an appreciation that some areas of public governance were to be treated differently from the ministerial areas, with much more direct responsibility to the legislature intended in areas differentiated from the departments. Thus, in another 1993 Senate Lecture, Ian Temby, then head of the NSW Independent Commission Against Corruption (ICAC), had instanced his own organisation as a public body 'independent from Government but accountable to Parliament ... [it] reports direct to the Parliament, not through a Minister but direct to the presiding officers' (Temby 1993: 3,7). Obviously his was not the only public body in this position: as others 'funded by and close to government but required by statute to be independent from government', he instanced also Directors of Public Prosecutions, regulators such as the Australian Broadcasting Authority, appeals tribunals and courts. I simply added to this list, pointing out that, to a considerable degree, his descriptions applied also to the statutory bodies running public broadcasting services, public universities, GBEs and so on. Whenever parliament legislated to create such a body, it was declaring that the accountability arrangements should be different from those applying in departments. To be sure, there were many degrees of autonomy. In some, ministers were given greater powers of direction or intervention than in others; nonetheless the authority was clearly intended to be the first-instance decision-maker.

In another paper I had reviewed a mass of authoritative statements to this end (Wettenhall 1983). The Victorian and NSW legislators may have differed in their appreciations in creating their railway commissions in the 1880s, but they were as one in endorsing the arms' length view: the autonomy of the commissioners needed to be defended while they were complying with the principles laid down in the creating statutes, for the very good reason that close ministerial involvement would bring in partisan influences that would often be inimical to the service in question. Succeeding generations applied this principle fairly widely as Australian governments

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extended their networks of developmental enterprises. New accountability arrangements were fashioned, importantly involving regular reporting by the authorities to parliament and often specialised parliamentary committees to enhance the parliamentary role, but also often restricting the right of MsP to question ministers about the operational affairs of authorities. This approach was repeated in thousands of statutory authority/statutory corporation creations the world over, and analysed and endorsed in a large academic and practitioner literature that developed. In Australia the 1937 Banking Royal Commission found that the Commonwealth Bank, then a statutory corporation, was an entity independent of the government, with powers delegated by parliament; proposals designed to deal with legitimate differences between it and the government were soon adopted in legislation, and then carried over to today's Reserve Bank. The High Court ruled in a 1959 judgment that the Tasmanian Hydro-Electric Commission was independent of the state apparatus, in the sense of not being a 'servant of the Crown', and that the few statutory powers given to the minister were merely 'a limitation upon what is otherwise a completely independent jurisdiction'. A British committee of inquiry had seen the BBC as a 'trustee for the national interest', broader than the interests represented by a partisan government, and so requiring a form of organisation protecting that role. An ABC chairman and a NSW Auditor-General spoke of statutory corporations being responsible, not *to* their ministers like departments, but *through* their ministers to parliament. And so on. To be sure, there were some failures – but, on any dispassionate analysis, their causes were as much to do with inappropriate (including extra-legal) ministerial interventions as with managerial inadequacy.<sup>13</sup>

What emerges is a recognition of two different types of relationships: the linear (two-way) relationship between the parliament and the government of the day, made up of ministers unambiguously heading departments; and the triangular (three-way) relationship between parliament, government, and statutory authorities/corporations. Parliament's front-line role in the latter relationship is underlined in important contributions to the literature referred to in the last paragraph: for example, in books titled *Parliament and Public Ownership* (Hanson 1961), *Parliament and Public Enterprise* (Ramanadham & Ghai 1981), and *The Member of Parliament and the Administration: The Case of the Select Committee on the National Industries* (Coombes 1966). That those three emphasise public enterprise in their titles does not weaken the argument: privatisation may have removed some of the more commercial bodies, but the broad statutory authority group includes many regulators, service providers, managers of public institutions and so on. At the 1959 conference of the Commonwealth Parliamentary Association held in the Old Parliament House in Canberra, the Deputy Chairman of the Upper House of the Indian Parliament endorsed the dictum of a leading British mid-1900s authority that parliament was 'the final arbiter between the public corporation, the Minister and the community'.<sup>14</sup>

There is yet another argument to be considered, but it is one that is totally ignored both by Uhrig and by those pushing the 'whole of government' cause today. It was well developed in the post-World War generation, and had a discernable organisation-theory flavour. Thus Webb argued that granting a degree of autonomy to authority boards was necessary to attract contributions from people or groups who would not have participated in a departmental context, and for Peres the autonomy was a necessary condition for achieving 'adequate stocks of the incentives needed to induce

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and maintain co-operation from contributors to the corporation' (Webb 1954; Peres 1968: 368; Wettenhall 2005b: 7-8). This view aligns both with multidimensional accountability and the need for clear parliamentary involvement as a corrective to the hierarchical pretensions of any government-of-the-day.

*The issue of the government-owned company*

The third matter raised in my Senate lecture was the impact on parliament of the rising use of the government-owned company as an alternative NDPB form, something often described as 'corporatisation'.<sup>15</sup> The Senate Committee already referred to had already drawn attention to this development in two important reports, making clear its strong concern that parliament was much further removed from the companies than it was from the statutory authorities/corporations (SSCFGO 1981, SSCFPA 1989b); and, in promulgating his guidelines for the use of statutory authorities, Finance Minister Peter Walsh had expressed a clear preference for the statutory authority over the company form because the latter was less satisfactory in terms of proper accountability to parliament (Walsh 1987: 10).

Uhrig was not asked to look at the companies, and virtually ignored them in his report. So I say no more about them here except to point out that I have elsewhere (Wettenhall 1997b, 2001) expressed the view that, though still government-owned and therefore surely still public,<sup>16</sup> they move us much closer to the private/market end of the public-private spectrum, whereas the statutory bodies represent a (mostly) carefully crafted effort over a century or more to establish 'middle-ground' conditions that combine the requirements of due public accountability with the relative freedom and flexibility required to discharge public policies in an enterprising and not overly partisan manner. With the statutory authorities parliament plays a vital part in that its statutes determine these conditions, and it has the opportunity of monitoring their operations through the various reporting devices it has laid down. It does not have such determining involvement in the creation of companies and, given that their primary reporting is *via* Corporations Law procedures devised primarily for the private sector, it is likely that it also stands at a further remove in respect of its monitoring ability.<sup>17</sup>

*Statutory authorities need parliament's protection!*

The fourth part of my 1993 argument extended the first and second parts, insisting that, while all parts of the public sector must be accountable, appropriate accountability regimes need to be created, and that regimes suited to statutory authorities will be different from those suited to departments. Uhrig (2003: 58) was on safe ground in arguing that we need to think carefully before creating statutory authorities, but not so in being so unwilling to differentiate between the minister's role in respect of departments and that in respect of authorities, and in being so cavalier about the parliamentary connection. There is a legitimate parliamentary role here that is separate from that of the government of the day, and it needs constant promotion and refreshment.

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In 1993 I urged that parliament should be vigilant in these matters, and in particular stressed the vital investigative and educational role to be played by specialist cross-portfolio committees like the old Senate Standing Committee on Finance and Public Administration – I recognised that all committees were important, but believed the cross-functional ones had special value because they had greater detachment and were less susceptible to being controlled by ministers.<sup>18</sup> I see no reason now to alter those views: while there is much current concern that the Senate has just lost its independence, they stand irrespective of whether there is a unicameral or a bicameral legislature, and whether, in the latter case, government has or does not have an upper house majority. There is a vital role here for non-ministerial MsP.

This is not, of course, an invitation for MsP to intervene freely in the affairs of statutory bodies – far from it. The point is that ministers often fail to observe the 'ordinances of self-denial'<sup>19</sup> required under the statutes creating statutory bodies, which establish the frameworks for autonomous management and delimit the powers of boards, executive managements and ministers. The task of parliament and its committees is to see that those frameworks are properly observed, working through the accountability arrangements that have been developed separately for statutory bodies.

## **Statutory authorities in conflict with government**

### *How and why conflicts happen*

So I come to the special problem of statutory authorities whose charters and roles necessarily bring them into conflict with 'owning' governments from time to time:

- They may be inspectors or regulators of the activities of other public sector agencies, such as audit offices, ombudsmen and appeals tribunals.
- Or they may have broader missions such as promoting and protecting the observance of human rights or running a national broadcasting network or even a national museum or a police service. While the governments and parliaments creating them no doubt intend them to direct their primary attentions to matters non-governmental, it is likely that, in the proper performance of their functions, they will sometimes find themselves compelled to criticise the actions of, or take different positions from those of, ministers, departments and other parts of their own governance system.
- In other cases, budget-funded agencies with tasks directed to non-governmental actions and events will nevertheless feel compelled to protest when budgets are cut or they suffer other government-imposed constraints that prevent them, in their view, from performing those tasks adequately.

Pointing out that such bodies were 'bound to cause displeasure from time to time', Temby drew attention to parliament's parenting role. While he focused mostly on authorities headed by single statutory officers, his analysis has wider application:

there will ... be awkwardness caused because an important function of government, whatever it may be, is disclosed as being inadequately performed. It is the need for that demonstration to occur which imposes the requirement of independence. Only a non-partisan body can be authoritative and will enjoy public confidence. Periods of

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disharmony between government and independent officers are, accordingly, inevitable. If they were never encountered, the only available conclusion would be that the independent officer was not doing his or her job properly.

The fact of that disharmony, the inevitability of it occurring from time to time, of course brings one to Parliament. It is Parliament that creates all of these bodies and it is Parliament which must look after them. When relations between a particular government and an independent officer, say an Ombudsmen, become strained, the protection and support must be vouchsafed by Parliament. Why is this so? First, because parenthood brings responsibilities. Secondly, because those not directly affected can appreciate that the proper performance of functions, simply doing the job laid down by legislation, can involve the making of inconvenient decisions. Thirdly, because the Parliament directly distils and reflects the will of the people in a way that government and the bureaucracy never can and never will... (Temby 1993: 7-8).

Since a lecture series arranged by a parliamentary chamber featured these views and the earlier expression of the argument I am making here, it is appropriate that I should point out also that even earlier contributions to that series contained three presentations by statutory 'watch-dogs' who, it was suggested, needed 'unchaining'. All stressed their role in seeking and monitoring integrity in government (Taylor 1990, Pearce 1990, Saunders 1990). Clerk of the Senate Harry Evans remarked in the resulting publication that the observations of these watch-dogs were 'of great interest in assessing the soundness of the system of government and also in assessing how well Parliament does its work' (Evans 1990).

That the interests of the government and that of parliament can so easily diverge were well in evidence when the Howard government sought to revamp the system of administrative review tribunals it had inherited; these tribunals are of course statutory authorities. Uhrig (2003: 19) did note that courts and tribunals 'involve considerations which take them outside the scope of matters examined by the review', though his decision to ignore them contributed to the general weakness of his report. Government legislation to replace a number of separate tribunals with a single Administrative Review Tribunal organised in several divisions reflecting the main jurisdictions of the existing tribunals passed the House of Representatives at the end of 2000. But it was defeated in the Senate, the majority of whose members objected that the proposed tribunal's independence would be compromised by provisions requiring: first, the appointment of members of each division to be recommended by the minister whose department's decisions were under review; and second, the funding of that division to come from the same department on purchaser/provider lines (reported in the parliamentary journal *About the House* 2001: 3). Here we see parliament defending the principle of authority independence, and most of us are likely to say 'Thank God for that' -- though we must wonder what will happen if the government with its new Senate majority now simply reintroduces the legislation.

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*Illustrative cases*

The leading Australian case of an authority drawn into conflict with its owning government from time to time is surely the ABC. Its inevitable trials and tribulations are well recorded in books such as Bolton's (1967) biography of its chairman from 1945 to 1961, Sir Richard Boyer, and Inglis's (1983) jubilee history. Noting that people on both main sides of Australian politics were 'a little trigger-happy in attacking the ABC', Bolton tracked Boyer's relationships with ministers: some ministers were helpful and 'genuinely concerned for the independence of the ABC', but others gave much trouble (pp.156-157); a particularly aggressive intervention over the ABC's plan to produce a television feature on Canada's relationship with the US was seen as hastening Boyer's death (pp.276-280). Dealing with the ABC's first 50 years, Inglis documents thoroughly, through successive ministers, chairmen, commissioners, general managers and other senior staff, the on-going tension between the ABC's need for substantial operating autonomy and political demands for powers to censor or otherwise control and check its activities. So concerned about all this was Darling, Boyer's successor as chairman, that he took the opportunity in the ABC's *31st Annual Report* to deliver a lecture on the commission's responsibilities under its Act: the report had to be addressed to the minister, but Darling was very clearly directing his remarks to the parliament, consistently with Boyer's view, noted above, that statutory authority responsibility was *via* the minister *to* the parliament (ABC 1963: 4-6). Nine years later, Darling's successor Madgwick, apparently stung because members of a Senate Estimates Committee were asking detailed questions about the ABC's day-to-day operations, again asserted that the statutory corporation status conferred by parliament meant that it had to be treated differently from departments. He pointedly indicated that his report was for presentation to parliament, to which the commission felt accountable; the minister was kept informed so that he could perform his role as 'the spokesman for the ABC in Parliament and the channel through which the Commission reports' (ABC 1972: 4-6). The big question here is: how did parliament react to such communications?

The same question arises from events affecting the Tasmanian parliament in the 1950s. The Public Service Commissioner, as a statutory official then holding responsibility conferred by the Public Service Act for matters of staffing and organisation in departments, complained in his annual report that ministers were giving directions to departments contrary to the provisions of that Act (recorded in Wettenhall 1959: 300-301). Again, what action did parliament take? There must be many such cases, all provoking the same question.

ABC Chairman Darling's report was certainly noted in parliament: it was referred to several times in a debate on the Appropriation Bill in October 1963 (*CPD/HoR* 23 October: 2140, 2143, 2151). I doubt that any firm information is available as to how often members do refer to statutory authority reports in this way – my guess is not too often. But it is worth remembering that, since way back in the Australian state parliaments in the 1880s, the annual report has always been seen a major feature of statutory authority accountability to the legislature, with the motion to table providing an excellent opportunity for members to debate and review performance of the authority within its statutory charter.<sup>20</sup> Unfortunately, it seems that this message has often been forgotten.

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It is unlikely that occasional attention of this kind will do much to change ministerial attitudes. It is likely, nonetheless, that MP interest in issues concerning the ABC contributed in some part to the commissioning of the 1980 Dix inquiry and the ensuing conversion under new legislation in 1983 from the *ABC Commission* to the *ABC Corporation*. No doubt that gave this authority/corporation a fresh lease of life, but the fairly recent 'war' between it and Minister Richard Alston over its *AM* program's reporting of the Iraq conflict showed that tension with the minister is something that is never likely to disappear, and that vigilance is always needed.<sup>21</sup> The *Canberra Times* thought the ABC was 'simply doing its job'(CT 2003)!

Describing itself as 'an independent statutory organisation [that reports] to the federal parliament through the Attorney-General', the Human Rights and Equal Opportunity Commission is another leading case. Its mission to 'foster greater understanding and protection of human rights in Australia and to address human rights concerns of a broad range of individuals and groups' (HREOC 2005) makes it a servant of the whole nation, but in pursuit of that mission it inevitably finds itself from time to time in very direct criticism of the government. Some of its inquiry reports such as those on immigration detention centres, the 'stolen generation' and Aboriginal social justice generally (HREOC 1997, 1998, ATSIJ 2000) have been heavily critical of government activity; ministers and former ministers have attacked it or warned it (as reported eg in Macdonald 2000, Lawson 2002); and its commissioners have engaged in their own vigorous defence against such attacks (as reported eg in Peake 2000, Lawson 2000). Not surprisingly the government that funds it is very testy about these issues, and is often tempted to constrain it. But parliament created it, and parliament has to be seen as something of an umpire here.<sup>22</sup>

### **Importance of the parliamentary committee role**

The interests of parliament in these matters are surely best served by committees focusing on generic governance issues that flow across portfolios (ie whose missions are not limited to single portfolios). I have been studying statutory authorities and other NDPB forms for around 30 years, and I want to say that, in my experience, some of the best literature stems from the work of such committees – best in terms of investigative effort and informative reports of high educational value. Box 3 instances just a few such reports (some from way back!) from Commonwealth parliamentary committees.

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**BOX 3. HIGH VALUE IN THE WORK OF PARLIAMENTARY COMMITTEES – SOME EXAMPLES**

- The first six post-Coombs royal commission reports of the Senate Standing Committee on Finance and Government Operations (1978-82); the more focused reports of that committee and its successors on eg the Australian Dairy Corporation (1981), the Superannuation Fund Investment Trust (1984), non-statutory (but still non-departmental) bodies (1986, 1988), the timeliness and quality of annual reports (1989a) and the reporting requirements of government companies (1989b); and its lists of Commonwealth bodies (1990-96) noted earlier in this paper.
- The reports of the Joint Public Accounts (now Public Accounts and Audit) Committee on the War Service Homes Commission (13 reports between 1920 and 1929-30 – esp PAC 1922), Aluminium Production Commission (2 reports --- JCPA 1955), annual reporting guidelines (1991), social responsibilities of statutory authorities and GBEs (1992), 'Public Business in the Public Interest' (1995), and GBE corporate governance and accountability arrangements (1999).
- Of course other parliamentary committees also contribute importantly from time to time, as when the Senate's Environment, Communications, Information Technology and the Arts References Committee looked at the vexed question of appointments to the ABC board (SECITARC 2001).

It is not necessary to agree with everything said in these reports to recognise they all contribute usefully to the cause of better understanding of the field of governance they are concerned with. Several, indeed, have been well and productively studied in relevant university courses. But Uhrig ignored them, just as he failed to consult anyone directly concerned with the parliamentary interest. Of course, his was an inquiry internal to the government, not in any sense a *public* inquiry – so obviously, as already pointed out, he did not see it as any part of his remit to consider the parliamentary interest. In terms of informing the public and the parliament itself, the kinds of parliamentary committee exercises to which I have just directed attention are much more useful. Long may they continue!

### Summary

The issue of the relationship between statutory authorities and government has been presented in a new light by the Uhrig inquiry which, though it sought recognition that there were two broad classes of authorities, nevertheless generalised fairly spectacularly from serious consideration of only a small group of Commonwealth authorities of particular interest to big business supporters of the Prime Minister. The inquiry was clearly driven by a desire to improve ministerial control within a 'governance' paradigm that believed all delegations of power should be strictly delimited. Scant attention was given to the interests of the legislature.

This paper has sought to show that parliament has a strong interest in how statutory authorities operate within the legislative contexts it has itself established, and that proper pursuit of that interest requires recognition that the relationship framework of statutory authorities is different from that of departments. It may be that the fact

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that we have so many authorities makes understanding of this difference more difficult, and I support Uhrig's observation that we should think very carefully before setting up such bodies. Once we have done so, however, parliament needs to recognise that it plays an umpire role in monitoring and regulating the minister-authority relationship on behalf of the public at large.

Authorities as well as ministers have rights that need protecting, and since some authorities will inevitably be in conflict with ministers from time to time if they are to perform effectively, they are in need of special protection. I have speculated on how this parliamentary monitoring and regulating role is being performed, and suggested that the best hope lies in objective work by major constituents of its committee system.

### Notes:

1. Australian governments have been using statutory authorities since the early 1800s, and the form has remained popular until the present day. Where statutory authorities are incorporated by their creating statutes (as bodies corporate or corporations sole), they are also known as statutory corporations. A third related term – statutory agency – has appeared in the Commonwealth jurisdiction since the passing of the rewritten Public Service Act in 1999: it refers to statutory authorities staffed under the provisions of that Act. More recently, especially in the Commonwealth jurisdiction, the government-owned company has become popular as an alternative NDPB form, and a third form, the executive agency, has become a viable option in the Commonwealth jurisdiction, again since the passing of the 1999 Public Service Act (see Wettenhall 1987, 1998, 2003a, 2003b). For a more general exploration of types of public sector organisations, see Thynne & Wettenhall 2003. NDPB emerged as a cover-all term for non-departmental bodies in a British inquiry commissioned in the early days of the Thatcher government (Pliatzky 1980).

2. No thought is given to that other sense of 'governance' in modern political and social discourse which sees our communities 'governed' through complex interactions between the public (government), private (market) and civil (third) sectors, emphasising the importance of constructive networking between these sectors, and even exploring the possibility that governance can operate without government. Consistently with the inquiry framework set by the Howard Government, the Uhrig sense comes directly from 'corporate governance' as that concept has taken off in the private sector.

3. Consultations were held with ministers and senior departmental officials; the chairs and/or chief executives of the eight earmarked statutory authorities; the Auditor-General, Public Service Commissioner and Ombudsman; leaders of two other government-commissioned reviews; 16 'industry bodies'; and three others (including one academic) who had previously been departmental or statutory authority chiefs. For list, see Uhrig 2003: 111-114.

4. Though not one of the authorities receiving special treatment in his review, Uhrig cited with obvious approval the new arrangement where the board of the Civil Aviation

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Safety Authority had been eliminated because, as he put it, 'the community expected the Minister to be accountable for the performance of the authority' (Uhrig 2003: 42). Using Commonwealth statutory terminology and lamenting what he sees as the current mishmash, Uhrig considers that his executive management group should all be brought under the Financial Management and Accountability (FMA) Act, his board group under the Commonwealth Authorities and Companies (CAC) Act where, although he doesn't specifically say this, they would join the government-owned companies.

5. There may be some exemption here, notably for government business enterprises, where 'an existing governance framework provides for a comparable arrangement', notably a requirement that corporate plans be submitted annually to the minister for endorsement (pp.8, 11).

6. For a comparative treatment of the role of public sector boards that is not noted in the Uhrig Report, see Corkery *et al* 1994, Wettenhall *et al* 1997. These works track some earlier studies also not noted in the Uhrig Report.

7. For background to the developments discussed in this paragraph and further references, see RCAGA 1976: section 4.4; SSCFPA eg 1990; SFPALC 1999; DOFA 2004; Wettenhall 1986a, 2003b: 30-32. The earlier search for guidelines extended over two decades and was often marked by friction within the departmental public service itself -- between the central agencies and the line departments, which were sometimes accused of being 'captured' by their associated bodies. This story is told progressively in the relevant chapters of the *Australian Commonwealth Administration* series published by the Canberra College of Advanced Education/University of Canberra and associates: in the 6th and 7th volumes in this series, I took the view that there was now 'less disputation about principles, methods and forms of organisation, suggesting that the guidelines adopted in the late 1980s and early '90s [had] begun to 'bite'', with the eventual passing in 1997 of the FMA and CAC Acts simply consolidating that process (Wettenhall 1997a: 63, and 2000: 66-70). Now, obviously, I am not so sure!

8. 'Whole of government' is an issue now attracting wide attention in the discourse of public administration. It is not considered here except in so far as it impinges on the issues raised by the Uhrig Report. For the Commonwealth, a useful background document is MAC 2004.

9. Including government-owned companies as well as statutory authorities. On implementing this change, see Scott 2005.

10. The abolition of one of them, the Australian National Training Authority, appears to represent a heavy unilateral act disturbing what has been seen for many years as an important area of Commonwealth-state cooperation: for discussion, see Selby Smith 2005.

11. According to this report, Shergold drew attention to his 2003 effort to introduce a standard logo for all government agencies as illustrating his push for 'whole of government' solutions. But the same paper's previous public service columnist,

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Verona Burgess, had taken a different line, poking fun at that effort and obviously liking what she saw as understandable resistance to it: see Wettenhall 2005a: 90 for comment on this episode.

12. This is a perennial refrain from central personnel authority chiefs, and was well in evidence in the administration of Duncan McLachlan, the Commonwealth's first Public Service Commissioner: see Wettenhall 1986b: 322. Perhaps, however, the Public Service Act may 'travel' more easily now that it is less managerially restrictive and more concerned with espousing good governance values.

13. For some references, see Wettenhall 1993: 78-83; also Wettenhall 1983. Recent statements highlight another example: claiming to be 'one of the most important elements of an effective democracy' and providing 'a "mirror" on society', the Australian Bureau of Statistics asserts that it too is 'independent from government'. Fortunately this case has not generated much controversy: the current chief acknowledges 'the wisdom of our political leaders' in letting the ABS get on with its job and providing it with adequate funds (Trewin 2005: 7; also Dickinson 2005).

14. In a discussion of 'Parliamentary Control of Statutory Bodies': CPA 1959. The English authority was Ernest Davies, himself a member of parliament.

15. Though, as I then pointed out, Ian Thynne had suggested that this was really 'stage 2 corporatisation', with statutory authorities in the corporate form (statutory corporations) representing 'stage 1 corporatisation' (Thynne 1990; Wettenhall 1993: 86). On the rising use of the government-owned company in Australia, especially in the Commonwealth jurisdiction, see Wettenhall 1998, 2003b.

16. Or part-public, as in the case of 'mixed enterprises' such as Telstra in its present form.

17. Of course the Parliament was centrally involved in the passing of the Financial Management and Accountability (FMA) and Commonwealth Authorities and Companies (CAC) Acts in 1997, establishing the two categories of Commonwealth public sector agencies for purposes of financial management. However, while that represented an important further development of the reform process dating back to the Coombs Royal Commission, it scrambled the concern for statutory authorities revived in the establishment of the Uhrig inquiry. The FMA Act aligned a weaker group of authorities with departments for the purposes of that Act (close to Uhrig's executive management template), and the CAC Act aligned the stronger group (generally the statutory corporations, close to Uhrig's board template) with the government-owned companies.

18. Thus Mrs Thatcher soon collapsed the important cross-portfolio committee Coombes wrote about in favour of committees with narrower focuses.

19. This phrase, well known in this connection, was used by a leading US Roosevelt-era administrator advising the Indian government and legislature not long after India gained independence: Appleby 1956: 4-5. Quoted and discussed in Hanson 1959: 351.

20. In earlier times this annual reporting, with the opportunity it provides for annual debate and review, was seen as balancing the need for restraint in the matter of continuous parliamentary questioning about authority affairs.

21. Complaining that this reporting was biased against the government, Alston had referred 68 examples of alleged bias to an independent complaints review panel and had 12 serious cases upheld (ABC 2003).

22. The Aboriginal and Torres Strait Islander Commission was another to frequently cross swords with the funding government. Here it could be said that ATSIC eventually lost so many friends that the parliament acquiesced in its closure (Sanders 2005).

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