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Government Business Enterprises and Public Accountability through Parliament



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Government Business Enterprises and Public Accountability through Parliament

The Vision in Hindsight: Parliament and the Constitution: Paper No. 3

Vision in Hindsight

Vision in Hindsight is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

The Vision in Hindsight: Parliament and the Constitution will be a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. In the first stage, essays are being commissioned and will be published, as IRS Research Papers, of which this paper is the third.

Stage two will involve the selection of eight to ten of the papers for inclusion in the final volume, to be launched in conjunction with a seminar, in November 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assists DPL with the management of the project.



Centenary of Federation 1901-2001

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Major Issues

Authors note: This paper was finalised in November 1999.

This paper reviews the accountability environment of Commonwealth government business enterprises (GBEs) and assesses the role of Parliament in that environment. GBEs face two sets of demands which can have conflicting effects. These demands can be described as commercialisation and parliamentary accountability. Commercialisation has been a prominent part of government policy in recent years. It requires government business enterprises to be able to perform effectively in the private sector. On the other hand parliamentary accountability demands that these entities should respond to requirements of open government. Despite their significant historical and contemporary role in the system of public government, a continuing question has been how GBEs can best be located within a framework of Parliamentary accountability. The conclusion drawn in this paper is that despite the considerable attention which has been given to the question of GBE accountability, the role of Parliamentary accountability still requires greater attention.

To a considerable extent the accountability problem for GBEs stems from the fact that they are hybrid organisations; they have features of both private and public sector organisations. Like private companies, they engage in profit-seeking commercial activity, often in competition with private sector businesses. Like public sector agencies, they are required to execute government policies, often in the form of delivering non-commercial services (or 'community service obligations'). For the purposes of this discussion, a GBE is said to have three characteristics:

- its principal function is to engage in commercial activities in the private sector
- it is controlled by government, and
- it has an independent legal existence from government and the executive.

The accountability problems which are posed by GBEs arise from the tension between the first two characteristics: GBEs are public bodies which engage in private sector activity.

The difficulties in devising and applying appropriate accountability mechanisms arise from the tension between the last two characteristics: how does government effectively control an entity which is legally independent of it and, consequentially, how does parliament retain control over these entities? In particular, the legal independence of GBEs has two consequences. On the one hand it offers the advantage that a GBE can operate with some degree of organisational, operational and budgetary independence from government. On the other hand it creates a barrier to the usual mechanisms of Parliamentary accountability and control, necessitating the creation of special accountability mechanisms. This applies whether the GBE is a statutory corporation or company incorporated under the Corporations Law.

The concept of accountability itself gives rise to a number of questions which must be answered in the particular context of GBEs. For example, what conduct satisfies the criterion of accountability? To whom should accountability be provided? When should accountability be provided?

Regarding the first question, different criteria which can be used in assessing whether a GBE is being 'accountable'. A GBE might be said to be accountable if it provides accurate information about its financial (and possibly its performance) activities when it is required to do so. Here the demands of accountability and commercialisation are likely to conflict because a GBE may want to keep commercially sensitive information confidential rather than disclosing it in a public Parliamentary forum. This problem is exacerbated if, on a stronger view of accountability, a GBE is required to explain or justify its actions to Parliament.

Secondly, further accountability problems arise when one considers the varying requirements of different accountability audiences. This is apparent in the case of GBEs which are incorporated as Corporations Law companies. This was illustrated at the first general meeting of Telstra Ltd in 1998 after its one-third privatisation, where many questions were directed at the perceived conflict between the board's responsibilities to the minority private shareholders and to the Government as majority shareholder. In instances where the shareholders of the GBE are Government Ministers and a director of the GBE is a departmental officer, it might be said that the accountability of the director to the shareholder is similar to that of an officer to the Minister, and that no separate accountability obligations should therefore apply. But although the people involved are the same, the fact remains that they occupy dual roles with each role attracting different accountability issues.

Thirdly, there is an issue as to when the accountability requirements should apply. Should they apply before significant policy or resource decisions are made, during the time policies are being implemented and resources are being used, or after these events? Different accountability timeframes will apply depending upon who the accountability audience is, and on the method by which that accountability is conveyed. For example, accountability of GBEs to the public will be after the event, while accountability to the

portfolio Minister will require disclosures of policies before they are implemented by the GBE.

Making these accountability choices with regard to GBEs creates a dilemma. The dictates of commercialisation, particularly where the entity is required to compete in a private sector market, will demand that certain issues be kept confidential, and that the entity should be allowed greater freedom than other governmental entities from parliamentary accountability mechanisms.

The existing accountability framework for GBEs is constructed from a number of different but interlocking mechanisms. This multiple approach has the advantage of covering different aspects of GBE operations but it also has the disadvantage of possible inconsistency and lack of cohesion. Not all of these accountability mechanisms involve the Parliament directly. Indeed, it is more accurate to say that Parliamentary control over GBEs is most often indirect and after the event.

One of the principal methods for ensuring the accountability of GBEs has been to locate them within the general structure of ministerial responsibility to Parliament. In simple terms, this means that staff in a GBE are accountable to management who are in turn accountable to the board of directors. The directors are accountable to the relevant portfolio minister who, in turn, is accountable to Parliament for the performance of GBEs in that portfolio. Problems can arise at different points along this accountability chain. For example, in a Corporations Law GBE, if a director is appointed from the Minister's department, conflicts may arise between the director's autonomous duty to the company and his or her obligations to the department. This may impede the extent to which that director reports to the Minister.

Another set of accountability mechanisms is supplied by statute. One such source is the *Commonwealth Authorities and Companies Act 1997* (Cwlth). Added to this, a company GBE will be subject to requirements in the Corporations Law. In some cases a company GBE will be also subject to further specific statutory requirements, as with Telstra Corporation Ltd and the *Telstra Corporation Act 1991* (Cwlth). A statutory corporation GBE will have accountability requirements imposed by its incorporating statute.

Strong arguments can be made for the view that by itself the accountability environment which is created by the Corporations Law is insufficient for the public governance environment in which GBEs operate. For example, while the immediate shareholders in a GBE may be Ministers, in a wider sense the ultimate 'owners' of the enterprise are the members of the taxpaying public, and their ownership is not voluntary and it is not transferable. Moreover, while GBEs may be subject to competitive market pressures for goods or services, an underperforming GBE is not subject to the threat which is, in theory, posed by a potential takeover of the organisation, as occurs in the private sector.

The Auditor-General also has a role in GBE accountability, serving as an important public symbol for the public nature of GBE activity. There are, however, limitations on this role.

Under the *Auditor-General Act 1997* (Cwlth) the Auditor-General may only conduct a performance audit of a wholly-owned Commonwealth company that is a GBE if requested to do so by the Finance Minister, the responsible Minister or the Joint Committee of Public Accounts and Audit (ss. 16–17). The argument used to support this limitation is that the pressures of market competition and the enforcement of performance targets are an effective substitute for scrutiny by the Auditor-General.

In general, the key GBE accountability mechanisms which are identified in the paper tend to rely on executive monitoring and to under-emphasise the role of Parliamentary control and accountability. This is consistent with the three-pronged requirements of commercialisation, corporatisation and privatisation. Whether it is consistent with the requirements of public and parliamentary accountability is debatable.

The history of government in Australia suggests that it is unlikely that GBEs will disappear from our public landscape. What is needed, therefore, is continuing attention to the accountability framework within which these entities operate. An important step in that process is to systematise the gathering and publication of information about GBEs and wider government commercial operations.

Introduction

At the end of the twentieth century commercialisation (allowing or requiring government agencies to charge for the goods and services they produce) and corporatisation (the adoption of private sector management models and legal structures) have become firmly established policies at the Commonwealth and State level of government.¹ Government business enterprises (GBEs) are one of the clearest illustrations of these two trends in modern public governance. This paper examines the place of Commonwealth GBEs within the wider framework of parliamentary and public accountability. The need for such an inquiry is underlined by the scale of GBE activity and its contribution to economic and social well-being.

Ironically, despite the prominence of GBEs, it is difficult to obtain a clear picture of the overall significance of GBE activity. This is partly because there is no universally accepted way of defining the term 'GBE', and partly because comprehensive and up-to-date figures are difficult to obtain. Nevertheless, it is possible to give some idea of the dimensions of the GBE sector. According to the Australian National Audit Office (ANAO), in 1995–96 Commonwealth GBEs generated nearly \$21 billion in revenue, provided dividends of \$1.6 billion, controlled assets of approximately \$41 billion and produced an average return on assets of 12.8 per cent.² The same ANAO Report noted that 'a number of GBEs play a central role in the economy and dominate certain strategic industries, including postal services and telecommunications'.³ Australia Post, for example, had a gross revenue of \$2.9 billion, making it one of Australia's top 40 corporations in 1995–96.

Clearly, GBEs are a prominent aspect of the modern system of extended government. Indeed, Professor Paul Finn (now a Judge of the Federal Court) has dubbed this area of activity the 'fourth arm of government'.⁴ It is useful to remember, however, that while the scale and range of modern GBE activity is significant, government reliance on GBEs is not just a recent phenomenon. Professor Roger Wettenhall, a leading observer, notes that '[t]he Australian States and New Zealand were pioneers in the English-speaking world in the use of State enterprise for developmental purposes and, during the 19th and earlier 20th centuries, they built up large networks of public enterprises'.⁵ Wettenhall goes on to mention the importance of railways in these early developments. This was also noted by the High Court in *Deputy Commissioner of Taxation v State Bank of New South Wales*:

The activities of government are carried on not only through the departments of government but also through corporations which are agencies or instrumentalities of

government. Such activities have, since the nineteenth century, included the supply on commercial terms of certain types of goods and services by government owned and controlled instrumentalities with independent corporate personalities. Railways are a notable example. As early as 1906, in *The Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employees Association* ... (1906) 4 CLR 488, this Court recognised that the railway undertakings of the colonial governments carried on by incorporated Railway Commissioners were instrumentalities of those governments, *ibid.*, per Griffith CJ at p. 535. Likewise, banking activities were conducted by corporations under legislation enacted by the colonial legislatures before federation ...⁶

Professor Ross Cranston has characterised the growth of public enterprise in Australia in the 19th century as being the product of economic necessity: '[t]he distances to be covered, and the absence of large local capitalists, placed the onus on government to develop railways and communications'. In contrast, during the early 20th century, 'Labor politicians saw government enterprise and nationalization as the means of combating monopoly and achieving social justice'.⁷

Cranston gives two examples which illustrate the point. Amalgamated Wireless (Australia) Ltd was a company with a share capital of one million pounds, a bare majority of which was held by the Australian Government, the rest being held by private shareholders. In the 1920s and early 1930s this company had a monopoly over radio and telegraphic services between Australia and other countries in the British Empire as a result of agreements negotiated by the Australian Government. In the 1950s the Commonwealth shareholding was sold by the Menzies Government. The second example concerns the Commonwealth Oil Refineries company, in which the Commonwealth held a bare majority of the issued shares. According to Cranston, this company was formed originally to conduct an oil refinery in order to free Australia from the 'stranglehold of foreign corporations'. In 1924 its activities were expanded to include domestic distribution of its petroleum products. As Prime Minister Bruce put it in Parliament, 'I should indeed be surprised to find the House not agreeing that the company should be so self-contained as to be in a position to do its own distributing in competition with other suppliers of the refined products of oil to the people of Australia'.⁸

Whatever the benefits of GBE activity may be in terms of returns to government or efficiency of service delivery, the continuing question has been how to locate GBEs within a framework of public or Parliamentary accountability. The argument which was put by the Royal Commission into government commercial activity in Western Australia is just as appropriate at the Commonwealth level:

The public is entitled to insist that government be conducted openly and that it be, and be seen to be, accountable for its actions. Nowhere is the need for this more apparent than when it undertakes initiatives which put public funds and resources at risk.⁹

The conclusion that is drawn in this paper is that despite the considerable attention which has been given to the question of GBE accountability, the role of Parliamentary accountability still requires greater attention.

Why are Government Business Enterprises Created?

There is no single rationale that explains the creation of all GBEs. As a general proposition, however, it is safe to say that a GBE will be created when Government wishes to conduct some form of commercial enterprise at arm's length from the usual departmental structures and processes.

What this means is that the question 'why are GBEs created?' breaks down into two more particular questions: 'why does Government want to engage in that particular commercial activity?' and 'why must it be conducted in the form of a GBE?' A detailed answer to the first question lies beyond the scope of this paper but reference can be made to historical and contemporary demands. The National Commission of Audit noted in its 1996 Report that:

Governments became involved in [commercial] areas for several reasons: the private sector was seen as incapable of delivering the required products or services; the community considered it appropriate that government should own a firm that operated as a natural monopoly; or the government wanted to fulfil a community service obligation (CSO).¹⁰

Referring to contemporary developments, the Joint Committee of Public Accounts (JCPA) noted in 1995 that:

The recent extension of commercialisation has occurred in the context of broader changes in public sector management which are designed to increase the efficiency and effectiveness with which resources are used. ... The proponents of commercialisation claim that it provides greater incentives to manage costs and improve the quality of the goods and services provided.¹¹

The second question is addressed in detail under the next heading of this paper.

What are Government Business Enterprises?

As noted already, the term 'government business enterprise' (or GBE) is used widely, but there is no single, generally accepted definition that attaches to the term. Yet if we are to make any headway in discussing the accountability environment of GBEs it is important to understand what is being referred to. This is because GBEs are hybrids. They have features of both private and public sector organisations. Like private companies, they

engage in commercial activity with the goal of profit-making, often in competition with other private sector companies. Like public sector agencies, they are required to execute government policies, often in the form of delivering non-commercial services (or 'community service obligations'). In theory, then, there are choices to be made about adopting primarily public or private styles of accountability regulation for these entities. Attention to the definitional question can help to clarify this choice of regulatory regime.

In some instances the problem of definition has simply been side-stepped. For example, the accountability mechanisms which are found in the *Commonwealth Authorities and Companies Act 1997* (Cwlth) (the CAC Act) apply only to those specific GBEs which are prescribed by regulation for the purposes of the Act. The regulations to the Act list 13 organisations which have been classified as GBEs for this purpose, although some of these have since been either fully privatised or wound up.¹² The remaining GBEs in the list include: the Australian National Railways Commission; Australian Postal Corporation; Defence Housing Authority; Employment National Limited; Export Finance and Insurance Corporation; Snowy Mountains Hydro-electric Authority; and Telstra Corporation Limited. This definition by prescription approach avoids the problem of identifying clear criteria, although it does give some indication of the type of organisation with which this paper is concerned.

We need, however, to go further than listing examples. We need to understand why a particular organisation might be included in, or omitted from, such a list. A review of the recent literature suggests that the following three characteristics are considered to be essential in classifying an organisation as a GBE:¹³

- its principal function is to engage in commercial activities in the private sector
- it is controlled by government, and
- it has an independent legal existence from government and the executive.

The accountability problems which are posed by GBEs arise from the tension between the first two characteristics: GBEs are public bodies which engage in private sector activity. The difficulties in devising and applying appropriate accountability mechanisms arise from the tension between the last two characteristics: how does government effectively control an entity which is legally independent of it and, consequentially, how does parliament retain control over these entities? Common to these problems is the fundamental assumption that GBEs are the responsibility of government and, therefore, parliament, and that they should be subject to some form of public accountability.

To identify the accountability and control problems more clearly it is useful to look at these three characteristics in a little more detail.

Commercial Activities

With regard to the first, the term 'commercial activities' refers to 'the sale of goods or services for financial return in an open market, that is, in a market where the consumers of the goods or services are not limited to government-funded bodies'.¹⁴ It should be noted that not all GBEs engage in commercial activities in the same way. Some are monopoly suppliers of goods or services (such as Australia Post), while others (such as Telstra Ltd) operate in competitive markets with private sector companies.¹⁵ Commercial activity need not be the only activity of a GBE but it will be its principal activity. This therefore excludes from our definition agencies which are primarily regulatory authorities, such as the Civil Aviation Safety Authority. It also allows that GBEs will often be required to discharge community service obligations (that is, provide goods or services at subsidised or less than market prices and which might therefore not be provided if the GBE operated on a purely commercial basis). For example, Australia Post is required by s. 27 of the *Australian Postal Corporation Act 1989* to provide a standard letter service at a single uniform rate of postage within Australia. Similarly Telstra Ltd is required to deliver a number of 'universal service obligations' which are specified in the *Telecommunications Act 1997* (Cwlth). The JCPA has reported on the tensions which exist between the commercial orientation of GBEs and the requirements of providing uneconomic public services.¹⁶

Government Control

There are also variations on the second factor—Government control. The question of control lies at the heart of accountability. What do we mean when we talk about Parliamentary control of GBEs? 'Control' is a nebulous term—it can be exercised generally or in relation to specific issues; it can be exercised permanently or intermittently; it can come from inside the GBE or be imposed from outside. It can be actual or potential (sometimes control is exercised by the threat or potential of actual control). And it can be a combination of these factors.

Two methods of control that have been used in relation to GBEs are the appointment of government officers to the board of management (as occurred, for example, in the Australian Technology Group Pty Ltd) or direct ownership. Some GBEs are controlled by virtue of being wholly owned by the Commonwealth. Other GBEs are partly owned by private sector interests, often as a step towards the full privatisation of the entity (again, at the time of writing Telstra Ltd is an obvious example). In partly-owned GBEs there is a question about the level of ownership which is necessary to give the Commonwealth control over the entity. That is, what level of Commonwealth ownership is necessary for an entity to be classified as a *government* business enterprise? There are no precise answers to this question. As we move along the scale from 100 per cent ownership through 50 per cent to minority government ownership we encounter entities which are more properly regarded as private, although the point at which this happens will vary

depending on the company. One attempt at a categorical answer was recommended by the Administrative Review Council, relying on a test which is similar to that found in the Corporations Law (s. 46) for defining the relationship of holding company to subsidiary company. That is, the Commonwealth is said to control a Corporations Law GBE if the Commonwealth:

- controls the composition of the GBEs board of directors
- can cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the company, or
- holds more than one-half of the issued shares in the GBE.

However there are other standards of control that might be used. For example, we could borrow the control threshold which is used in regulating company takeovers, and say that anything over a 20 per cent ownership of voting shares constitutes effective control.¹⁷

Independent Legal Existence

In common practice, a GBE will be created in one of two ways. A GBE can be established as a statutory corporation by a specific Act of Parliament. These are commonly known as statutory corporations. The CAC Act includes these entities under the umbrella term 'Commonwealth authority' (s. 7). Examples include the Australian Postal Corporation and the Defence Housing Authority. The alternative is for a GBE to be registered as a company under the Corporations Law, in practice as a public company. Of the thirteen GBEs currently prescribed under the CAC Act, seven are Corporations Law companies and the remainder are (or were) statutory corporations.¹⁸

There are important differences between statutory corporations and government companies (some of which are discussed below) but they also have some common characteristics which raise important implications for the Parliamentary control of GBEs. Most significantly, both statutory corporations and Corporations Law companies fall into the legal category of 'body corporate'. This means that they are separate legal entities which are legally independent of parliament and of the executive. Either type of corporation may therefore acquire, hold and dispose of property in its own right. It can enter into, and enforce, legal obligations on its own, and it can be sued in its own right.

It is important to stress that the formal independence of a GBE will not be negated by the level of control which government exercises over the GBE. This is nicely illustrated in the case of *The Commonwealth v Bogle*.¹⁹ The Commonwealth Hostels Ltd was a company over which the Department of Labour and National Service exercised complete management and control. The company had been formed to carry out aspects of the Department's activities. There were no membership interests other than the

Commonwealth. The Minister controlled the appointment and removal of the company's directors. The board could not act without the Minister's approval in matters of policy and in many matters of daily business. The winding up of the company was controlled by the Minister and any surplus capital on winding up was to be paid to the Minister. Nevertheless a majority of the High Court held that the company was not to be treated as the Crown for the purposes of immunity from State legislation. Fullagar J noted that 'the company was formed at the instance of the Commonwealth, that the Commonwealth through the Minister is in a position under the articles to control the company, and that the ultimate financial interest is that of the Commonwealth'. Nevertheless he held that 'none of these things can affect the legal character of the company as a person suing in the courts'.²⁰ Nor did the fact that 'the company is in possession and control of property of the Commonwealth, and that its activities are activities in which the Commonwealth ... is vitally interested'.²¹ As Taylor J concluded, '[t]he plain fact is that it is a body with an independent existence ...'.²²

This legal independence has a double edge. On the one hand it offers the advantage that the GBE can operate with some degree of organisational, operational and budgetary independence from Government. On the other hand it creates a barrier to the usual mechanisms of Parliamentary accountability and control, necessitating the creation of special accountability mechanisms which are examined later in this paper.

In theory there are a number of factors which might influence the choice between statutory corporation and government company. If it is intended that the GBE should operate in a competitive private sector market, then incorporation under the Corporations Law gives the entity the same legal basis for operation as its competitors. Registration as a company will also be seen as useful if the enterprise is intended to combine government and private sector interests, especially if there are longer term plans for full privatisation. Organisational flexibility is another perceived advantage of the company form—it is comparatively easier to amend a company's constitution than it is to amend the incorporating statute of a statutory corporation. Speed of incorporation is another factor—despite the sometimes cursory nature of the legislative process,²³ it can take some time to get a Bill onto the legislative agenda and to see it pass through both Houses.

This takes us to one of the most important implications of the choice between statutory corporations and generally incorporated companies. There is a significant difference in the degree of Parliamentary scrutiny that is possible when the entities are created. Statutory corporations are created on the floor of Parliament and are therefore subject to the usual processes of parliamentary debate and inquiry. In this way Parliament is immediately made aware of the creation of a new GBE and, in theory, it has the opportunity to scrutinise the management and accountability structures of the new entity. Furthermore any later amendments to those structures will require statutory amendment, giving an occasion for further Parliamentary scrutiny.

Government companies, on the other hand, are created as a result of executive action which will not always come to the attention of Parliament before the event. A government

company can be created in a number of ways. First, the Government, via one of its agencies, might purchase a controlling shareholding in an existing private sector company, as happened in 1946–47 with the acquisition by the Commonwealth of full ownership of Qantas Airways Ltd. The capacity of a statutory authority to purchase shares in a private company was upheld by the High Court of Australia in *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission*.²⁴ Second, a new government company can be formed by registration under the Corporations Law. This can be done by a department or by another government company or a statutory corporation. In the latter two cases, the CAC Act requires that the relevant portfolio Minister must be notified of the incorporation. Third, a statutory corporation may be converted, via an Act of Parliament, into Corporations Law company (e.g. the *Snowy Mountains Engineering Corporation (Conversion to Public Company) Act 1989* (Cwlth)). This will often be a prelude to the full privatisation of the enterprise. For example, the *Commonwealth Banks Restructuring Act 1990* (Cwlth) converted the Commonwealth Bank from a statutory corporation to a public company limited by shares registered under the general companies legislation. That company was then fully privatised by way of a public share float.

There is no central register of GBEs (or, indeed, of any Commonwealth Government corporate entities). In 1989 the Senate Standing Committee on Finance and Public Administration (SSCFPA) noted that 'the absence of any comprehensive and readily accessible index of Commonwealth bodies is a potentially serious flaw in the accountability system'.²⁵ The recommendation of that Committee that such a register be established has not been acted upon.

Factors Behind the Creation of GBEs

The decision to create a GBE in either of these two forms will be outcome of many factors. Today, that decision also has to be understood within the context of policies which promote the commercialisation, corporatisation and, in some instances, privatisation of government services. In their study of the Canadian experience, Trebilcock and Pritchard point out that policy makers face a three-step choice:

- (1) should goods or services be produced publicly or should the government rely on regulation or subsidization of, or contractual arrangements with, private sector firms;
- (2) if goods or services are to be publicly produced, should production be undertaken through the departmental or corporate form;
- (3) if goods or services are to be produced through the corporate form, what should be the extent of the government's ownership interest, the method of creation, the management and accountability regimes, etc?²⁶

The first question in this list raises issues such as the availability of private sector firms to deliver the service or product, the costs to government of regulating or subsidising those firms and the ideological importance of public ownership of those goods or services. Under the second question, policy-makers must decide whether the goods or services need

to be delivered in competition with, and on a similar basis as, private sector companies or whether it is preferable to commercialise aspects of existing departmental service delivery. The third question points to the issue which lies at the heart of this paper—what accountability regime should apply to GBEs?²⁷

Commercialisation v Accountability

There is a vast literature on accountability and it seems that each new attempt to synthesise previous explanations of the term just adds further options to the list. This paper is not an essay about accountability in general but it is nevertheless useful to consider some of the dimensions of the accountability problem as it affects GBEs. We can explore the complexities of the problem by asking a series of questions: what conduct satisfies the criterion of accountability? who should be accountable? to whom should accountability be provided? and when should accountability be provided?

As to the first question, there are different ways of assessing whether a particular GBE is being accountable. A GBE may be said to be accountable if it provides accurate information about its financial (and possibly its performance) activities when it is required to do so. This can be described as accountability in the sense of 'accounting for' or 'accountability as verification'.²⁸ This is one area in which the demands of accountability and commercialisation are likely to conflict because of a GBE's wish to keep certain commercially sensitive information confidential—this is explored in more detail later in this section of the paper. A stronger view of accountability would require that in addition the GBE should be able to explain or justify its actions ('explanatory accountability' or 'accounting to'). An even stronger approach to accountability would require that the GBE should also be held responsible for its activities, in the sense of 'being held to account'.

Secondly, there are choices to be made about who should be accountable. In most GBEs the accountability requirements are imposed on the individuals who comprise the board of management. This accords with standard private sector corporate models. But there are other possibilities which can be considered in the case of large corporate GBEs such as Telstra Ltd. Professor Mark Bovens has provided a useful typology of four types of accountability which, in theory, may apply in a large organisation.²⁹ He differentiates between individual accountability, whereby individuals in the organisation are accountable to the extent that their actions contributed to the organisation's conduct; corporate accountability, in which the organisation is accountable as if it were an autonomous actor; hierarchical accountability, which makes the people at the top of the organisation's management hierarchy accountable for the conduct of the organisation; and collective accountability, where everyone in the organisation is personally accountable in equal measure for the conduct of the organisation.

To whom should accountability be provided? In the case of GBEs, the accountability audience potentially includes the members of, or shareholders in, the corporate entity, the

portfolio Minister and other relevant Ministers (such as the Finance Minister), accountability agencies such as the Auditor-General and the Australian Securities and Investments Commission, Parliament, customers and clients of the GBE, and the general public. In some cases these categories may overlap (for example, where the Minister is a shareholder) or one may be seen to satisfy another (for example, accounting to Parliament may be seen as accounting to the public). The latter point gives rise to a danger that the requirements of one accountability audience may override others. This is apparent in the case of GBEs which are incorporated as Corporations Law companies. In instances where the shareholders of the GBE are the relevant Government Ministers and the directors of the GBE include a departmental officer, it might be said that the accountability of a director to the shareholder tracks that of an officer to the Minister, and that no separate accountability obligations should therefore apply. But although the people involved are the same, the fact remains that they occupy dual roles (e.g. Minister/shareholder) and different accountability issues attach to each role. For example, a shareholder or member of a company has only a limited legal capacity to ask questions and to seek and be given information about the entity's operations.³⁰ In contrast, a Minister can (and must) be much more proactive in seeking information about Departmental operations. The difference between the two accountability relationships was illustrated at the first general meeting of Telstra Ltd in 1998 after its one-third privatisation. One newspaper report noted that during the five hour meeting many questions were directed at the perceived conflict between the board's responsibilities to the minority private shareholders and to the Government as majority shareholder.³¹

The fourth question asks when the accountability requirements should apply. Professor John Goldring and Ian Thynne have identified three possibilities: *ex ante* accountability, which is required before significant policy or resource decisions are made; *process* accountability, which occurs while policies are being implemented and resources are being used; and *ex post* accountability, which operates after the event.³² As they point out, different accountability timeframes will apply depending upon who the accountability audience is and on the method by which that accountability is conveyed. For example, accountability of GBEs to the public is likely to be *ex post*, while accountability to the portfolio Minister will also be *ex ante*.

Making these accountability choices with regard to GBEs produces a dilemma. The dictates of commercialisation, particularly where the entity is required to compete in a private sector market, will demand that certain issues be kept confidential and that the entity should be allowed greater freedom than other governmental entities from governmental or parliamentary restraints. In its 1995 inquiry into commercialisation in the Commonwealth Public Sector, the Joint Committee of Public Accounts³³ noted that the public sector accountability mechanisms were 'certainly more onerous than those applying to the private sector' and that it had received submissions from GBE officers arguing that 'the accountability arrangements applying to government businesses should not be more onerous than those applying to publicly listed companies'.³⁴ As one submission put it:

The purpose of separate incorporation is defeated if those entities are required to comply with specific directions as to their activities to an extent, or on a basis, that would not be acceptable to private sector enterprises.³⁵

Resolving the issue of commercial confidentiality is central to establishing an appropriate accountability regime for GBEs. In part, this issue arises because of the different accountability audiences in private versus public sector entities. In the case of a private sector company the primary accountability audience is the general body of company members, supplemented by reporting requirements to the Australian Securities and Investments Commission. In the case of a public sector entity, the primary audience lies outside the entity, in the form of Parliament or, through Parliament, the general public. In a private sector company, information about company affairs may need to be retained within the company in order to protect the financial interests of the members. In a public sector entity the presumption works the other way; information should be disclosed in order to protect the interests of the public. However, in a public sector commercial entity such as a GBE the question is whether commercially sensitive information should be disclosed in the same way. GBEs commonly argue that they should be treated similarly to their private sector counterparts in this regard. For example, John Uhr describes the attempts by the then partially privatised Commonwealth Bank Ltd to resist a public hearing by the Senate Standing Committee on Finance and Public Administration on matters relating to the Bank's internal management. According to Uhr, the Bank's executives argued that their primary duty was to account to the shareholders, not to government or Parliament.³⁶ There is an obvious risk that 'commercial sensitivity' can be too easily invoked as a barrier to legitimate public scrutiny. The Australasian Council of Auditors-General has noted that '[s]ome private and public sector bodies are instinctively apprehensive and protective about the disclosure of any commercial information'. But the Council goes on to state that:

Quite plainly, the duty of Parliament to oversight the Government raises the prospect that Government activity will be disclosed as being inefficient, uneconomical, ineffective or improper. But that prospect should not be the rationale for a Government refusing Parliament access to information without which it cannot undertake its duty to hold the Government to account.³⁷

The same issue has been considered by the Senate Committee of Privileges. In 1995 the Committee noted that:

It has not yet been generally accepted that the commercial confidentiality which normally applies in the private sector should not also apply in the public sector.

The Committee concluded, nevertheless, that Commonwealth authorities

Must be prepared to account to Estimates Committees for all aspects of their financial management and administration, even where the information sought may be regarded as private or commercially confidential.³⁸

In the event of a conflict, the Committee recommended that an independent arbitrator be used to evaluate the claim of confidentiality.

Thus far this paper has canvassed the background of ideas and practices against which the issue of GBE accountability must be placed. The remainder of the paper examines the actual practices that are now in place and assesses their impact on Parliament's capacity to control and monitor GBE activity.

Recent History of GBE Accountability Reform

The recent history of GBE accountability reform can be sourced to the Royal Commission on Australian Government Administration which reported in 1976. But for present purposes the more immediate reforms began in October 1987 when the Minister for Finance (Senator Walsh) issued a policy statement titled *Policy Guidelines for Commonwealth Statutory Authorities and Government Business Enterprises*.³⁹ These guidelines were designed to reduce the control exercised over GBEs by the Government and to allow a more flexible, commercial style of management. The guidelines dealt with matters such as establishment of GBEs and covered their corporate plans, financial targets, capital structure and the costing of community service obligations. The 1987 Guidelines were replaced in 1993 by the Accountability and Ministerial Oversight Arrangements for GBEs, also issued by the Minister for Finance. These Arrangements required the preparation and annual review of corporate plans and the submission of annual reports by GBEs. In June 1994 the Minister for Finance introduced a package of three Bills into the House of Representatives aimed at reforming the Commonwealth's financial management. The three Bills were the Auditor-General Bill 1994, the Financial Management and Accountability Bill 1994 and the Commonwealth Authorities and Companies Bill 1994.⁴⁰ It is the latter Bill which is of greatest relevance here, since it contained reporting and corporate planning requirements which were very similar to those found in the Ministerial Arrangements. The package of Bills was the subject of close review, particularly by the JCPA.⁴¹ It was eventually passed, following amendment, in October 1997. In the meantime, following a review conducted by Richard Humphry, Managing Director of the Australian Stock Exchange, the Government issued revised GBE Governance Arrangements in June 1997,⁴² replacing the 1993 Arrangements. One of the main changes introduced by the new Arrangements was that the Commonwealth's ownership interest in a GBE was now to be represented by the Finance Minister and the relevant portfolio Minister, each to be 'Shareholder Ministers'.

The Present GBE Accountability Framework

The accountability framework for GBEs is built out of a number of different but interlocking mechanisms. This multiple approach has the advantage of covering different

aspects of GBE operations but it also has the disadvantage of possible inconsistency and lack of cohesion. Not all of these accountability mechanisms involve the Parliament directly. Indeed, it is more accurate to say that Parliamentary control is most often indirect and after the event. As Uhr explains:

Parliamentary control refers to a right to verify reported or disputed claims of performance: parliamentary accountability is not managerial accountability. Parliamentary control typically falls short of any pretence to 'micro-management ...'⁴³

With these caveats in mind, seven accountability mechanisms are described below.

Ministerial Responsibility

One of the principal methods for ensuring the accountability of GBEs has been to locate them within the general structure of ministerial responsibility to Parliament or, as Finn J put it in *Hughes Aircraft Systems International v Airservices Australia*, within 'the constitutional environment of responsible government'.⁴⁴ The JCPA has described this chain of accountability as follows: staff in a GBE are accountable to management who are in turn accountable to the board of directors. The directors, individually and collectively, are accountable to the relevant portfolio minister who, in turn, is accountable to Parliament for the performance of GBEs in that portfolio.⁴⁵

Despite its fundamental importance to a Westminster system of government, doubts have been expressed about the effectiveness of this accountability structure. Problems can arise at different points along the chain. For example, in a Corporations Law GBE, if a director is appointed from the Minister's department, conflicts of interest may arise between the director's autonomous duty to the company and his or her obligations to the department. This may impede the extent to which that director reports to the Minister.

Further along the chain, other difficulties may arise. The idea of Ministerial responsibility in this context depends upon the right of the Minister to obtain information from GBEs within the Minister's portfolio, and on the right of Parliament to be kept informed by that Minister about GBE activity.⁴⁶ However, commentators have questioned the practicality of this model. As one commentator has put it:

The problem lies partly in the unwillingness of governments to keep parliaments informed of company activities, though it also lies in the inability of parliaments to sustain the questioning of responsible ministers ...⁴⁷

The report of the Western Australia Royal Commission in its report into 'WA Inc' was more adamant, noting that:

The Commission rejects categorically the suggestion, behind which officials so often take refuge, that the 'Westminster' derived principle of individual ministerial responsibility is a sufficient and effective external accountability measure.⁴⁸

The capacity of a Minister to account to Parliament for GBEs within his or her portfolio is affected by the ambit of power which he or she has to give directions to those entities. There are limits to the extent to which a Minister can give directions to a GBE board. This was recognised recently in the previously mentioned case of *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, which concerned the actions of a statutory corporation (the Civil Aviation Authority). Finn J noted that:

Where a ministerial communication could, because of its tenor or context, reasonably be interpreted by those to whom it is made either as being akin to a direction (whether or not it formally disclaims such an intent) or as manifesting an intent to contrive a decision to be taken, it properly can be regarded as offending the purposes (constitutional and statutory) which inform the legislative creation of bodies whose decisions are intended by Parliament to be freed from ministerial control save where the minister, as contemplated by the statute in question, assumes responsibility for a particular decision in the manner envisaged by that statute.⁴⁹

Under the CAC Act, a portfolio Minister, and in some cases the Finance Minister, has power to issue guidelines and to require the production of information for the purposes of being kept informed about the entity's operations. More generally, the Act permits a Minister to notify the directors of a Commonwealth authority or company of the general policies of the Government that are to apply to the entity and the directors must ensure that, as far as practicable, the policies are carried out (ss. 28 and 43). These sections concede that the board of a CAC Act entity has day-to-day managerial autonomy, with the Minister relegated to a supervisory role.

Statutory Accountability and Control

Commonwealth GBEs are subject to at least two sources of statutory accountability. One source is the CAC Act, which is dealt with below. The second source will depend upon the type of corporation. A company GBE will be subject to requirements in the Corporations Law—these are discussed later. In some cases a company GBE will be also subject to further specific statutory requirements, as with Telstra Corporation Ltd and the *Telstra Corporation Act 1991* (Cwlth). A statutory corporation GBE will have accountability requirements imposed by its incorporating statute. These will vary depending upon the nature of the statutory corporation but the following examples are illustrative.

The *Export Finance and Insurance Corporation Act 1991* (Cwlth) requires Ministerial approval before that corporation enters into any partnership or joint venture agreement or participates in forming a new company (s. 13). Where it is in the public interest, the Act empowers the Minister to give directions to the corporation regarding the performance of

its functions or the exercise of its powers (s. 9). Furthermore the Minister can direct the corporation to enter into certain types of contract in the national interest (s. 29). The *Defence Housing Authority Act 1987* (Cwlth) similarly requires Ministerial approval prior to entering partnerships or joint venture or forming companies (ss. 8–10). There is also power to give directions to the Board where this is in the public interest (s. 31).

Alongside the accountability mechanisms which are found in specific incorporating statutes or in the Corporations Law, Parliament has recognised the need for a set of generic accountability measures for GBEs and other Commonwealth non-departmental entities. In 1997 the Commonwealth enacted a package of three Acts which seek to provide 'a legislative framework which emphasises performance, propriety and accountability of Commonwealth Agencies and entities' (Explanatory Memorandum, Auditor-General Act 1997). Those Acts are the *Auditor-General Act 1997*, the *Financial Management and Accountability Act 1997*, and the *Commonwealth Authorities and Companies Act 1997*.⁵⁰ Of these, the latter—the CAC Act—has the most immediate impact in establishing financial reporting and auditing requirements for Commonwealth GBEs.

The application of the CAC Act is not limited to GBEs. The Act applies more generally to Commonwealth authorities, the clearest example being a statutory corporation, and to Commonwealth companies, defined as a Corporations Law company in which the Commonwealth has a controlling interest (s. 5). The Act establishes reporting and accountability requirements for both types of entity. As was noted earlier, a GBE can operate in either form and so GBEs will be affected by all of these requirements. However there are some special requirements, noted below, that apply only to GBEs.

The main accountability mechanisms under the CAC Act are as follows:

Annual Reporting

This is an example of 'accountability as verification' which is provided ex post. Each entity which is governed by the Act must prepare an annual report each financial year which is given to the entity's responsible Minister (ss. 9 and 36). For a Commonwealth authority the contents of the report are prescribed by the Act (Schedule 1), which states that the Report must contain a report of operations prepared by the directors, the financial statements prepared by the directors and the Auditor-General's report on those financial statements (discussed below). For a Commonwealth company the annual report must include the documents which the company is required by the Corporations Law to put before its annual general meeting (s. 36).⁵¹ The annual reports of Commonwealth authorities and wholly-owned Commonwealth companies must be tabled in each House of Parliament by the responsible Minister as soon as practicable. This provides one of the main sources of public information about the entity and its performance and they have been described as 'the centrepiece of accountability for these bodies'.⁵² There are

confidentiality limits on this accountability, however. Under the Finance Minister's Orders issued under the Act, if the directors of a Commonwealth authority GBEs believe on reasonable grounds that the inclusion of commercially sensitive information would be likely to result in unreasonable commercial prejudice to the GBE then that information does not have to be included in the annual report.

Interim Reporting

An entity may be required by the Finance Minister to prepare interim reports (either half-yearly or quarterly). An interim report must meet the same contents requirements that apply to the annual report of a Commonwealth authority GBE (outlined above). As with the annual report, an interim report is given to the responsible Minister and then tabled in each House of Parliament (ss. 13 and 38).

Continuous Reporting

This is an example of 'process accountability'. The responsible Minister for each Commonwealth authority and company must be kept informed of the operations of the entity. In addition the Finance Minister must be given any reports, documents or information about the entity's operations as are requested (ss. 16 and 41). A further reporting requirement is that any significant events such as the formation of a new company or the acquisition or disposal of a significant business must be reported to the responsible Minister (see ss. 15 and 40 for further detail). The Minister can issue guidelines to the directors concerning their obligation to report significant events, although this does not apply to the formation of new companies. In the case of a Commonwealth company in which the responsible Minister or the Finance Minister is a member, these reporting requirements give the Minister a noticeable advantage over non-Ministerial members who, under the Corporations Law s. 247A, have only restricted rights to company information.

Corporate Plan

This requirement applies only to entities which are prescribed as GBEs under the CAC Act and it is an instance of 'ex ante accountability'. Each GBE must prepare a corporate plan annually which is then given to the responsible Minister. Whilst the Act does not specify it, the plan is regarded as a confidential document. The plan covers a three year period and includes details about the entity's objectives, business strategies, investment and financing programs, financial targets and projections, non-financial performance measures and community service obligations (see ss. 17 and 42 for more detail). Unlike the annual reports, the rationale for the corporate plan is limited to creating an

accountability mechanism between the GBE and the relevant portfolio Minister. Indeed, according to the JCPA, the corporate plan is 'the main plank of accountability of a GBE board to the portfolio Minister'.⁵³ This limited accountability role is reinforced by the fact that there is no requirement for the plan to be tabled in Parliament. This is explained on the grounds that the plan will necessarily contain commercially sensitive and confidential information. However the JCPA went on to note that this results in a lack of transparency about the contents of corporate plans and an inability of Parliament to scrutinise this issue.⁵⁴

The scope and intention of the CAC Act is fixed primarily on financial reporting and officers' obligations. Whilst this is important, it is noticeably narrower than equivalent legislation which is found in some Australian States and Territories.⁵⁵ It is also narrower than the 1989 recommendation of the Senate Standing Committee on Finance and Public Administration for a comprehensive Government Owned Companies Act which would establish requirements for the formation, reporting, auditing and disposal of government companies.⁵⁶ This legislation could also specify arrangements for the holding of shares and the exercise of voting rights on behalf of the Commonwealth, and define the powers of Ministerial or departmental shareholders in relation to the board of directors.⁵⁷

Auditor-General

The *Auditor-General Act 1997* (Cwlth) states that the Auditor-General is an independent officer of the Parliament (s. 8). The role of the Auditor-General as a crucial accountability agent for Parliament has been reaffirmed in several recent reports. In 1996 the Joint Committee of Public Accounts stated that:

The Auditor-General's ultimate client is the Parliament. The primary purpose of public audit is to assist the Parliament to hold the Executive to account for its use of public monies.⁵⁸

Similarly, the Report of the Royal Commission into 'WA Inc' stated that the Auditor-General is the 'critical link' between the public sector, the Parliament and the community.⁵⁹ The role of the Auditor-General in reviewing GBEs therefore serves as a public symbol for the public nature of GBE activity. As the JCPA put it in another Report, 'the case for retaining the Auditor-General as the auditor of government businesses rests on their ownership by the taxpayer'.⁶⁰

The CAC Act prescribes that the Auditor-General is to be the auditor of each Commonwealth authority and of its subsidiaries (s. 8). Commonwealth companies, on the other hand, may appoint either the Auditor-General or another auditor to meet their audit requirements under the Corporations Law (s. 35). If another auditor is appointed then the Auditor-General must nevertheless give a report on the company's financial statements. In

this way Commonwealth companies may be subject, in effect, to double scrutiny in the audit process.

Under the Auditor-General Act, the Auditor-General, via the Australian National Audit Office, conducts two types of audit. First, financial statement audits involve a review of an entity's financial operations, as well as the extent of compliance with applicable laws and regulations. Under the Act, the Auditor-General's functions include financial audits of Commonwealth authorities and companies, including GBEs (ss. 12–13). In practice financial audits of GBEs are contracted out to private sector auditors.⁶¹

Second, performance audits involve a review of the economy, efficiency and effectiveness of the entity's operations and functions. However, under the Auditor-General Act the Auditor-General may only conduct a performance audit of a wholly-owned Commonwealth company that is a GBE if requested to do so by the Finance Minister, the responsible Minister or the Joint Committee of Public Accounts and Audit (ss 16–17). The Auditor-General may ask that such a request be made, although this has not yet occurred.⁶² In the event that a GBE is performance audited then the report of the audit must be tabled in each House of Parliament and a copy given to the responsible Minister.

The limitation on performance audits of GBEs has been the subject of disagreement between Parliament and Government. In 1989 the JCPA (as it was then called) recommended that the Australian National Audit Office (the ANAO) should have the power to undertake performance audits of GBEs.⁶³ This was not accepted by the Government, as evidenced by the limitations now found in the Auditor-General Act. The argument against a general discretion to undertake performance audits of GBEs is that the pressures of competition and the enforcement of performance targets will be an effective substitute for scrutiny by the Auditor-General.⁶⁴

Management and Shareholding Arrangements

Earlier it was noted that management control and/or shareholder control might also provide some measure of accountability. Management control over a GBE can be sought by appointing departmental officers to the managing body or board of the entity. Ostensibly their role is to represent the interests of the government on the board and to provide a direct contact point with the Minister. The extent to which this can be successful will depend, amongst other things, on the number of such appointments and on the commercial independence of the entity. There is also a legal question at stake: should board members act in this way? In the case of Corporations Law companies, there is the potential for significant legal problems for representative directors as they confront conflicts between their company law-based duties to the company and their public sector obligations to their Minister.⁶⁵ In short, there are significant uncertainties about the effectiveness of this accountability mechanism.

Another 'internal' accountability mechanism is the use of shareholdings. As was noted earlier, the 1997 Governance Arrangements for Commonwealth Government Business Enterprises stipulate that the portfolio Minister and the Finance Minister will be the two 'Shareholder Ministers' in a GBE. A variation on this pattern occurs when the shares are held by a statutory corporation or a government holding company.⁶⁶ The CAC Act assumes, without stating it, that the responsible portfolio Minister will be a member of the company. In each case, however, the effect is to emphasise accountability to shareholders rather than accountability to Parliament. As was noted earlier, even where the shareholders are Ministers of the Crown, these are qualitatively different types of accountability. This is what underlies Professor Mark Aronson's observation that the 'conversion of Ministers to shareholders has been accompanied by a great reduction in the amount of information relevant to government entities received by parliamentarians generally, with a consequent net reduction in ministerial responsibility'.⁶⁷

Another example of accountability by way of shareholding is the shareholders' agreement. This is a contractual agreement that 'regulates the relationship between the shareholders with regard to the management and control of the company'.⁶⁸ There is no clear evidence about the extent to which shareholders' agreements are used in GBEs, although in 1995 the JCPA noted that they were a part of the accountability arrangements of Australian Technology Group Ltd and their use was also acknowledged by the Secretary of Finance.⁶⁹ There are two difficulties with shareholders' agreements in this context. First, there is no clear legal precedent about their enforceability and therefore we cannot be certain about their effectiveness as an accountability mechanism. Secondly, and more importantly from a Parliamentary perspective, these agreements are not open to public scrutiny. There are no legislative requirements for tabling or reporting shareholders' agreements. They are essentially private, in-house agreements which, nevertheless, can have an impact on the public accountability of a GBE.

Corporate Law

This accountability framework is only relevant to GBEs which are incorporated companies. Such companies are governed by the Corporations Law and by a broad body of court-generated rules. If the GBE is a public company listed on the Australian Stock Exchange (as with Telstra Ltd), then additional obligations are imposed by the Exchange's Listing Rules and Business Rules.

The principal accountability mechanisms in the Corporations Law for public companies are the requirements for regular financial reporting, audits and annual general meetings. These requirements are reinforced by obligations imposed on company officers to act in best interests of the members and limited rights of action available to members.

Strong arguments can be made for the view that accountability via the Corporations Law and general corporate law principles is insufficient for publicly owned businesses.⁷⁰ One

such argument is that the Corporations Law creates an internal system of accountability in which directors are accountable to shareholders so that they can make informed decisions about where to invest. This does not fit with the environment of a public sector commercial entity, where there is no effective market for control, no choice of investment and no choice of membership. There are four key differences between the accountability environment which is created by the Corporations Law and that in which GBEs operate:⁷¹

- while the immediate shareholders in a GBE may be Ministers, in a wider sense the ultimate 'owners' of the enterprise are the members of the taxpaying public, and their ownership is not voluntary and it is not transferable
- while GBEs may be subject to competitive market pressures for goods or services, an underperforming GBE is not subject to the threat which is, in theory, posed by a potential takeover of the organisation, as is the case for private sector companies⁷²
- there is a public perception that the government will guarantee the business of a GBE.⁷³ The ANAO has noted that although some GBEs have explicit Commonwealth guarantees for some of their operations, 'GBEs are seen as being implicitly guaranteed by virtue of their ownership by the Commonwealth; which lessens debt holders scrutiny as the latter rely on the Commonwealth's credit rating'.⁷⁴ According to the Administrative Review Council (ARC), the implication that government will guarantee the debts of GBEs puts them 'in a substantially different position from that of any private sector enterprises with which they may compete',⁷⁵ and
- there is a remote possibility that a GBE may have immunity from other legislation.⁷⁶

More generally, the Commonwealth Auditor-General has recently identified the different concerns which underlie public and private sector services:

The provision of public services is not just about the lowest price or concepts of profit or shareholder value. It is about maximising overall 'value for money' for the taxpayer. This requires consideration of issues other than production costs, such as citizen satisfaction, the public interest, openness, fair play, honesty, justice, privacy and equity.⁷⁷

General Parliamentary Mechanisms

The preceding list of accountability mechanisms is more or less specific to the situation of GBEs. Importantly, there are other 'arenas of accountability'⁷⁸ which have a wider scope but which include the operations of GBEs. This includes the work of Parliamentary committees, particularly (as is apparent throughout this paper) the Senate Standing Committee on Finance and Public Administration and what is now the Joint Committee of Public Accounts and Audit (the JCPAA).⁷⁹ The JCPAA is a statutory committee of the Parliament, established by the *Public Accounts Committee Act 1951* (Cwlth). Its duties include examining the accounts of the receipts and expenditure of the Commonwealth and

reporting to both Houses of Parliament any items or matters in those accounts to which the Committee is of the opinion that the attention of Parliament should be directed. The Committee also determines and advises the Auditor-General of Parliament's audit priorities. The JCPAA has played a prominent role in raising and reviewing accountability issues in relation to GBEs, as indicated by the Reports referred to in the accompanying list of references. Recently the Committee has announced an inquiry into corporate governance and accountability arrangements for Commonwealth GBEs, identifying one area of inquiry as being whether additional parts of current GBE arrangements should be the subject of legislation. This paper concludes with a recommendation that this should be the case.

In addition to Parliamentary committees, we could add question time and Parliamentary debates, although commentators are sceptical about the extent to which these mechanisms provide true or effective accountability to the public.⁸⁰

Administrative Law

To complete this picture of the accountability environment for GBEs it is worth mentioning briefly the application of Commonwealth the 'package' of administrative law mechanisms found in the *Ombudsman Act 1976*, the *Freedom of Information Act 1982*, the *Privacy Act 1988* and the *Administrative Decisions (Judicial Review) Act 1977*. Strictly speaking this system of administrative accountability is not part of the scheme of Parliamentary accountability—indeed, these Acts were introduced partly in response to perceived inadequacies of Parliamentary accountability procedures.⁸¹

In its 1995 review of the application of these laws to GBEs, the ARC concluded that 'there is no general rule or principle that determines the extent to which a GBE is affected by the operation of the administrative law package, or any element of it'.⁸² The application of any of these Acts will depend upon whether the GBE is a statutory corporation or a Corporations Law company and on the type of entities to which the Act is expressed to apply. As the ARC noted, 'the result is that a GBE exempt under one Act may not be exempt under another'.⁸³ The ARC concluded, therefore, that the Commonwealth administrative statutes should be amended so that they apply to government-controlled bodies, including GBEs, but that GBEs should be exempted from these Acts in relation to commercial activities undertaken in competitive markets. In other words, the ARC accepted the idea that a competitive commercial market is capable of supplying similar outcomes to a system of public accountability. These recommendations have not yet been acted on.

Conclusion

One summation of the key GBE accountability mechanisms which have been described in this paper is that they reveal an emphasis on 'Executive-driven monitoring of the corporate planning and performance appraisal processes' and the weakening of Parliamentary control and accountability.⁸⁴ This is clearly consistent with the three-pronged requirements of commercialisation, corporatisation and privatisation. Whether it is consistent with the requirements of public and parliamentary accountability is debatable.

The history of government in Australia suggests that it is unlikely that GBEs will disappear from our public landscape. What is needed, therefore, is continuing attention to the accountability framework within which these entities operate. An important step in that process is to systematise the gathering and publication of information about GBEs and wider government commercial operations. In this writer's opinion, one set of reforms which merit renewed attention are those found in the decade old report of the SSCFPA. The current inquiry by the JCPAA presents an important opportunity for this reform.

Endnotes

1. These definitions are adapted from Joint Committee of Public Accounts (JCPA), *Public Business in the Public Interest: An Inquiry into Commercialisation in the Commonwealth Public Sector*, Report 336, AGPS, Canberra, 1995, pp. 1–2.
2. Australian National Audit Office (ANAO), 1997, *Government Business Enterprise Monitoring Practices—Selected Agencies*, Performance Audit no. 2, Canberra, p. ix.
3. *ibid.*, p. 4.
4. P. Finn, 'Public trust and public accountability', *Australian Quarterly*, vol. 65, 1993, p. 50 at 54.
5. R. Wettenhall, 'Corporations and corporatisation: An administrative history perspective', *Public Law Review*, vol. 6, p. 7 at 13. See also R. Spann, 1979, *Government Administration in Australia*, Allen and Unwin, Sydney, 1995, pp. 122–130.
6. (1992) 174 CLR 219 at 230–1.
7. R. Cranston, *Law, Government and Public Policy*, Oxford University Press, Melbourne, 1987a, p. 123.
8. R. Cranston, 'Privatisation: A critique', in *Privatisation: An Australian Experience*, ed., P. Abelson, Australian Professional Publications, Sydney, 1987b, pp. 276–7.
9. Royal Commission into Commercial Activities of Government and Other Matters, *Report*, Part II, Western Australia, 1992, para. 3.13.2.
10. National Commission of Audit, 1996, *Report to the Commonwealth Government*, para. 3.3.

11. JCPA, *supra* n 1, paras. 1.7 and 1.8.
12. A similar 'definition by prescription' approach is used in the *Proceeds of Crime Act 1987* (Cwlth) s. 4(1), although the similarly outdated list of GBEs prescribed for that Act differs from that in the CAC Act.
13. See for example Administrative Review Council (ARC), 1995, *Government Business Enterprises and Commonwealth Administrative Law*, Report no. 38, Canberra, p. 7; CAC Act Explanatory Memorandum; JCPA, *supra* n 1, p. 20.
14. Administrative Review Council, *ibid.*, p. 10.
15. JCPA, *supra* n 1, p. 20.
16. *ibid.*
17. See also Senate Standing Committee on Finance and Public Administration (SSCFPA), *Government Companies and their Reporting Requirements*, AGPS, Canberra, 1989, p. xii.
18. The six Corporations Law companies listed in reg. 4 are ADI Ltd, ANL Ltd, Australian Technology Group Ltd, Employment National Ltd, Health Services Australia Ltd, Medibank Ltd, and Telstra Corporation Ltd. The statutory corporations are Australian National Railways Commission, Australian Postal Corporation, Defence Housing Authority, Export Finance and Insurance Corporation, Federal Airports Corporation, and Snowy Mountains Hydro-electric Authority. Due to privatisations and other changes, this list is somewhat out of date. For example, Medibank Ltd is now Medibank Private Ltd, and Australian National Railways Commission has been replaced by the Australian Rail Track Corporation Ltd.
19. (1953) 89 CLR 229.
20. *ibid.*, p. 267.
21. *ibid.*, p. 268.
22. *ibid.*, p. 282.
23. J. Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament*, Cambridge University Press, Melbourne, 1998, pp. 125–7.
24. (1997) 139 CLR 117.
25. SSCFPA, *supra* n 17, p. 8.
26. M. Trebilcock, and J. Pritchard, 'Crown corporations: The calculus of instrument choice', in *Crown Corporations in Canada*, ed., J. Pritchard, Butterworths, Toronto, 1983, p. 16.
27. The question raises a further issue, not discussed in this paper, concerning the constitutional power of the Commonwealth to create and operate GBEs. This is a difficult and uncertain issue, and is discussed in N. Seddon, and S. Bottomley, 'Commonwealth Companies and the Constitution', *Federal Law Review*, vol. 26, 1998, pp. 271–307.
28. J. Uhr, 'Redesigning accountability: From muddles to maps', *Australian Quarterly*, vol. 65, 1993, p. 1.
29. M. Bovens, *The Quest for Responsibility—Accountability and Citizenship in Complex Organisations*, Cambridge University Press, Cambridge, 1998.

30. A member can only inspect the books of a company if this is authorised by a Court order, and the Court can only make such an order if it is satisfied that the member is acting in 'good faith' and that the inspection is for a 'proper purpose' (Corporations Law s. 247A). Otherwise, members access to information is limited to the company's annual financial statements and accompanying reports.
31. C. Mathieson, 'Telstra set to name CEO', *Weekend Australian*, 7–8 November 1998, p. 59.
32. J. Goldring and I. Thynne, *Accountability and Control—Government Officials and the Exercise of Power*, Law Book Company, Sydney, 1987, p. 226.
33. Since 1997 this committee has been known as the Joint Committee of Public Accounts and Audit.
34. JCPA, *supra* n 1, p. 155.
35. *ibid.*, p. 157.
36. Uhr, *supra* n 23, p. 201.
37. Australasian Council of Auditors-General, *Statement of Principles: Commercial Confidentiality and the Public Interest*, 1997, <http://www.acag.org.au/acomm00.htm>
38. Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994—Casselden Place Reference*, 52nd Report, 1995, p. 3.
39. Between 1985 and 1986, John Kerin, the Minister for Primary Industries, had undertaken a major reform of primary industry statutory marketing authorities. It appears that this may have been a catalyst for the wider reforms in the Walsh Guidelines—R. Bennett, 'Diary of a Dairy', unpublished paper, 1997.
40. A fourth Bill was associated with the package—the Audit (Transitional and Miscellaneous) Amendment Bill.
41. Joint Committee of Public Accounts, *An Advisory Report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994, and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of Parliament*, Report 331, AGPS, Canberra, 1994.
42. Department of Finance and Administration, *Governance Arrangements for Commonwealth Government Business Enterprises*, 1997.
43. Uhr, *supra* n 23, p. 200.
44. (1997) 146 ALR 1 at 88.
45. JCPA, *supra* n 1, p. 150.
46. A similar issue was the subject of the recent decision of the NSW Court of Appeal in *Egan v Chadwick* [1999] NSWCA 176, holding that the NSW Legislative Council's power to call for documents extends to compel the Executive to produce documents to the Council in respect of which a claim of legal professional privilege or public interest immunity is made.
47. I. Thynne, 'The incorporated company as an instrument of government: A quest for a comparative understanding', *Governance*, vol. 7, 1994, p. 59 at 77.

48. Royal Commission, *supra* n 9, para. 3.12.1.
49. (1997) 146 ALR 1 at 75.
50. Together with the *Audit (Transitional and Miscellaneous) Amendment Act 1997*.
51. Here it is worth noting that the Corporations Law does not require proprietary companies to hold an annual general meeting.
52. JCPA, *supra* n 1, p. 153.
53. *ibid.*, p. 152.
54. *ibid.*, pp. 160–1.
55. For example, the *Territory Owned Corporations Act 1990* (ACT); *State Owned Corporations Act 1989* (NSW), *Government Owned Corporations Act 1993* (Qld), *Government Business Enterprises Act 1995* (Tas), *State Owned Enterprises Act 1992* (Vic).
56. SSCFPA, *supra* n 17, pp. 18–19.
57. S. Bottomley, 'Corporatisation and accountability: The case of Commonwealth Government companies', *Australian Journal of Corporate Law*, vol. 7, 1997, pp. 156 at 173–6.
58. Joint Committee of Public Accounts, *Guarding the Independence of the Auditor-General*, Report 346, AGPS, Canberra, 1996, p. 37.
59. Royal Commission, *supra* n 9, para. 3.10.1.
60. JCPA, *supra* n 1, p. 175.
61. Barrett, P. 1999, 'Auditing in Contemporary Public Administration', paper presented to Public Seminar Series, Australian National University Graduate Program in Public Policy, Canberra, 17 May, p. 7.
62. *ibid.*, p. 18.
63. Joint Committee of Public Accounts (JCPA), *The Auditor-General: Ally of the People and Parliament—Reform of the Australian Audit Office*, Report 296, AGPS, Canberra, 1989. See also Joint Committee of Public Accounts, *An Advisory Report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994, and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of Parliament*, Report 331, AGPS, Canberra, 1994.
64. Joint Committee of Public Accounts, *Public Business in the Public Interest: An Inquiry into Commercialisation in the Commonwealth Public Sector*, Report 336, AGPS, Canberra, 1995, p. 176.
65. S. Bottomley, 'Regulating government-owned corporations: A review of the issues', *Australian Journal of Public Administration*, vol. 53, 1994, pp. 521 at 526. The practice of appointing departmental officers to GBE Boards was recognised in the Accountability and Ministerial Oversight Arrangements for Government Business Enterprises. This occurred, for example, on the Board of the Australian Technology Group Pty Ltd.
66. Thynne, *supra* n 47, pp. 64–65.

67. Mark Aronson, 'Ministerial directions: The battle of the prerogatives', *Public Law Review*, vol. 6, 1995, p. 77 at 94.
68. H. Ford, R. Austin and I. Ramsay, *Ford's Principles of Corporations Law*, 9th edn, Butterworths, Sydney, 1999, at p. 187.
69. JCPA, *supra* n 1, pp. 165 and 167.
70. *ibid.*, p. 158.
71. See also *ibid.*, p. 177.
72. This is not to say that the GBE will be free from the consequences of underperformance. For example, a Government may take steps to revise the Board's membership or to introduce tighter controls on the entity, as occurred with ANL Ltd in 1994—see Australian National Audit Office, *Matters Relating to the Proposed Sale of ANL Ltd*, Audit Report No 2, Canberra, 1995–96.
73. Again, the Government 'bail outs' of ANL Ltd in the 1980s and 1990s provide an example: K. Trace, 'You Couldn't Give it Away': Privatising the Australian National Line', *Agenda*, vol. 2, 1995, pp. 433–44.
74. ANAO, *supra* n 2, p. 12.
75. ARC, *supra* n 13, p. 82.
76. Immunity will depend upon whether a GBE can be regarded as 'the Crown', and then on whether the legislation in question is intended to bind the Crown. Because of their independent legal status and the commercial nature of their operations, it will be difficult for GBEs to successfully claim immunity.
77. Barrett, *supra* n 61, p. 5.
78. Uhr, *supra* n 23, 158.
79. It is also relevant here to note the work of the Senate Committee of Privileges.
80. For example Uhr, *supra* n 23, pp. 125–7, 198–9.
81. ARC, *supra* n 13, pp. 51–2.
82. *ibid.*, p. 32.
83. *ibid.*, p. 33.
84. P. Finn, 'The abuse of public power in Australia: Making our governors our servants', *Public Law Review*, 1994, vol. 5, p. 43 at 55.

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