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Abstract
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Keywords
government owned corporations, Queensland, corporate governance, corporatisation

CORPORATE GOVERNANCE AND GOVERNMENT OWNED CORPORATIONS IN QUEENSLAND

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The purpose of this article is to review the legal structure, constitution and regulation, both internal and external, of government owned corporations ("GOCs") in Queensland and to identify the principles of corporate governance applicable to such organisations.

Introduction

> *Corporatisation* is a *structural reform process* which *changes* the *conditions* under which government owned enterprises operate, so that they are placed, as far as practicable, on a *commercial basis* in a *competitive environment* while allowing the Government, as owner, to continue to provide *broad direction* by setting *key financial* and *non-financial performance targets* and *community service obligations*.[1]

The Case for Corporatisation

Traditionally, Australian governments provided a wide range of services to the broader community. Funding for those services has been derived in the main from taxation revenues and to a lesser extent from user pay charges[2]. Since the 1940s State Governments have become increasingly reliant on Commonwealth sources of revenue. This flows from the fact that in the Australian Federation the Commonwealth possesses the major taxing powers and specifically controls the growth taxes of wholesale sales tax and petrol excise.

The challenge for the States in meeting service delivery demands that are placed on them is to find alternative sources of revenue, increase the existing levels of taxation, or, to seek to gain efficiencies that will lead to a lower cost of service delivery or enable the provision of the same services in the future at the current cost. Even if a State has a strong financial position in a balance sheet sense it may still need to act to correct the position from an operating viewpoint. This certainly was the thrust of the findings of the Queensland Commission of Audit[3].

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1 Queensland Treasury Department: *Corporatisation in Queensland; Policy Guidelines*, March 1992 ('The White Paper') at 5; and see Government Owned Corporations Act 1993 ('GOC Act') s16.

2 This imbalance which is referred to as vertical fiscal imbalance or 'VFI' will be altered from a financial perspective with the introduction of the Tax Reform Package in July 2000 including the adoption of a GST.

3 Fitzgerald V, Carmichael J, McDonough D D and Thornton B, *Report of the Queensland Commission of Audit*: Queensland Government Printer, 1996 at Chs 1-3 ('Commission of Audit Report').

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In its Report the Commission found that while the State of Queensland had a strong balance sheet (net worth of $51bn) there was evidence of a worsening operating deficit growing at the rate of $200m-$250m per year projected to reach $2.7bn by the year 2005-2006. Against that background the Commission recommended the adoption of a number of principles which had been used and tested in other jurisdictions and been found to be most effective. The principles had for the past 10-15 years been developed as part of a worldwide public sector reform.

The Efficiency Unit established by the UK Government in 1979 was an early manifestation of the reform process. That Unit was established by the then Thatcher Government to spearhead a drive for efficiency within the UK public sector as part of that government's Efficiency Strategy. As part of its processes the Unit established a number of initiatives including the promotion in each government department of an organisation in which managers at all levels were given:

- clear objectives;

- the means to enable an assessment of results and performance against those objectives;

- well defined responsibility for making optimum use of available resources; and

- the training and access to expert advice to enable proper exercise of responsibilities[4].

The above principles are not entirely dissimilar to those adopted in respect of corporatisation in Queensland which was first mooted in 1992. At that time it was said that it was to be a method of micro-economic reform - to ensure that the state's resources were used in the most economically efficient manner. However, it was acknowledged at the time of the release of the Green Paper that government owned enterprises had not performed well in Australia generally and that whilst there was little information available on Queensland government owned enterprises the little information that was available indicated that their performance did not result in a high level of financial return to the government.[5]

Since corporatisation has been adopted in Queensland figures are now available in relation to the performance of some of the corporatised bodies. Table 1 identifies rates of return for major government business enterprises in the financial year 1994/1995.

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4 See O'Toole B J and Jordan G (eds), *Next Steps: Improving Management in Government*, HMSO, London, (1991) at 4 and the Next Steps Report of 1988 which recommended the adoption of a number of principles which were embraced by the Queensland Commission of Audit: see Commission of Audit Report above n 3 at 5 and 6.

5 Queensland Treasury Department, *A Green Paper on Government Owned Enterprises* (August 1990) Queensland Government Printer, Brisbane ('the Green Paper') 4.

Table 1: **Rates of Return for Major Queensland Government Business Enterprises in 1994-95**

AUSTA Electric	6.8%
Powerlink Queensland	3.8%
Queensland Industry Development Corporation	11.8%
Queensland Rail	0.1%
SEQEB	6.8%
SUNCORP Insurance and Finance	17.2%

Source: Annual Reports 1994-1995 - Queensland Commission of Audit Report

The proposal for corporatisation was to enable the development of a management strategy for government owned enterprises that would result in a more accountable, responsive and efficient public sector[6]. This proposal for structural reform held some promise for success as was seen in New South Wales where there had been productivity improvements of between 13% and 51% over a three year period.

Principles of Corporatisation

The principles adopted by Queensland to constitute its four 'Key Principles of Corporatisation' are set out in s19 of the GOC Act:

1. Clarity of Objectives.

2. Management Autonomy and Authority.

3. Strict Accountability for Performance.

4. Competitive Neutrality.

Importantly, the principle which has not been adopted in Queensland or in any other of the Australian jurisdictions is the principle of rewards and sanctions. There is no obvious reason for the exclusion of the principle of rewards and sanctions from the Queensland corporatisation model. Certainly no mention of it was made in the Green Paper produced prior to the adoption of the Queensland corporatisation model. One could be cynical enough to suggest that at least in Queensland, it was unpalatable to the then Labor government bearing in mind its relationship with the unions. The fact that the principle is not in any other jurisdiction may suggest that government generally has consciously not adopted that principle as part of corporatisation as to do so might result in a lessening of control over the corporatised entities.

In a Policy Research Report the World Bank identified the need for a regime of rewards and sanctions particularly with regard to the relationship between the government and managers of government owned enterprises:

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6 Green Paper above n 5 at 4.

> To better understand the differences between successful and unsuccessful contracts, we analysed how each contract handled three types of problems, information asymmetry, rewards and penalties, and commitment. Information problems arise because contracting agents (government on the one hand and public or private managers or owners of a monopoly on the other) have different sets of information; thus each side can use the information it holds exclusively to improve its position at the expense of the other. At the same time, because future events are unknown it is impossible to design a contract that will cover all eventualities. To alleviate the information problems and contract imperfections, contracts usually include promises of rewards and penalties to induce the contracting parties to reveal information and comply with contract provisions. But promises of rewards and penalties alone are not enough. Each party needs to be convinced of the commitment of the other to actually deliver. *Like a chain with three strong links, contracts that include mechanisms to handle problems of information, rewards and penalties, and commitment are best suited to attaining the desired outcome - improved enterprise performance* (author's emphasis).[7]

The driving force behind the move to corporatisation in Queensland was the desire of the former Queensland Labour government to improve the performance of the Queensland economy through the placing of government enterprises on a commercial basis in a competitive environment.[8] An interesting feature of this was that there was no attempt to adopt the key principles in relation to other areas of government as had been done in the UK following the findings of the Efficiency Unit and also done in New Zealand.

There are three sectors within government:

- general government - departments and statutory corporations (including business units servicing those bodies) which provide services free or on a not-for-profit basis and which are primarily funded by taxpayers and the state's other sources of general revenue;

- public trading enterprises - enterprises other than financial service providers which deliver product and service outputs for commercial return; and

- public financial enterprises - which operate commercially as financial intermediaries offering insurance, funds management and retail and wholesale banking services.[9]

It was only in the second and third sectors that the principles were adopted and then only in respect of some of the enterprises. There has been little attempt in the past to introduce the principles at departmental level so as to bring about a concentration on outputs ie. results and not inputs.

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7 *Bureaucrats in Business; The Economics and Politics of Government Ownership*, World Bank, Washington DC (1995).
8 The Green Paper, above n 5.
9 Commission of Audit Report, above n 3 Ch 4.

One of the key elements within the corporatisation process has been the retention of ownership by government through a structure that is akin to but not identical to private companies. One author suggests that the corporate form was chosen as it best provides a separation on an arms-length basis between government and the enterprises to distance government and allow management of the enterprise to focus more on the business of the particular enterprise.[10] It may be that the reason for the adoption of the corporate form was to clarify the roles of the various parties being the GOC, the Minister and the government; improve accountability; and achieve competitive neutrality. However the real question is whether or not there is a sufficient break between government and the entity. Indeed, the question might be whether or not corporatised bodies can be successful from a corporate governance perspective.

The New Zealand experience provides evidence that once government owned enterprises are converted to the corporate form the business then moves towards change to the ownership structure through privatisation. This is perhaps easily understood when you consider that once the commercial and social objectives of such bodies are sufficiently delineated, with the social objectives being separately funded, the question is then raised as to why government should retain ownership of the commercial enterprise. The ideological barrier of private ownership can then perhaps be more easily overcome as sale becomes a logical alternative to retention of ownership.[11]

Historical Perspective

GOCs are not a new phenomenon born out of the economic difficulties of the late 80s/early 90s in Australia[12]. They have been part of the Australian political life for many years. One of the earliest examples was the then Federal Government's holding of greater than fifty percent of Amalgamated Wireless (Australia) Ltd. That company held a monopoly in the 1920s on the broadcasting of radio services between Australia and other countries in the British Empire.

In the late 1940s the Federal Government acquired one hundred percent of the issued share capital in what was then Qantas Airways Limited. In September 1951 the Federal Government incorporated Commonwealth Hostels Limited under the Victorian Companies Legislation. That company which was wholly owned by the Federal Government was established to take over the activities of the Department of Labour and National Service in relation to the management of certain migrant hostels established around Australia[13].

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10 Wiltshire K, 'Privatisation and Corporatisation' in RG Stewart (ed), *Government and Business Relations in Australia*, Allen & Unwin, Sydney (1994) 217.

11 Farrar J & McCabe B, 'Corporatisation, Corporate Governance and the Deregulation of the Public Sector Economy' (1995) 6 *PLR* 22 at 25. In Victoria and New South Wales privatisation has been embraced to varying degrees, eg. the New South Wales Government Insurance Office was privatized in 1992 and subsequently purchased the Victorian State Government Insurance Office.

12 They have been an integral part of other jurisdictions. As to which see Seidman H, 'The Government Corporation: Organisation and Controls' (1954) 14 *PAR* 183.

13 Bottomley S, 'Regulating Government Owned Corporations: A Review of the Issues' (1994) 53 *Australian Journal of Public Administration* 522 and 523 and see *The Commonwealth of Australia & Anor v Bogle & Ors* (1953) 89 CLR 229.

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Each of these provides an example of a GOC, albeit, a Commonwealth Government owned corporation. The first two were commercial in nature whilst the third was more of a non-commercial organisation. However, there is an important distinction between these Commonwealth GOCs and the GOCs under the Queensland corporatisation model. It lies in the fact that the Commonwealth GOCs are one-off corporatisations and are not part of an overall wider policy initiative of corporatisation.[14] The corporatisation models adopted in Australia have been designed to apply across the broad spectrum of government activity. On the other hand the model, if it be called that, adopted by the Commonwealth, has been directed at one-off situations.

GOCs both in Australia and overseas have served a range of political and economic aims:

> Labor governments have used them as vehicles for policies of nationalisation and, later, to provide services in the private sector. Recently, both in Australia and overseas, Labo(u)r and non-Labo(u)r governments have used GOCs in the privatisation of certain aspects of government administration.[15]

The reality has been that since Australia was established as a colony it has been necessary for government to provide a range of services that would or could not be provided by the private sector. For example, rail and communications would not have been developed in this country without the involvement of government simple because the capital was not otherwise available from the private sector[16]:

> Economic necessity, rather than political ideology, were [sic] at the back of the 'colonial socialism' of the 19th century. The distances to be covered, and the absence of large local capitalists, placed the onus on government to develop the railways and communications. Early this (ie. twentieth) century Labor politicians saw government enterprise and nationalisation as the means of combating monopoly and achieving social justice[17].

It may be that the more recent corporatisation phenomenon in Australia is no more than a further stage in the economic growth of what is a young country with government realising that activities currently undertaken by it can be more effectively and efficiently run by private enterprise. This is the case particularly as there is now available a sufficient pool of capital to fund a number of areas previously reserved to government.

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14 cf the position in the United States in respect of which see Froomkin, A Michael, 'Reinventing the Government Corporation' (1995) *University of Illinois Law Review* 543.

15 Bottomley above n 13 at 523; and see Wiltshire et seq note 10 at 210 and 211.

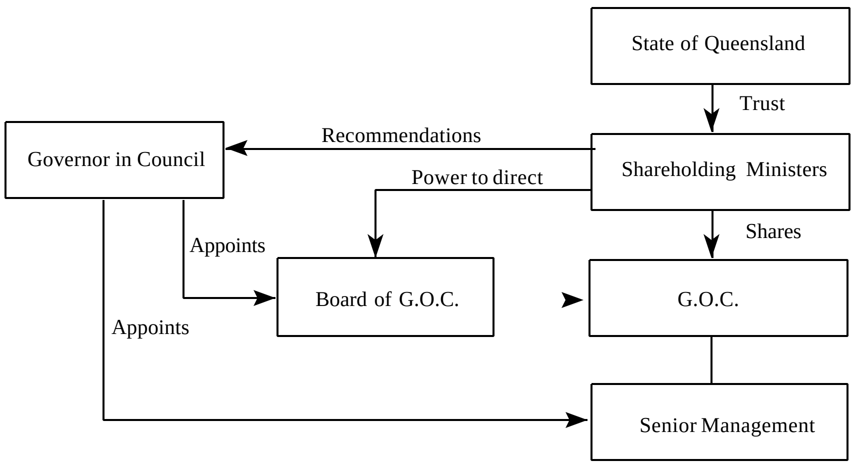
16 Bottomley above n 13 at 523 and see the material there cited and see Sawer G, *The Public Corporation in Australia*, in Friedmann W G (Ed) The Public Corporation: A Comparative Symposium, Carswell, Toronto (1954).

17 Bottomley, above n 13 at 523.

Legal Framework

The corporatisation model in Queensland can be diagrammatically represented as follows:

Figure 2: Structure of Government Owned Corporations in Queensland



Source: Queensland Commission of Audit Report

Under the corporatisation model in Queensland each GOC has a board of directors and at least two shareholders. One of those shareholders is the state Treasurer and the other is normally the relevant portfolio Minister. Those Ministers hold their shares in trust on behalf of the state. The body corporate, once corporatised, is given a degree of independence from government. However, that independence is restricted by the ability of the shareholding Ministers to issue directions and other matters.

The legal arrangements appear to be constructed on the basis that the GOC is no more than an agent of the government. As such it is contractually bound to do that which the government requires of it through the shareholding Ministers. However, difficulties arise from a number of viewpoints:

1. The directors of the GOC do not have the power to hire and fire the executives within the GOC. That power resides in the Governor acting on the advice of the Executive Council. While the board of the GOC do have input into the process for the selection of the chief executive officer and the other senior officers of the GOC the board is nonetheless bound by the appointments which are made. This is arguably unsatisfactory as it circumscribes the ability of the board to ensure the proper management of the GOC and the maximum or optimum utilisation of the human

resources available to the GOC.[18] This brings into sharp focus the absence of the principle of rewards and sanctions.

2. There does not appear to have been a sufficient acknowledgment of the position of the directors of the GOC and the fiduciary obligations they owe to the GOC. In particular, the directors of the GOC may be placed in the position of potentially jeopardising their own position through compliance with directions given to them by the shareholding Minister. No guarantee or indemnity is provided to directors in the event that they are called on to act in interests other than those of the government owned corporation itself.[19]

3. Shareholding Ministers hold their shares in trust on behalf of the wider community. In that case they are fiduciaries. Powers that are given to them under the provisions of the GOC Act arise as incidents of their holding the shares. It may well be that the powers given to them must be exercised having regard to the interests of the beneficiaries on whose behalf the shares are held ie. the wider community. This would mean that the powers could not, for example, be exercised for party political purposes.

GOC ACT

The GOC Act came into force in Queensland on 19 July 1993. The short title of the GOC Act is - *An Act to provide for the corporatisation of nominated government entities and for related purposes.* In s16 the Act provides a definition of *corporatisation* as follows:

> [Corporatisation] is a structural reform process for nominated government entities that –
>
> (a) changes the conditions and (where required) the structure under which the entities operate so that they operate, as far as practicable, on a commercial basis and in a competitive environment;
>
> (b) provides for the continued public ownership of the entities as part of the process; and
>
> (c) allows the State, as owner on behalf of the people of Queensland, to provide strategic direction to the entities by setting financial and non-financial performance targets and community service obligations.[20]

That final paragraph suggests that the control of the enterprise from a governance viewpoint is to remain with the Government and not to be passed to

18 This particular aspect was the subject of some adverse comment by the Efficiency Unit in the UK - see O'Toole and Jordan, above n 4 at 5.
19 Commission of Audit Report, above n 3 at 75.
20 cf s15 of the GOC Act.

the entity's governing body. This emphasises the continuing link with government and raises important fundamental issues on the question of control and governance which are addressed later in this article.[21]

The process of corporatisation in Queensland is stated to have been designed to have government entities think, act and feel like privately owned companies. It was to allow for focused management independent of government[22]. However, in its practical outworking corporatisation in Queensland has, in the main, stopped short of applying to GOCs the same rules and regulations that apply to private companies as it was recognised that this could not be done. Put another way, the process of corporatisation was designed to create an environment in which there would be sufficient incentive for management to operate in a similar but not identical way to the private sector.

The legislation adopted in Queensland as well as other Australian states and New Zealand follows a template which was laid down by the post-War Labour government in the United Kingdom. The main distinguishing features of the typical United Kingdom public corporation established under the model which was laid down by Herbert Morrison are:

1. It was a body corporate established by statute with its own legal existence.

2. It was free to manage its affairs without detailed supervision by Parliament .

3. The Minister had the power to give directions of a general character as to the exercise and performance of the functions of the corporation, and with regard to specified matters of special importance; for example major capital expenditure programmes.

4. The Minister appointed the whole or a majority of the Board.

5. The corporation was financially independent in the sense that it has power to maintain its own reserves and to borrow within limits laid down by Parliament.[23]

The Queensland legislation is both facilitative and regulatory. It facilitates the establishment of bodies corporate as GOCs and then seeks to regulate the relationship of those GOCs with, inter alia, the shareholding Ministers. The importance of this is that it does give rise to the potential for some ongoing Parliamentary input and scrutiny in relation to the operations of GOCs through debate on, and review of this legislation. As Bottomley observed[24] when speaking of Commonwealth statutory corporations:

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21 See in particular the section of this Paper dealing with Ownership and Control.

22 Wiltshire, above n 10 at 217.

23 Duncan I & Bollard A: *Corporatisation & Privatisation: Lessons from New Zealand,* Oxford University Press, Wellington (1992) 27 et seq.

24 Bottomley, above n 13 at 521.

> Statutory corporations are created by specific legislation; this means that there is the potential for some degree of Parliamentary input and scrutiny in their creation. It also means that "tailor-made" provisions, such as those relating to accountability and ministerial control, can be built into the legislation.
>
> Moreover, any subsequent change in those provisions will require statutory amendment and therefore (in theory) further Parliamentary scrutiny. In contrast, a corporation under general corporations or associations incorporation legislation does not usually require Parliamentary approval or input. Matters of accountability and corporate governance are dealt with by the non-specific requirements of that legislation and by the memorandum, articles of association or rules of each corporation.[25]

The shortcoming of the GOC Act from the viewpoint of Parliamentary scrutiny lies in the fact that any scrutiny by Parliament of the GOCs would be indirect if Parliament were to rely solely on its review of the GOC Act. This is because that Act applies to all GOCs and does not have specifications in respect of each individual GOC. If the GOC is a company GOC there would be no opportunity for Parliamentary scrutiny through the review of legislation. This means that Parliament has to place reliance on the wider market and the Corporations Law[26]. As far as statutory GOCs are concerned there would be an opportunity for direct and indirect scrutiny by Parliament . Direct scrutiny through the legislation establishing the GOC and indirect scrutiny through review of the GOC Act.

Be that as it may a review of the Estimates Committee process in Queensland recommended that the spending of GOCs be subject to scrutiny by the Estimates Committee. Whether that recommendation is adopted remains to be seen. However, it does reinforce to an extent the view that government sees GOCs as no more than agents of government. It also raises issues of accountability that are dealt with later in this article[27].

Objectives of GOC Act

The GOC Act identifies the objectives of the Corporatisation process as being to improve Queensland's economic performance and the ability of the government to achieve its social objectives, by improving the efficiency and accountability of GOCs[28]. As we have seen, the objectives are to be met through the application of the *Key Principles*:

- Clarity of Objectives
- Management Autonomy and Authority

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25 Bottomley, above n 13 at 521-522.

26 Seidman, above n 12 at 189 and see the discussion in this Article on the Categorisation of GOCs.

27 This focuses on the difficulty or reluctance through Ministers not being prepared to answer questions in Parliament - Taggart M, 'Corporatisation, Privatisation and Public Law' (1991) 2 *PLR* 77 at 79.

28 GOC Act s17

- Strict Accountability for Performance
- Competitive Neutrality

Efficiency

The key word in the statement of objectives is the word efficiency. There are two aspects to efficiency - productive efficiency and allocative efficiency.[29]

Productive efficiency requires an organisation to use the least amount of available resources to produce goods and services. To attain productive efficiency it is necessary to have a good quality management team. That team's performance is in turn dependent on the extent to which management bears the consequences of its own actions. If management is free to make decisions without having to live with the consequences of its actions it will not operate efficiently as there will be a tendency to take decisions without regard to the consequences of them. This will lead to poor decision making.

Inherent then in the aspect of productive efficiency is the need to set clear objectives and confer on management an appropriate level of authority to make key decisions to allow the attainment of those objectives. It necessarily follows that there must also be a means of monitoring performance against the objectives that have been set. Finally, there must be established a system of rewards and sanctions to ensure that management is properly motivated. If any of the above elements is missing it is difficult to ensure that productive efficiency will be attained.

The second aspect of efficiency is allocative efficiency. This necessitates a consideration of the outputs to be delivered such that they should give rise to maximum consumption benefits to the wider community over time. This means that for there to be allocative efficiency there needs to be competition within the market. That competition should apply at the level of inputs and outputs.

It is against this background that the principles set out above were developed. Interestingly as has been pointed out earlier, the principle of rewards and sanctions was not adopted. One would have thought that this would be a significant shortcoming of the process adopted in Queensland.

Each of the key principles referred to above assist in defining the role of the GOC and more importantly set out, at least in part, relationships with the bureaucracy.[30]

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29 New South Wales Steering Committee on Government Trading Enterprises: *A Policy Framework for Improving the Performance of Government Trading Enterprises*; New South Wales Government Printer, Sydney, 1988 at 9 (referred to as 'The New South Wales Steering Committee Report').

30 Seidman, above n 12 at 185 et seq.

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Clarity of Objectives

This principle has 4 elements to it:

- clear non-conflicting objectives for each GOC;

- financial and non-financial performance targets to be set for the commercial activities and community service obligations undertaken by each GOC;

- identification and removal of any regulatory or policy formulation role from the GOC to an appropriate government department or other appropriate government agency; and

- identification and separate costing of community service obligations with the GOC being compensated by the government for the community service obligations performed.

The term *community service obligation* ("CSO") is defined in s121 of the GOC Act in the following terms:

> Section 121
>
> (1) The "Community Service Obligations" of a GOC are obligations to perform activities that the GOC's board establishes to the satisfaction of the shareholding Ministers:
>
> (a) are not in the commercial interests of the GOC to perform; and
>
> (b) arise because of a direction, notification or duty [31] to which this section applies; and
>
> (c) do not arise because of the application of the following key principles of corporatisation (and their elements):
>
> (i) Principle 3 - Strict accountability for Performance;
>
> (ii) Principle 4 - Competitive neutrality.

On the face of it s121 sets out a process for determining the activities which are CSOs. However, that process is more illusory than real. This is because an activity will only be a CSO if it has been directed or notified by the appropriate Minister or it is already enshrined in a statute as giving rise to a statutory obligation on the part of the GOC to perform that particular activity.

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31 The terms ‘directions’, ‘notification’ and ‘duty’ are defined for the purposes of s121: see ss 107, 117, 120, 124,101 and 123.

In order for the activity to be classified a CSO it is necessary that all 3 elements in s121(1) be established to the satisfaction of the Ministers who hold the shares in the GOC. This means that in each case the board of the GOC will need to be able to show that the particular activity arises as a result of a direction, notification or duty as defined in s121(2). What this really means in a practical sense is that for an activity to be a CSO it must be said to be such by the Ministers.

Save for statutory duties that may be capable of easy identification there is no objective element within section 121 that would assist with the identification of CSOs. The matter is left entirely to the discretion of the relevant Ministers as they are the ones to whose satisfaction the matters in section 121 must be established: non-commercial interests of the GOC; arising as a result of a direction, modification or duty (as defined in section 121(2)); and not arising because of the obligations of competitive neutrality or strict accountability.

This means that even if a matter is the subject of a direction or modification it may nonetheless not be a CSO if the board of the GOC is unable to establish **to the** *satisfaction of the shareholding Ministers* that the activity is not in the commercial interests of the GOC to perform. The difficulty for the directors of the GOC in such a circumstance is the extent to which they can be compelled to have the GOC undertake activities that are not in the interests of the GOC to undertake.

The Queensland Commission of Audit in its report referred to the issue of CSOs and concluded that it was not satisfied that CSOs were being properly identified and costed in all cases. If correct, this means that GOCs may be performing functions for which they are not being properly remunerated. More importantly, the Commission of Audit further concluded that there was a lack of effective monitoring of the performance of CSOs[32]. If these conclusions are correct it means that the system of identification outlined in section 121 does not work as effectively as it should. At the very least the provision should have injected into it an element of objectivity.

Apart from the legislation the position will not be corrected unless and until CSOs are properly identified and costed. Additionally, and perhaps more importantly, CSOs need to be monitored on an output or results basis. That is, the shareholding Ministers, need to identify the results that are to be achieved and pay for those results.[33] The fact that a GOC has commercial and non-commercial (CSO) objectives could well create confusion in relation to the attainment of the overall objectives of the GOC.

This is particularly the case as the available resources for the attainment of each different set of objectives are identical. In such circumstances it is more probable than not the GOC will seek to devote its resources to the attainment of commercial objectives to the detriment of the non-commercial objectives. This

32 Commission of Audit Report, above n 3 at 72 and 73 and see Taggart above n 27 at 78.
33 Commission of Audit Report, above n 3 at 6.

could occur where objectives are not sufficiently and clearly defined or are blurred due to cross-overs between commercial and non-commercial activities. If that arises it is difficult to achieve an appropriate measure of accountability for performance. CSO requirements can of themselves create disincentives to efficient performance of public enterprises by creating the conflict, as referred to above, between commercial and social objectives.[34]

In the Green Paper published in 1990, preparatory to the adoption of a corporatisation process, there was an acknowledgment that it was necessary for there to be clarity in respect of what were then termed *Management Objectives* - "*... managers of government businesses have been faced with a multitude of social, political, economic and financial goals. These various goals are often conflicting. Not surprisingly, it has been difficult to maximise financial returns or to call management to account in terms of their non-commercial responsibilities. The corporatisation model aims to clarify a GOE's [GOC] objectives.*"[35] The GOC Act attempts to achieve this through the introduction of this principle in relation to objectives for the GOC.

In the private sector the setting of these objectives is left in the hands of the board. It is one of the main functions of the board to identify the strategic direction that the company should take and to set the corporate policy which is to be implemented by management.[36] Within the private sector model the board sets the objectives that are in the interests of the company as a whole. That would include the shareholders. Not from the viewpoint of any duty owed to them but simply from the practical viewpoint that shareholders will not invest in a company if the objectives of the company do not at least include an objective of increasing shareholder wealth.

In the Queensland corporatisation model the focus for objective setting is the shareholding Ministers. They set the commercial and non-commercial (CSO) objectives of the GOC both from a financial and non-financial viewpoint. In that way, the GOC is confirmed as an agent of the Government.

One very important feature of this principle of *Clarity of Objectives* is the need to identify and remove any regulatory or policy formulation role from a GOC. It would be clearly inconsistent for a corporation which is to be independent of government to be given a regulatory or policy formulation role ie. to be part of the machinery of the executive government.[37]

34 Commission of Audit Report, above n 3 at 72.
35 The Green Paper, above n 5 at 7.
36 Hilmer F G, et al, *Strictly Boardroom: Improving Governance to Enhance Company Performance*, The Business Library, Melbourne (1993) 32 ('Strictly Boardroom').
37 See chapter 2 of the Commission of Audit Report above n 3.

Management Autonomy and Authority

There are 4 elements to this principle:

- a board must be established for each GOC. That board must use its best endeavours to meet performance targets which are set externally to the board;

- the board must be vested with the appropriate level of autonomy and authority to make commercial decisions within the areas of responsibility defined by the corporatisation framework;

- there is to be a replacement of detailed controls over management decisions by the adoption of strategic monitoring procedures; and

- there is to be a clear definition as to the role of Ministers with the reserve powers given to them to be exercised in an open way.

The objective is spelt out in s17 of the Act in terms of seeking to improve the economic performance of the State so as to assist the government in achieving its social objectives through improving the efficiency and accountability of GOCs.

This has meant, that GOCs in Queensland have not been established as being "independent" from government. There is still a significant amount of involvement of government in the operations of the GOC particularly through the powers reserved to the shareholding Ministers.

It seems reasonable that in the establishment of the corporatisation process the government should reserve to itself the ability to ensure that whilst there is a level of autonomy and authority there still though remains a form of accountability to Parliament.[38] To an extent that equates to the position in relation to private companies except for the limitation that there is to be - *autonomy and authority to make commercial decisions within areas of responsibility defined by the corporatisation framework.*

The principle of management autonomy and authority, generally speaking, seeks to vest in managers of GOCs the appropriate power to make decisions regarding the use of available resources. The thrust of the corporatisation process is to ensure that the external controls placed on a GOC are limited to those matters which are major strategic issues. An attempt is made to remove any external controls in respect of operational issues.[39] This is sought to be achieved through the adoption of what are termed strategic monitoring procedures. Additionally, as will be seen later in this article, the role of Ministers and particularly their ability to use reserve powers is strictly defined. When they use those reserve

38 Bottomley, above n 13 at 527.
39 Green Paper, above n 5 at 7.

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powers, such needs to be publicised. In that way, the particular *externals controls* are said to be transparent. Importantly though the authority and autonomy to make decisions are confined to *"areas of responsibility defined by the corporatisation framework"*.

Strict Accountability for Performance

The elements involved in this principle are:

- accountability in relation to the performance of the GOC is from the board to the shareholding Ministers;

- the basis for the measurement of accountability lies in the statement of corporate intent. Performance is monitored by the Government against the targets set out in that statement. The monitoring of the GOC is said to - *compensate for the absence of the wide range of monitoring to which listed corporations are subject by, for example, the share market and commonwealth regulatory agencies*.

The issue of accountability has been at the forefront of the Australian political scene particularly over the last 10 years following a succession of inquiries into the failure of accountability at a variety of levels within government or within the organisations controlled by them.[40] The fundamental reason for accountability in government is to ensure that governments and the people that work for them will be held to account for their stewardship. This is much the same as applies in relation to the directors of a company under the Corporations Law.[41] Except that under the Corporations Law and at common law there are legal sanctions for non-compliance or a breach of the law.

Accountability by its very nature requires that there be appropriate systems and controls established to ensure that there is in fact accountability. In the context of GOCs this means systems and procedures to ensure that the boards of a GOC are held accountable. However, it also extends to the owners of the GOC - the shareholding Ministers. This is particularly so as those Ministers are entrusted with powers of direction etc. under the GOC Act.[42]

The cornerstone of the accountability regime for GOCs is the Statement of Corporate Intent[43]. That statement is required to be negotiated annually between the GOC board and the relevant shareholding Minister.[44] It is *intended* that it

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40 Finn P D, 'Public Trust and Public Accountability' (1993) 56 *Australian Quarterly* 50 at 51 referring to the WA Inc, Fitzgerald (Qld) inquiries and the various reports of the Queensland Electoral and Administrative Review Commission; cf Taggart above n 27 at 79.

41 Finn, above n 40 at 53.

42 For example see the powers conferred on the shareholding Ministers under GOC Act ss 86, 107, 110, 117, 120, 123, 124 and 161.

43 cf s140 of the Corporations Law which renders the constitution of a company to be a contract between the members, the company, the directors etc. Note the term 'constitution' replaces the previous references to the memorandum and articles of association of a company as a result of the introduction of the Company Law Review Act 1998.

44 GOC Act s116 et seq.

represent an agreement between the GOC board and the shareholding Ministers. The Statement contains a variety of matters[45] which deal with the operations of the GOC.

The Statement of Corporate Intent for a GOC may be compared with the constitution of a company. That latter document is a statutory contract between the board and the shareholders etc.[46] It may be compared more in the nature of a document that sets out the legal basis for the definition of the inter-relationship of the company, the directors and the members than they are in the nature of a performance contract. The Statement of Corporate Intent is more an operational statement against which performance can be monitored. In that way it is a document upon which the board of a GOC may be held to account. It is a type of performance contract under which the GOC board can be held to account. This is important for Ministers under the public law obligations of responsibility to Parliament.

The interesting feature of the principle of Strict Accountability for Performance is that it equates GOCs to public listed corporations - see s19(c) of the GOC Act.[47] Such companies are exposed to a wide range of regulation encompassing the Corporations Law and the Listing Rules of Australian Stock Exchange. One of the key requirements for such companies is the need to comply with stringent disclosure requirements. The disclosures that are made are then subjected to intense scrutiny by the investment community including skilled financial analysts. These in some way could be equated with the obligations of GOCs to provide financial and other information on a regular basis to the GOC regulator within the Queensland Treasury.[48]

Fundamentally, it is not possible artificially to create an environment for GOCs that equates with the true market. Within public companies there are shareholders who can buy or sell ownership in the company as they see fit. With the GOC ownership by the general public is compulsory. There is no trading in the equity of the GOC and there is little if any monitoring of the activities or operations of a GOC by members of the general public.[49] Additionally, there is little if any analysis of the operations of GOCs by external analysts which would equate to the type of reports which are continually prepared and circulated on public companies by stockbrokers.

The adoption of this principle and its equating of GOCs with public companies has placed a high level of expectation on the corporatisation model itself and the controls, both internal and external, designed to ensure attainment of the principles. This principle, however, is necessary to ensure the continuation of

45 GOC Act ss115, 122 and 171.
46 Corporations Law s140.
47 In relation to listed companies this would include regulation in respect of disclosure of information through the application of Australian Stock Exchange Limited Listing Rules and encompass the continuous disclosure regime set out in the Corporations Law.
48 Queensland Department of Treasury GOE Unit.
49 See Bottomley, above n 13 at 528. Public monitoring normally would only occur where there is a problem with the provision of service as with the 1998 water problems in Sydney and the electricity supply problems in Queensland.

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the Westminster system of ministerial responsibility and accountability. This in part would be the justification and the explanation why the issue of strict accountability for performance has been dealt with as one of the key principles upon which the corporatisation process is based.

The Green Paper[50] acknowledged - *the usual checks and balances applied by the Executive and Legislature for strategic decisions and other important policy matters will be maintained in accordance with the Westminster style of Government applying in Queensland*. This means that GOCs are effectively to be subjected to an amalgam of two distinct systems of governance - *the Westminster political system and aspects of the corporate law/corporate governance systems*.

Whilst GOCs were to be created as separate bodies corporate there nonetheless was perceived to be a need to ensure that there was a retention of power in relation to those bodies. Put another way, the government was prepared to confer on GOCs a level of autonomy and authority but this was to come at the cost of accountability and close monitoring of performance. At this level there is seen a hint of the clash between the public administration law requirements and the tenets of private law. A feature of autonomy is that if GOCs are established as independent organisations they must not only be seen to be independent but must also in truth be independent. There must not be interference or manipulation by Ministers[51] unless that is transparent and can otherwise be justified as being in the interests of the State.

Competitive Neutrality

This principle is the one that will come into sharp focus through implementation of the reforms propounded in the Hilmer Report on National Competition Policy[52]. The elements within this principle are:

- markets within the state must not be unnecessarily distorted;
- each GOC must wherever possible compete on equal terms with the private sector and to that end any special advantages or disadvantages of the GOC because of its public ownership or its market power must be removed, minimised or at least made apparent;
- where a GOC has excessive market power there may be a need for structural reform to increase competition and special monitoring may be necessary to prevent market abuse.

The inclusion of this principle recognises that competition is inherently an essential component for achieving economic efficiency. As identified in the

50 The Green Paper, above n 5 at 8.
51 Finn, above n 40 at 58.
52 Hilmer FG, Rayner MR, Taperell CQ, *National Competition Policy*, Australian Government Publishing Service, Canberra, August 25 (1993) ('the Hilmer Report').

Commission of Audit Report it is necessary that government services be provided within a competitive framework.[53] The Green Paper on corporatisation sought a "level playing field" in respect of the activities of GOCs.[54] Whilst such can be easily identified where there is competition between the GOC and private enterprise the same cannot be said where the GOC has a natural monopoly.

The need for competitive neutrality was emphasised in the White Paper. It acknowledged that where effective competition was difficult to achieve and there was the potential for GOCs to abuse monopoly power additional policies would need to be developed. In addition, there would be a need for carefully designed monitoring procedures and a clear setting out of government requirements in the Statement of Corporate Intent to ensure that there was effective neutrality in respect of competition.[55]

Categorisation of GOGs

The GOC Act provides for two forms of government owned corporation: the *statutory corporation* and the *company* model. The essential difference between the two is the extent to which the Corporations Law applies. A statutory GOC whilst established as a body corporate is not registered under the Corporations Law nor is it subject to that law. A company GOC is subjected to the whole of the Corporations Law except where the GOC Act otherwise provides.[56]

Each GOE to be corporatised is to be considered on a case by case basis to see whether and to what extent the Corporations Law is to apply. The GOC Act was drawn in that manner to provide an "easing-in" period for those entities which are not yet prepared for company status. In that way a statutory GOC could be progressively subjected to the Corporations Law and ultimately transferred by regulation to become a company GOC when the shareholding Ministers namely, the Treasurer and the applicable Portfolio Minister, were confident the GOC had found its commercial feet.

A former Queensland Treasurer (Hon. K De Lacy) had, on a number of occasions, identified the criteria necessary to become or to be transferred to company GOC status as being:

- operating in a highly competitive environment;
- demonstrated performance at a commercial level;
- board and management experienced in operating a GOC in a commercial environment;
- few community service obligations;

53 Commission of Audit Report, above n 3 at 6.
54 Green Paper, above n 5 at 8.
55 White Paper, above n 1 at 15 et seq.
56 GOC ss 67 and 69

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- derives little benefit as a result of government ownership.

Ownership and Control

The corporatisation structure used in Queensland has as its basis the retention of public ownership vested in shareholding Ministers[57]. The resulting corporate structure is set out in Figure 2.

With a statutory GOC there are to be 2 shareholders. There are to be 5 shareholders in a company GOC. This therefore equates a statutory GOC with a private company and a company GOC with a public company. In the statutory GOC the shareholders are to have equal rights whilst with the company GOC only 2 of the shareholders are to have equal voting rights, the other 3 having no voting rights.[58] This is to ensure that the only Ministers who are to have a say are the Treasurer and the relevant portfolio Minister.[59]

In 1932 Adolf Berle and Gardiner Means published their treatise on *The Modern Corporation and Private Property*. It is this work which has had attributed to it the proposition that those who own large public corporations do not control them and, conversely, those who control such corporations do not have significant ownership interests in them.[60] In their work Berle and Means pointed out that shareholders in large public corporations had exchanged *control* for *liquidity*.[61] By *control* Berle and Means meant:

> Since direction over the activities of a corporation is exercised through the board of directors, we may say for practical purposes that control lies in the hands of the individual or group who have the actual power to select the board of directors, (or its majority), either by mobilising the legal right to choose them - "controlling" a majority of the votes directly or through some legal device - or by exerting pressure which influences their choice. Occasionally a measure of control is exercised not through the selection of directors, but through dictation to the management, as when a bank determines the policy of a corporation seriously indebted to it.[62]

With this definition of *control* Berle and Means identified 5 major control types[63] that apply to corporations. Whilst their work was confined to public corporations the types of control identified are applicable to all corporations:

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57 cf Seidman, above n 12 at 187 and 191 et seq.
58 GOC Act ss 71, 72, 76 and 77
59 See GOC Act ss74 and 80 which ensure that the only persons with real power are the Treasurer and the portfolio Minister. GOCs may not be used as vehicles for joint ventures: GOC Act ss 73, 74, 78 and 80 and see Seidman, above n 12 at 184 et seq
60 See Redmond P (ed) *Companies & Securities Law Commentary and Materials* (2nd ed) The Law Book Company (1992) 181.
61 See, for example, Wolfson, N, *The Modern Corporation: Free Markets versus Regulation*, The Free Press, New York (1984) Chapter 2 at 20 et seq.
62 Berle and Means, *The Modern Corporation and Private Property* (Rev ed) Harcourt, Brace World, New York (1968) 66 and see Armen A Alchain & Harold Demsetz, 'The Property Rights Paradigm' (1973) 33 *J Econ Hist* 16; Demsetz H, 'Toward a Theory of Property Rights' (1967) 57 *Am Econ Rev* 347.
63 Berle and Means, above n 62.

1. *Private ownership* - this gives rise to control through complete ownership of the corporate form;

2. *Majority control* - control that arises as a result of the ownership of a majority of the shares;

3. *Control through a legal device* - the person who exercises the control does not own a majority of the issued shares but is nonetheless able to control the entity through for example the use of non-voting shares, super shares (as proposed in the relatively recent case of News Corporations Limited), or shares with weighted voting rights etc;

4. *Minority control* - this is where the particular group only holds a small number of shares but nevertheless is able to control the corporation. This can particularly be the case with public companies that have a large but scattered shareholder base such that a holder of perhaps as low a figure as 10% is able to exercise control; and

5. *Management control* - this occurs where the share register is widespread and there is no single group that has minority control. Often this can be the case in public companies the majority of shares in which are held by institutions. Management is left to control by default.

The first three types are concerned with an ability to muster enough votes to cast 50.1% to enable the passage of an ordinary resolution at a meeting of shareholders. The fourth control type only arises in a few situations where there is a widely scattered shareholder base. This position is to be distinguished from the situation where a person holds say 26% of the shares thus enabling that person to block the passage of special resolutions. That is more correctly called negative control. In the fifth control type there is no nexus between ownership of shares in the corporation and control of the corporation as it is vested in management and not the owners.

In his work on shareholder rights and remedies Peter Willcocks[64] acknowledges that members of an Australian company do not in general control the company and its operations. The reason for this in many cases is a result of a wide shareholder base and in others is quite simply that the management and control of an Australian company is vested in its board of directors.[65] As Greer L.J. stated in *John Shaw & Sons (Salford) Limited v Shaw*:

> If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if the opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the

64 Willcocks P, *Shareholders' Rights and Remedies*, The Federation Press, Sydney (1991).
65 Willcocks, above n 61 at 1 and see s.226A of Corporations Law and see Hazen T L, The Corporate Persona, Contract (and Market) Failure, and Moral Values (1991) 69 *NCL Rev* 273.

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> articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.[66]

This statement itself supports the view that the modern corporation is an abstraction devoid of physical form. It exists only in contemplation of the law and therefore incapable of expressing its will without the mediation of natural persons. One can view companies as contractual structures where the board of directors and majority shareholders control and dominate the affairs. Alternatively, they may be viewed as a nexus of contracts and fiduciary obligations. Whatever the view of them, they are not natural and therefore must operate through agents who are natural persons. Those agents have imposed on them fiduciary obligations that operate over and above and in addition to any contractual rights and remedies.[67]

Where there is a breach of an obligation owed to of the company it follows naturally that it is the company that should be the person that takes the legal action. Indeed, that was the position in *Foss v Harbottle* [68] where the court held that where there was a breach of the duties owed to the company the proper plaintiff was the company itself.

Shareholders have certain positive controls available to them. These can include voting to remove directors who do not represent the will of the shareholders. The difficulty is being able to win the proxy fight by getting the requisite numbers at the meeting. If the numbers are not able to be mustered the shareholders must revert to what are termed negative control measures ie legal remedies in order to redress the imbalance in control between the owners of the business and the directors/managers of it.[69] At least one commentator has referred to this as the tension between control and accountability.[70]

In many public companies the share register is very widely held and it is often very difficult to remove directors or to bring about change. In the case of many public companies this is exacerbated by the growth of institutional investment holdings and the inability or lack of desire on the part of those institutions to seek to exercise control over the management of companies. Therefore, shareholders, particularly small shareholders, becoming more and more bound to rely on the aspects of negative control as opposed to positive control.[71]

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66 [1935] 2KB 113 at 134

67 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413 at 418 per Hoffmann LJ; *Hospital Products Limited v United States Surgical Corporation & Others* (1984) 58 ALJR 587 particularly at 628 per Dawson J and 596 per Gibbs CJ; s140 of the Corporations Law which provides that the constitution of a company has the effect of a contract under seal between the company, the members and the officers of the company; and see Corkery J and Gygar T and others; Shareholders' Actions Against Company Controllers; Ch 4 *Laws of Australia*; Business Organisations (loose leaf series) 193

68 (1843) 2 Hare 461; 67 ER 189. Note that the rule in *Foss v Harbottle* is to be displaced by a statutory derivative action by the Corporate Law Economic Reform Bill 1998 s.236 et seq.

69 Willcocks, above n 61 at 16 et seq.

70 Ramsay I, 'Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action' (1992) 15 *UNSWLJ* 149 at 151.

71 As an example see the difficulties with Coles Myer Limited in 1995 where shareholders expressed significant dissatisfaction with performance of the board and sought changes. One factor that has limited action particularly by institutional investors is the effect of Chapter 6 of the Corporations Law as it proscribes the formation of alliances for the purpose of controlling the constitution of a board. Additionally, the investment

The control aspects of a GOC are very different. Ownership of the GOC is vested in the State as represented by the shareholder Ministers. There is not a disparate grouping of shareholders whose interests may be very different one from the other and who are able to buy and sell shares in reaction to decisions of management. The wider community, on whose behalf the shares are held, in a sense exercise a type of indirect control of GOCs though the ballot box at general elections.

The shareholding Ministers either themselves, or, the executive government acting through the Governor-in-Council control GOCs absolutely through:

- *appointment of directors* - a GOCs board is appointed by the Governor-in-Council[72];
- *appointment of chairman* - for a statutory GOC the chairperson and deputy chairperson is made by the Governor-in-Council[73];
- *appointment of chief executive officer* - the Chief Executive Officer of a GOC is to be appointed by the Governor-in-Council on the recommendation of the GOC's board[74];
- *constitution* - the shareholding Ministers may direct a statutory GOC to require amendment of the memorandum and articles of association of a subsidiary GOC and may also amend the memorandum and articles of a company GOC[75];
- *draft corporate plan* - shareholding Ministers may give directions to the board of a GOC in respect of the Corporate Plan[76]. Additionally, the shareholding Ministers may direct the board to modify the Corporate Plan[77];
- *statement of corporate intent* - the shareholding Ministers may direct the board of a GOC in relation to the statement of Corporate Intent[78];
- *reserve powers* - the shareholding Ministers retained reserve powers in respect of notifications to the boards of GOCs of public sector policies[79];
- *power to give directions* - in relation to public sector policies the shareholding Ministers have the power to give certain directions[80]; and

deed for many institutional funds prohibit the managers (institutions) of the funds from voting on director elections unless they have an authority from the investors in the fund.

72 GOC Act s96 for a company GOC and s94 and Sch 1 of the GOC Act for a statutory GOC.
73 GOC Act s94 and Sch 1.
74 GOC Act ss62A and 62B, GOC Act s101 and Sch 2 for statutory GOC and s102 for a company GOC.
75 GOC Act s86 et seq.
76 GOC Act s107.
77 GOC Act s110.
78 GOC Act ss117 and 120.
79 GOC Act s123.
80 GOC Act s124.

- *disposal of assets* - the shareholding Ministers can require a GOC's board not to dispose of certain assets[81].

The fact that a shareholding Minister acting through the Governor-in-Council via executive government has the right to, control the composition of the board of directors means that the shareholding Minister does not necessarily have to rely on any other method of control provided in the GOC Act[82].

The ultimate sanction to be levied against directors is their removal or, alternatively, the giving of a direction. The fact of the existence of the power might well lead to situations developing where directors of GOCs simply acquiesce to the requirements of the shareholding Ministers without forcing the issue so as to require a direction to be given. Such could be achieved by ensuring that only those persons who are likely to be compliant are appointed to boards of GOCs.

Oversight of GOCs

Statement of Corporate Intent and Corporate Plan

The Statement of Corporate Intent which deals with the role of the GOC board is a document which must be prepared in each financial year for each GOC. It must be consistent with the Corporate Plan of the GOC.[83]

The GOC Act does not lay down any guidelines regarding the form and content of the Corporate Plan. This is left to the portfolio Minister being the Minister who has responsibility for the administration of the legislation relevant to the particular GOC. It is that Minister who may issue the guidelines regarding the form and content of the Corporate Plan. The Corporate Plan sets out the general policy objectives in respect of the GOC's operations.

Corporate Plans have been developed in the public sector for some time pursuant to the terms of the Public Finance Standards which have been produced under the authority of the Financial Administration and Audit Act[84]. Under those provisions the role of Corporate Plans for public sector organisations is to:

- clarify the aims and objectives of the organisation at the broad strategic level; and

- outline the actions and resources required to achieve those objectives.

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81 GOC Act s161.
82 See the discussion of this in Seidman above n 12 at 188.
83 GOC Act ss92 and 103-111
84 Queensland Treasury Department, *Public Finance Standards* (1990) Queensland Government Printer, Brisbane (1990); Financial Administration and Audit Act 1977 as amended by the State of Queensland.

The Plans also form part of the accountability process by setting out key outputs against which performance can be measured. This is part of the strategic planning process in respect of government agencies.

Corporate Plans have traditionally had a medium term focus identifying priorities for an agency over say 3 to 5 years. In Queensland, the Public Finance Standards specify that agencies prepare a Corporate Plan covering a period of at least 3 years. Those plans are to be updated annually, taking into account changes in government policy and other aspects of the operating environment for the particular agency. However, the focus remains on objectives that are to be achieved over a 3 to 5 year period.

Coupled with the production of the Corporate Plans has been the development of Business Plans by public sector agencies. These set out the detailed implementation plan for the particular agency for the year ahead to achieve its strategic mission and objectives.

The Business Plans and the Corporate Plans were to be reviewed by the central agencies of government being the Premier's and Treasury Departments. That was to ensure the agencies' objectives and statements of core business fitted with and were consistent with the whole of government policy.

The purpose of the Statement of Corporate Intent is to set out the GOC's financial and non-financial performance targets for activities in a particular financial year. It also, must include certain matters required by the statute relevant to the GOC's objectives; the nature and scope of the activities for the particular financial year; an outline of the main undertakings in the relevant financial year; the capital structure and dividend policies; major infrastructure investments proposed; borrowings made and proposed to be made; an outline of the policies adopted to minimise and manage any risk of investment and borrowings that may adversely impact on financial stability; policies and procedures relating to the acquisition and disposal of major assets; accounting policies that apply to the preparation of the accounts; identification of the type of information which will be given to the shareholding Ministers, particularly in quarterly and annual reports; the community service obligations; and employment and industrial relations matters.

The Statement of Corporate Intent to a large extent is equated to the Business Plan for public sector agencies. The Corporate Plan for GOCs would be very similar to the document of the same name which is produced for agencies.

The Corporate Plan and more particularly the Statement of Corporate Intent, provide a basis for monitoring performance of the GOC against stated goals. The drafting of the Corporate Plan and the Statement of Corporate Intent includes a negotiation process between the shareholding Ministers and the Board of the GOC.[85] At first blush this does seem to be slightly inconsistent

85 As much is inherent having regard to the provisions of GOC Act ss117-210 and ss103-111.

with the stated definition of corporatisation which, in part, is said to allow for the State to provide strategic direction through *setting* financial and non-financial performance targets.

Obviously, it would be difficult to give literal effect to that if it is intended to have an independent board seeking to achieve the targets that are set. It is both desirable and necessary to have a consultation process for setting the goals for the GOC. Within that process it is necessary to have established an appropriate regime of rewards and sanctions to ensure that the appropriate information flows from both sides of the negotiation. As was pointed out in the World Bank Policy Research Report - *Information problems arise because contracting agents (government on the one hand and public or private managers or owners of a monopoly on the other) have different sets of information; thus each side can use the information it holds exclusively to improve its position at the expense of the other*. [86] If the relevant information is not available to both sides, any agreement reached is likely to be of dubious value.

Once negotiated, the Statement of Corporate Intent is said to be a type of agreement between the board of the GOC and the shareholding Ministers.[87] Whilst that may be intended by the legislation it is doubtful that it could be legally elevated to such a level without a specific stipulation in the statute. The wording of s9(2) of the GOC Act is at best equivocal:

> "It is intended that the statement of corporate intent should represent an agreement between the GOC's board of directors and its shareholding Ministers."

An interesting feature is the fact that the shareholding Ministers have the overriding power to direct the board to modify the Statement of Corporate Intent. While the Ministers must take account of the board's view in respect of any modification there is no limit in the GOC Act on the discretion vested in the Ministers to act as they see fit in giving any direction. The presence of that power tends to potentially render the process of consultation more illusory than real[88] and to seriously question whether it is an agreement in the sense of a meeting of the minds.

Performance Monitoring

As indicated previously the Government has through the GOC Act conferred on GOCs a level of autonomy and authority. However, that has come at a cost - a cost of strict accountability for performance. Designed no doubt to replace the rigours of the market which are placed on private companies. However, if corporatisation is to be successful there necessarily must be a comprehensive monitoring system in place. This is particularly the case because there is to a

86 *Bureaucrats in Business* above n 7.
87 White Paper, above n 1 at 66 para 4.2 and GOC Act s 9(2) which prescribes as much as the law.
88 GOC Act s120

degree a relaxation of Ministerial control in favour of a board of directors vested with a level of autonomy and authority.

Due to the requirements of public administration law there must be established an appropriate system to monitor what is happening to what are in effect public assets owned by the corporatised entity. Additionally, as part of the key principle of *Strict Accountability for Performance* it is necessary to ensure that the monitoring *compensate(s) for the absence of the wide range of monitoring to which listed corporations are subject by, for example, the share market and Commonwealth regulatory agencies*.[89]

Statutory GOCs are liable to comply with the Financial Administration and Audit Act in Queensland which incorporates the Public Finance Standards. Company GOCs need to comply with the requirements of the Corporations Law including the continuous disclosure regime and the general disclosure requirements in relation to the preparation of annual reports etc.

The monitoring devices which have been adopted do not seek in any way to interfere at a day to day level in the operation of GOCs but to require reporting on a regular basis. That reporting allows for a periodic assessment of the performance of the GOCs against the pre-agreed targets set out in the Corporate Plan and the Statement of Corporate Intent. Responsibility in relation to the monitoring aspects in respect of GOCs falls under the control of the GOE unit within the Queensland Department of Treasury.

That monitoring looks both at financial and non-financial matters including the community service obligations undertaken by GOCs. The non-commercial or regulatory roles previously undertaken by the GOCs would already have been extracted prior to the formation of the GOC.

Corporate Governance Systems Generally

Definition

The Cadbury Committee defined corporate governance in the following way:

> *Corporate governance* is the *system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role* in governance is to *appoint the directors and the auditors* and to satisfy themselves that an *appropriate governance structure is in place*. (Author's emphasis).[90]

Perhaps, the ideal system of corporate governance would:

> ... do several things, it would first give a boss enough freedom to manage well. It would ensure that he used that freedom to manage the firm in the

89 GOC Act s19(c).
90 Report of the Committee on the Financial Aspects of Corporate Governance; December 1, 1992 ('the Cadbury Report'). The Committee was chaired by Sir Adrian Cadbury.

> interests of the shareholders. And, if somebody else could do a better job, it would let him. In such a system, the boss would know what shareholders expected, and shareholders would have enough information to judge their expectations were being met - and power to act decisively if they were not. The system would also keep shareholders sufficiently distinct from managers to let them buy and sell freely without breaking rules against insider trading in stock market; a key virtue of the public company is that it gives investors liquidity.[91]

Ford describes corporate governance as being *about the management of business enterprises organised in corporate form and the mechanisms by which managers are supervised*.[92]

Strictly Boardroom identified the traditional model of corporate governance in the following manner:

> The Board of Directors manages the corporation's business and formulates business policy. Shareholders elect the members of the Board for this purpose, retaining for themselves the right to decide only the most fundamental issues such as major changes in capital structure. Officers of the corporation act, in effect, as agents or delegates of the Board, their essential role being to carry out Board decisions. In this model, the Board has a distinctive position. It is treated as a separate company organ, rather than itself and agent of the corporate entity. For management purposes, it is the corporate entity.[93]

Strictly Boardroom then went on to state that it believed that the traditional model as defined above was reflected to a degree in the law. In that sense reference was made to what was then regulation 66 of Table A of the standard articles of association for a company.

Corporate Practices and Conduct in its report stated:

> Corporate governance is the system by which companies are controlled. Shareholders have delegated many of their responsibilities as owners to the directors who oversee the management of the business on their behalf. Directors are accountable to their shareholders and shareholder participation is necessary to make that accountability effective.
>
> Directors should use their best endeavours to ensure that the company is properly managed and constantly improve so as to protect and enhance shareholder wealth and perpetuity, and to meet the company's obligations to all parties with which the company interacts - its stakeholders. *The essence of any system of good corporate governance is to allow the board and management the freedom to drive the company forward but to exercise that freedom within a framework of effective accountability*.[94]

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91 'Corporate Governance - Watching the Boss' The Economist (January 29, 1994) 19
92 Ford, HAJ and Austin, RP, *Ford's Principles of Corporation Law* (9th ed) Butterworths, Sydney (1999) 167.
93 *Strictly Boardroom* above n 36 at 25.
94 Bosch H, *Corporate Practices and Conduct* (3rd ed) Pitman, Melbourne (1995) ('Corporate Practices and Conduct') at 7.

The diverse content of the above definitions of the term corporate governance, if they may be properly be called that, underscore the fact that there is not one definition and, more importantly, there is no universal acceptance as to the elements that make up a system of corporate governance. The most appropriate system of corporate governance will vary depending on the perspective from which it is viewed, the type of company and, to an extent, the personalities involved. However, whatever the perspective it is clear that the system must not be confined to matters of law. It goes beyond that.

The legal system that applies to corporations does not seek to prescribe any system of governance. The law is more concerned with the establishment of minimum standards of acceptable conduct.[95]

For a system of corporate governance to be established it is necessary to have regard to a number of elements of which management or more particularly, the power of management, is but one. The elements include (not in any particular order) - policy formulation, supervision, management, accountability, control, direction, information. Each of these is represented to varying degrees in the above definitions.

The need for a system of corporate governance was placed squarely on the agenda for companies following the report of the UK Cadbury Committee and the Australian Committee chaired by the previous chairman of the now defunct National Companies and Securities Commission, Mr Henry Bosch. While the Cadbury Committee in its report went so far as to recommend a nineteen point Code of Best Practice the Australian Committee did not. That latter Committee sought to identify the issues relevant to corporate governance without attempting to be prescriptive.

The Code of Best Practice as recommended by the Cadbury Committee contains nineteen paragraphs on two pages. It deals with four topics:

1. Board of directors;
2. Non-executive directors;
3. Executive directors;
4. Reporting and Controls.

Corporate Practices and Conduct deals with much the same matters but in a slightly different fashion. Importantly, even though Corporate Practices and Conduct did not prescribe a system of corporate governance it would seem that both it and the Cadbury Committee would accept the following as minimums in relation to a system of corporate governance:

95 cf. the approach in the Corporate Law Economic Reform Bill 1998 which refers to the topic of ‘Directors’ duties and corporate governance’

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- the board of directors must meet regularly;
- the board must divorce itself from matters of day-to-day management and confine itself to policy formulation and review of the performance of management;
- the board should have a number of non-executive directors to carry either majority or at least significant weight;
- a majority of the non-executive directors should be independent of the corporation;
- the board should establish appropriate reporting systems and controls to enable a proper monitoring of performance not only of management and the company but also of the board itself.[96]

The matter of corporate governance has been treated differently in each jurisdiction. In the UK the London Stock Exchange requires, under its Listing Rules, that listed companies incorporated in the UK, provide a statement in their annual reports as to whether or not there has been compliance with the Code of Best Practice. Where there has only been partial compliance that must be stated. That statement, in the annual report, must, as recommended by the Cadbury Committee, be reviewed, in respect of certain matters, by the company's auditors. The New York Stock Exchange has two main requirements relating to corporate governance practices for listed companies:

1. Domestic companies must have an audit committee comprising independent directors who are free from any relationship, that in the opinion of the board of directors, would interfere with the exercise of independent judgment as a committee member; and

2. Domestic companies must have at least two "outside" directors on their board.[97]

Guidelines in respect of corporate governance have also been laid down by the Toronto Stock Exchange.[98] In 1994 the Australian Stock Exchange proposed amendments to its Listing Rules that were designed to impose on listed companies a system of corporate governance. That proposal failed in favour of the current system of rules which requires disclosure by public listed companies of the systems of corporate governance adopted by them.[99]

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96 Cadbury Committee Report above n 90 particularly at 58 and 59; Corporate Practices and Conduct above n 94 particularly at pages 12 et seq.

97 See section 303 of the New York Stock Exchange Listed Company Manual.

98 See the Toronto Stock Exchange Company Manual and the report of the Exchanges' Committee on Corporate Governance in Canada referred to as the Toronto Report.

99 Australian Stock Exchange: Disclosure of Corporate Governance Practices by Listed Companies; Australian Stock Exchange, 1994; and see Australian Stock Exchange Listing Rule 4.10.3 and Appendix 4A to those Rules.

Corporate Governance and the Board of Directors

The centrepiece of any system of corporate governance is the board of directors. The actions of the board are governed by statute, general law, a variety of regulations, the shareholders operating through the annual general meeting or other meetings held through the year and the constitution of the company. The board is required to take account of a broad range of interests that impact on the company from those of the shareholders to those of what might be described as the broader community encompassing, employees, creditors, bankers, the environment, etc.

While the Cadbury's Committee Code of Best Practice identified four areas there were in fact only two broad areas:

- board of directors; and
- reporting systems and controls.

The first deals with all matters touching and concerning the makeup of the board - executive, non-executive and independent directors; the way in which the board meets and how it considers the matters that come before it; the committee structure of the board. The second is aimed more at the means by which the board is able to monitor the performance of the company, management and the board itself.

There would seem to be universal acceptance that the modern Australian public companies' board should be made up of a majority of non-executive directors of whom a majority are independent of the company and its management. The chairman of such a board should be selected from the ranks of the independent non-executive directors.[100]

Those non-executive directors should be selected for the skills that they bring to the board table. There should be a mixture of skills and experience that are relevant to the particular company. As stated, the majority of the non-executive directors should also be independent of the company. As Corporate Practices and Conduct identified that *independence* will be assured when the director:

- is not a substantial shareholder;
- has not been employed in any executive capacity within say the last few years;
- is not retained as a professional adviser to the company either personally or through his or her firm such as a lawyer or some other adviser;
- is not a significant supplier or customer of the company;

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100 Corporate Practices and Conduct, above n 94 at 13 et seq.

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- has no significant contractual relationship with the company other than as a director.[101]

A fundamental issue in dealing with the board is to ensure that the chairman is not also the chief executive officer. Many companies which experienced difficulties during the 1980s had an executive chairman who was also a large shareholder of the company. That was a dangerous combination. It now seems to be universally accepted that the chairman, to be most effective, should come from the ranks of the *independent* non-executive directors.[102]

Having decided on the make-up of the board it is then necessary to identify the formal structures that are to apply within the board to assist in its work. This can include the establishment of board committees that are given the specific task of dealing with such matters as audit, remuneration, nomination, legal compliance, etc. The range and duties of the committees will depend on the size of the board and the activities of the particular company. The purpose of the committee structure is to distribute the workload of the board and to enable detailed consideration to be given to the many important issues that come before the board.[103]

The purpose of the board structures is to ensure that the board is able to be satisfied that the company operates to a maximum level of efficiency. The board is responsible for setting policy and direction while management carries out the day-to-day management role. It is not for the board to seek to interfere in the day-to-day activities of the company. That is, the preserve of management. In the same way that management must report to the board on its stewardship so too must the directors report to the shareholders of the company - the ultimate owners.

In addition to adopting the correct structures at the board level it is also necessary to ensure that there are proper structures throughout the company that provide lines of communication to the board of directors. This is necessary to ensure that the board is kept informed on the company's activities. These are the systems of internal controls that need to be established to enable proper review of performance and the detection of failures or inefficiencies. It is beyond the scope of this article to attempt to identify all of the elements of such controls. However, suffice it to say that if the board is to be an effective and efficient instrument of corporate governance it is necessary that it have available to it an effective system of internal controls providing information on all aspects relevant to the company including but not limited to financial matters[104]

101 Corporate Practices and Conduct, above n 94 at 14.
102 Corporate Practices and Conduct, above n 94 at 15 and see the Cadbury Report above n 90 at 21 which makes allowance for the situation where the chairman is also the chief executive officer.
103 Corporate Practices and Conduct, above n 94 at 17.
104 Cadbury Committee, above n 90 at 27.

Corporate Governance and GOCs

Introduction

GOCs in Queensland range from small to medium to large by dollar value and by number of employees. Table 2 identifies the size of GOCs in Queensland as at June 30, 1995:

Table 2: **Size of GOCs**

	Assets $bn	**Liabs $bn**	**Net Assets $bn**	**Employees**
Q-Rail	7.2	3.2	4.0	15772
QIDC	2.8	2.6	0.2	448
AUSTA	4.4	1.6	2.8	1381
QTSC	5.7	2.3	3.4	112
Ports Corporation	0.5	0.084	0.416	29
TOTAL	**20.6**	**9.784**	**10.816**	**17692**

Source: Annual Reports for 94/95 financial year.

Farrar and McCabe say that the aim of the United Kingdom public corporation was to combine freedom of management from government supervision of day-to-day operations with public control of the broader policies of the enterprises.[105] They go on to quote the words of Professor W A Robson in "*Nationalisation Industry and Public Ownership*":

> The public corporation is based on the theory that a full measure of accountability can be imposed on a public authority without requiring it to be subject to ministerial control in respect of its managerial decisions and multitudinous routine activities, or liable to comprehensive Parliamentary scrutiny of its day to day working. The theory assumes that policy, in major matters, can be distinguished from management or administration: and that a successful combination of political and managerial freedom can be achieved by reserving certain powers of decision in matters of major importance to Ministers answerable to Parliament and leaving everything else to the discretion of the public corporation acting within its legal competence. Government is further endowed with residual powers of direction and appointment which marks its unquestionable authority.[106]

This may be contrasted with the statements of Harold Seidman in 1954 when he stated:

> In most countries, the reaction to excessive bureaucratic controls was to abandon controls altogether. Resort was had to the form of organisation most common employed by large scale private enterprise - the

105 Farrar J & McCabe B: 'Corporatisation, Corporate Governance and the Deregulation of the Public Sector Economy' (1995) 6 *PLR* 24 at 28; and see the Report of the New South Wales Audit Office - Performance Audit Report; Corporate Governance (June 1997).

106 Robson WA, *Nationalised Industry and Public Ownership* Allen & Unwin London (1960).

> Corporation .... created outside of the normal government structure, independent financed and largely immune from ministerial direction and control. This development was rationalised into a theory that public corporations are by their very nature autonomous bodies with certain inherent characteristics such as independence, freedom from direction and control by "political" officers, and self contained finance. The words "autonomous corporation" and "autonomous agency" have since become firmly embedded in the vocabulary of public administration.[107]

Those latter statements could perhaps be viewed in the context in which they were written ie. post World War II. It was at a time that perhaps the public corporation was used as:

> A convenient device for avoiding statutory or constitutional limitations on the government's borrowing authority and restrictive budget laws requiring that revenues and expenditures be balanced in any given fiscal year.[108]

This is not the position that applies to Queensland GOCs. They are established as a means of bringing about micro-economic reform in the state. As such it would seem to be necessary for the State to be able to exercise a significant level of control over the GOCs.

It could be forcefully argued that corporate governance has only come into sharp focus as a result of the failures of the 1980s. The Cadbury Committee was formed in 1991. Its sponsors:

> ... were concerned at the perceived low level of confidence both in financial reporting and in the ability of auditors to provide the safeguards which the users of company reports sought and expected. The underlying factors were seen as the looseness of accounting standards, the absence of a clear framework for ensuring that directors kept under review the controls in their business, and competitive pressures both on companies and on auditors which made it difficult for auditors to stand up to demanding boards.

Corporate Practices and Conduct was first published in 1991. It is not clear in respect of either as to the real motivation for carrying out the work that was done. However, it would seem clear that it was at least a reaction to the failures of the 1980s and out of a concern that perhaps the then existing rules and regulations were ineffective to deal with the excesses of the 1980s. Also, it may be that there was a concern that if the business community itself was unable to establish a regime for control of corporate conduct the legislature may well seek to increase the level of control over companies and the persons that control and manage them.

The position of a government owned corporation in Queensland is not the same as for private companies. There have not been any failures and there would not

107 Seidman, above n 12 at 184.
108 Seidman, above n 12 at 184.

seem to be a crisis of confidence in the systems and rules that control the operations of GOCs. However, the same cannot be said of government business enterprises generally.[109]

It cannot be contended that Queensland GOCs should not be subjected to a proper system of corporate governance. The absence of such an appropriate system could well lead to the disasters that have been experienced in the other states. The GOC Act does not provide a system as the Australian Stock Exchange Listing Rules do, that requires reporting of corporate governance practices that are adopted by a GOC.

Role of GOC Board

The role of the GOC board is dealt with in the GOC Act and is stated to include the following matters:

- responsibility for the GOC's commercial policy and management;
- ensuring that, as far as possible, the GOC achieves and acts in accordance, with its statement of corporate intent and carries out the objectives outlined in its statement of corporate intent;
- accounting to the GOC's shareholders for its performance as required by the GOC Act and other laws applying to the GOC;
- ensuring that the GOC otherwise performs its functions in a proper, effective and efficient way.[110]

On the face of it the GOC Act would appear to devolve to the board of a GOC the functions and responsibilities that one would expect would be placed into the hands of the board of a private company. However, that role must be viewed against the provisions of the Act generally and the definition of the term corporatisation set out in s16 of the GOC Act. That section states as one of the objectives of the corporatisation reform process in that the State should as owner of the GOC on behalf of the people in Queensland *provide strategic direction to the entities by setting financial and non-financial performance targets and community service obligations*.

This must mean that the board of a GOC does not have the power or authority to **set** the strategic direction for the GOC. At very best the board may only involve itself in the negotiation of the Corporate Plan and the Statement of Corporate Intent. However, the board is not able to negotiate an independent position. The shareholding Ministers retain the power to give directions and to effectively force the board to accept Corporate Plans or a Statement of Corporate Intent

109 There have been a number of significant failures by governments which have involved themselves in business operations. These have included the problems with the various state banks, the State Bank of South Australia, the State Bank of Victoria and Tricontinental, the problems of WA Inc and so on.

110 GOC Act ss 92 and 95.

which reflects the will of the State. That may be a proper objective from the State's viewpoint. However, it potentially impacts on the position of the directors.

The structure that has been adopted seeks to separate the issues of accountability and responsibility. The *board is accountable to the shareholding Ministers* who in turn are *responsible to Parliament*. The accountability of the directors is effectively limited to the financial performance of the GOC. That performance being measured against criteria laid down by the shareholding Ministers. Certainly, the directors have a role to play in negotiating the performance targets. However, in the end it is a process that can be effectively dominated by the shareholding Ministers.[111]

Through the legislation the GOC board is relegated to the role of performing the terms of what is arguably a contract with the shareholding Ministers - the Statement of Corporate Intent.

Division of Powers

In relation to company GOCs the position in respect of the division of powers is very similar to that which applies to companies incorporated under the Corporations Law. A company GOC being incorporated under the Corporations Law has, subject to the provisions of the GOC Act, all of the powers and privileges of a natural person. The way the powers are divided amongst the organs of the company are a matter for the company's constitution.

> Section 140(1) provides:
>
> A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:
>
> (a) between the company and each member; and
> (b) between the company and each director and company secretary; and
> (c) between a member and each other member;
>
> under which each person agrees to observe and perform the consitution and rules so far as they apply to that person.

The constitution is the source of the power for directors of companies. On the basis that a company GOC is incorporated under the Corporations Law it would seem that the powers for the directors of a company GOC would flow from the company's constitution.

The position in relation to statutory GOCs is not so clear. The powers of the statutory GOC flow from the statute that creates it and from the GOC Act. Under that latter Act statutory GOCs have all of the powers of a natural person. However those powers are subject to any restrictions expressly imposed by for

111 Taggart, above n 27 at 83

example the Statement of Corporate Intent or pursuant to any relevant directions, notifications or approvals given to the GOC.[112] In other words, a statutory GOC will have all the powers of a natural person unless the Statement of Corporate Intent etc determines otherwise. What is not so clear though is whether or not the Statement of Corporate Intent operates in the same way as the constitution of a company GOC.

The GOC Act states that the Statement of Corporate Intent is **intended** to represent an agreement between the GOC's board of directors and its shareholding Ministers. Unfortunately, the GOC Act does not state unequivocally that the Statement of Corporate Intent is to operate as such an agreement. Even if it did it may cause a complication when it comes to considering the position of a company GOC.

As already outlined the constitution of a company GOC operates as a contract, pursuant to the terms of the Corporations Law, between the GOC, the shareholding Ministers and the board of directors. Care would need to be taken to ensure that if the Statement of Corporate Intent, is in truth an agreement, then it should not contain any provisions that could in any way conflict with the terms of the constitution of a company GOC. Whilst primacy is given to the provisions of the GOC Act in relation to any inconsistencies between it and the memorandum and constitution the same does not apply in respect of the Statement of Corporate Intent versus the constitution. Also, and perhaps more importantly, the Statement of Corporate Intent at best is only an agreement between the shareholding Ministers and the directors. Not the GOC itself.[113]

There is no statement that unequivocally requires the GOC to be bound by the terms of the Statement of Corporate Intent. However, it is very clear from the provisions of the GOC Act that is intended. Also, when it comes to the issue of duties and liabilities, a court is required to take into consideration such matters as the provisions of the Statement of Corporate Intent[114].

At best, it would seem that the powers of the directors:

- in the case of a company GOC - are derived from the constitution subject to any restrictions provided by the GOC Act or the Statement of Corporate Intent; and

- in the case of a statutory GOC - are derived from a mixture of the statute that creates the statutory GOC, the GOC Act and the Statement of Corporate Intent.

Additionally, in both cases the powers of directors are subject to any Ministerial directions that may be given under the GOC Act.

112 GOC Act ss149 and 150.
113 GOC Act ss9(2), 90, 92, 95.
114 See GOC Act ss149, 150 and 146.

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Structure of GOC Corporate Governance

The centrepiece of any corporate governance structure is the need to ensure that there is a proper structure to the board of directors. This necessitates considerations relevant to the identification of appropriate non-executive directors, independent directors and if possible an independent chairman together with the identification of structures to assist the board to undertake its functions.

Within the GOC structure, the issue of directorial appointments is left solely in the hands of the government of the day. The appointments are made by the Governor acting upon the advice of the government as Governor-in-Council.

The functions of a board as recognised by Rogers CJ and the New South Wales Court of Appeals in the *AWA cases* are:

1. To set the goals of the corporation.

2. Appoint the chief executive of the corporation.

3. Oversee the plans of managers for the acquisition and organisation of financial and human resources towards attainment of the corporation's goals.

4. To review at reasonable intervals the corporation's progress towards attaining its goals.[115]

When it comes to an analysis of the above principles in relation to GOCs it is found that:

5. The board of directors do not set the goals for the corporation. These are set by the Ministers in accordance with the first key principle of corporatisation - Clarity of Objectives. The GOC has set for it specific financial and non-financial performance targets for its commercial activities. There is a negotiation process between the board of directors of the GOC and the Ministers in relation to the setting of those objectives. However, the shareholding Ministers retain the overriding right of objection and the ability to impose their views.

6. The chief executive of a GOC is appointed by the Governor-in-Council as are the senior executives of the GOC. It is an extremely difficult position for the board of directors if they do not have the power to hire and fire the chief executive and the senior managers of the GOC as they are not able to impose performance levels on them and retain an ability to impose sanctions.116

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115 *AWA Ltd v Daniels* (1992) 10 ACLR 933 at 1013 per Rogers CJ applied in *Daniel & Ors v AWA Limited* (1995)13 ACLR 299 at 662 per Clarke and Sheller JJA.

116 See GOC Act ss102 and 168 and see *Bureaucrats in Business,* above n 7 at 14 et seq.

7. There will be scope for the GOC's board to oversee the plans in relation to the attainment of the corporation's goals. However, the board does not have any ability to ensure that the chief executive officer and the senior executives enter into performance based contracts. The principles of rewards and sanctions is missing. Failure to attain set goals may well be the fault of management. However, faced with that there is little that the board can do.

Having regard to the above it is so difficult as to be impossible to develop a system of corporate governance for a GOC that is comparable to the type of system that applies to a public listed company. Far too many of the fundamental powers are vested in persons who are not directors and who therefore do not share the same liability as the directors. What this means is that under the corporate governance structure for a GOC, it is the shareholder minister/the government that is the centrepiece of the structure and not the board of directors.

What occurs in the GOC context is that directors are appointed to a position that carries with it all of the liabilities but are not given the power to carry out the roles that the law imposes.

It is the retention of powers to direct and notify etc. that place the matter of the proper governance of GOCs in jeopardy. The structure of the GOC does not effect a sufficient arms-length situation to enable the focus on management of the commercial enterprise that is the core objective of the corporatisation process and which should be the primary focus of good corporate governance. This retention of reserve power coupled with other regulatory features dealt with elsewhere in this article, when closely examined, lead one to feel that perhaps corporatisation is much to do about nothing.

One has to question whether or not the stated objectives of the corporatisation process - improvement of the State's overall economic performance and the ability of the government to achieve social objectives through improving the efficiency, effectiveness and the accountability of GOCs - could and should otherwise have been able to be achieved without the need to resort to a corporate structure that falls short of the private company model.

This is particularly so when the adoption of that structure seeks to create a new corporate being or a hybrid company/statutory corporation. By creating a hybrid company/statutory corporation the government has left open the issue of corporate governance. The model does not allow for the directors to act as they should - as fiduciaries of the organisation that they are appointed to direct. Adopting the corporate structure in the context of GOCs should mean embracing and applying it within a government context with all its imperfections.

The company, being a separate and distinct legal entity from its directors and its shareholders can incur debts which will not even be the debts of a sole beneficial shareholder.[117] In the same way a GOC is a separate and distinct legal entity separate from its shareholding Ministers. However, it is most unlikely that a government would not stand behind a GOC that encountered financial difficulties. To do otherwise is likely to result in political difficulties.

In the Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd*[118] their Lordships said:

> Directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed the majority of shareholders cannot control them in the exercise of these powers while they remain in office.

Directors of a company may exercise their management powers against the wishes of a majority of the members. The avenue that is available for disgruntled shareholders is to remove those directors with whose views they disagree. This goes to the fundamental relationship between the director and the company of which he is a director as a fiduciary. The same does not apply to GOCs.

From a corporate governance perspective the private corporate form cannot simply be grafted into the corporatisation process. If it is necessary to retain power of direct intervention or through other regulatory processes to obtain a position of indirect persuasion, significant changes need to be effected to the corporate form and the relationships that exist within the corporate form as between the shareholders, the company, and the directors.

The retention of the power to direct and the requirement that directions etc. be taken into account is so fundamental as to strip away any prospect that such bodies can apply principles of good corporate governance in the way that are applicable to public listed companies. The fact that the GOC Act requires that in assessing the actions of directors it is necessary to take account of the fact that it is a GOC but also retains the statement that the duties and obligations of directors as stated in the Act are in addition to those that apply at law confuses the position[119]. More importantly it perhaps creates a false impression for the directors of such bodies that in the eyes of the law, their position is somewhat different from or superior to their private sector counterparts because some consideration is to be given to their status as directors of GOCs in assessing their duties and liabilities. In some ways it means that perhaps it is the interests of the shareholders - either the shareholding Ministers or the person they represent i.e. the wider community - that are to be preferred to those of the corporation. If that is the case it fundamentally alters the fiduciary obligation

117 See the discussion of this in Ford, above n 92; Ch 4.
118 [1974] AC 828-37
119 GOC Act ss136(9) and 136(11).

and thereby distorts the corporate form. That alone jettisons any prospect of having a corporate governance structure equal to the private sector.

The unclear status of the Statement of Corporate Intent also jeopardies the position of the GOCs from a governance viewpoint. If it is to be an agreement that should be stated in unequivocal terms. Further if it is to act as a limiting factor on the actions of the GOC that also should be stated. It may well be that there was a reluctance to clearly spell out the intended structure and how it was to work in relation to corporatised entities as to do so may well have clearly stated that with corporatisation there is a lot of change, but nothing really changes - all things stay the same from a control perspective. That level of control is the clearest when you look at the position in relation to the senior management of the GOC. They are appointed by the government and the board of the GOC has no power over them thus highlighting the fundamental weakness of the corporate governance structure. The GOCs are little more than another manifestation of the State. They are very much agents and are not independent entities with appropriate control over their own destiny.