



The Uhrig Review and the future of statutory authorities

In November 2002, Prime Minister the Hon. John Howard commissioned former Rio Tinto and Westpac chairman, John Uhrig AO, to review the corporate governance of statutory authorities.¹ The terms of reference required an examination of the relationships between statutory authorities and the responsible minister. The purpose of the review was to assist in improving the performance of these bodies, without compromising their statutory duties.² In June 2003, the Prime Minister was given the [Review of the Corporate Governance of Statutory Authorities and Office Holders](#). The Report was finally released on 12 August 2004. This Research Note examines the recommendations of, and response to, the Uhrig Review. In particular, it notes the recent establishment of the federal Department of Human Services, which was influenced by the Uhrig Review.

The legislative framework

Statutory agencies are established by a specific Act of Parliament to fulfil prescribed responsibilities. In addition to each authority's enabling legislation, the Howard Government has established an overarching legislative basis. The [Financial Management and Accountability \(FMA\) Act 1997](#) and the [Commonwealth Authorities and Companies \(CAC\) Act 1997](#) provide an accountability framework for statutory agencies to manage their resources and remain responsive to ministers. They also reflect the two most common governance structures among statutory agencies—executive management and board management. The *FMA Act* applies to budget funded authorities managed by a Chief Executive. It establishes various management and reporting responsibilities for the Chief Executive (sections 44–46, 49 and 51), and allows the Minister to give the Chief Executive guidelines (s. 64). The *CAC Act* applies to authorities that are corporate entities managed by a board. It requires the CEO of the board to report to the responsible Minister (sections 15–16), and to ensure the authority's activities comply with government policies (s. 28).

Since the Whitlam Government, statutory agencies have been popular. In 1975 there were 92 statutory agencies—26 operating as quasi-departmental bodies under the *Public Service Act 1922*, and 66 as non-departmental authorities.³ In August 2004 there were 160 federal statutory agencies.⁴ This included 40 statutory agencies subject to the *FMA Act* and [Public Service Act 1999](#), 13 FMA agencies not subject to the *PS Act*, 80 agencies fully subject to the *CAC Act*, and 27 Commonwealth companies partially subject to the *CAC Act*.⁵ The growth in the total number of federal statutory

agencies is reflected in their share of total public sector employment. In June 2004 there were 49 905 employees within the 17 Departments of State; in contrast, the two largest statutory agencies—the Australian Taxation Office and Centrelink—had a total of 48 195 employees.⁶

The rationale for statutory agencies

Some of the reasons for creating statutory agencies are:

- where impartiality and expertise is required, e.g.: CSIRO (1949), Civil Aviation Safety Authority (1975)
- where independence is needed and close association with any political party undesirable, e.g.: Reserve Bank of Australia (1960), Australian Electoral Commission (1983)
- where the role of the agency is to monitor the other government bodies, e.g.: Australian National Audit Office (1902, 1990), Inspector General of Taxation (2003)
- where an organisation must be seen to be controlled by non-government interests, e.g.: Aboriginal and Torres Strait Islander Commission (1990–2005)
- to enforce regulation and competition policy, e.g.: the Australian Securities Commission (1991), Austel⁷ (1989–1997), the National Competition Council (1995), and
- where central government delegates activities to concentrate on policy development, e.g.: Australian National Training Authority (1992).

Background to the Uhrig review

In its 2001 election platform, the Coalition flagged its intent to examine statutory authorities and office holders. This was partly a response to complaints that agencies such as the Australian Competition and Consumer Commission and the Australian Taxation Office were treating big business unfairly.⁸ There were also notable failings of statutory agencies, such as the Australian Prudential Regulation Authority's (APRA) oversight of the HIH collapse and the loss of confidence in the board of the Civil Aviation Safety Authority (CASA). Both APRA and CASA have since replaced their boards with an executive group.⁹ More broadly, there had been 'considerable anxiety about the displacement of traditional accountability mechanisms associated with privatisation, contracting out, and loosening of traditional controls over statutory authorities'.¹⁰

The Report's findings and recommendations

The Uhrig Review found that the governance arrangements of statutory authorities are unclear and inadequate. In

particular, it argued that there was scope for improvement in the authorities' legislative framework and their relationship with the relevant Minister.¹¹ The report contained six key recommendations:

- *the Government should clarify the expectations of statutory authorities* by Ministers issuing Statements of Expectations, authorities responding with Statements of Intent, and the Minister making both documents public
- *the role of portfolio departments as the principal source of advice to Ministers should be reinforced* by requiring statutory authorities to provide relevant information to departmental secretaries, in parallel to that information being provided by statutory authorities to Ministers
- *boards should be used only when they can be given full power to act.* It is not feasible to have a board in authorities where Ministers play a key role in the determination of policy. In this case, governance can best be provided by executive management
- *the government should create a centrally located group* to advise on the application of appropriate governance structures when establishing statutory authorities
- *an Inspector-General of Regulation should be created* to investigate procedures used by regulatory authorities, and
- *the legislative basis for statutory agencies should be simplified*—the *FMA Act* should be applied to budget funded statutory authorities; the *CAC Act* should be applied to authorities that are legally and financially separate from the Commonwealth.

In summary, Mr Uhrig recommended more formal reporting requirements for agencies, two new central agencies to monitor the governance of statutory authorities, and the application of either an 'executive management' or 'board' template.

The Government's response

The Government's response accompanied the public release of the Uhrig Review in August 2004. A media release from the Minister of Finance and Public Administration, Senator the Hon. Nick Minchin, endorsed:

- the proposal for Statements of Expectations and Intent, which 'will give clients greater certainty in their dealings with agencies and greater confidence to raise issues of concern'
- a clearer legislative basis for statutory agencies based on either the *FMA Act* or the *CAC Act*
- the requirement that statutory authorities report to departmental secretaries as well as to the Minister
- the two governance templates of either a board or executive management, to 'ensure clear lines of accountability from the Minister down to the agency', and
- the creation of a central agency to determine the best governance structure. All Australian government agencies are to be assessed against the templates by March 2006.¹²

The only recommendation the Government rejected was the proposal for an Inspector-General of Regulation. It argued that this extra layer of regulation is unnecessary given the commitment to formalise the reporting process, and review the governance arrangements, of all agencies.

Responses to the Uhrig Review

The Uhrig Review has received a very low-key reception. One editorial, in the *Australian Financial Review*, was essentially supportive. It noted that while business 'may be disappointed about not getting a super regulator', Uhrig has acted on the common business and public interest goals of 'transparency, a review process and certainty'.¹³ The Business Council of Australia was content with proposals for stricter formal reporting requirements for regulatory agencies. Consumer groups saw the Government's rejection of an Inspector-General of Regulation as confirmation that concern about the way authorities were policing business was unwarranted.¹⁴

Indeed, there has been wider criticism that Uhrig's focus was misplaced. The former Chairman of the ACCC, Allan Fels, and journalist, Fred Brenchley, argued that the Report was 'basically a business wish list'.¹⁵ Specifically, it ignored the continuing need to protect regulatory agencies from the threat of 'regulatory capture', and focused instead on the need for an effective dialogue with business. It also ignored the scrutiny of statutory agencies through the Senate Estimates process. Fels and Brenchley supported the Statements of Expectations and Intent and the two governance templates. However, 'other schemes to involve departmental secretaries in regulators' activities and to give a central group an advisory role on future corporate governance ... seem more designed to tie regulators down'.¹⁶ In similar vein, Dr Ian Holland, a Committee Secretary in the Department of the Senate, has argued that scrutiny of statutory agencies should be the task of the Parliament, not departmental secretaries: 'statutory agencies are instruments of the Parliament, not the government'.¹⁷

Dr Colin Scott, a Reader in Law at the London School of Economics, argues that the focus on the governance of Australian statutory authorities is misplaced. Writing in 2002, he claims there is a paradox that independent regulatory authorities attract more scrutiny than regulatory sub-units wholly within ministerial departments. Statutory agencies have a 'dense web of relationships both of formal and day-to-day accountability to a wide variety of public and private actors'.¹⁸ By contrast, Scott argues that regulatory functions carried out within departments are more insulated, less transparent, and therefore, more independent than statutory bodies.

These critics contend that Uhrig's terms of reference were either incomplete or distorted. The Uhrig Review emphasised:

- the importance of agencies' informal relationship with the community, over their actual performance outcomes

- the accountability role exercised by ministers and departmental secretaries, over the review capacities of the Parliament and its committees, and
- the need for improved accountability arrangements for statutory authorities, over the less scrutinised regulatory functions within government departments.

The Department of Human Services

In October 2004, the Prime Minister announced plans to create a new [Department of Human Services](#) (DHS). The Department, which was formally established in December 2004, has oversight of six agencies—Centrelink, the Health Insurance Commission, the Child Support Agency, CRS (Commonwealth Rehabilitation Service) Australia, Australian Hearing, and Health Services Australia. Mr Howard confirmed that the Uhrig Review had influenced the reorganisation.¹⁹ Certainly, the measures announced in April 2005 by the Minister for Human Services, the Hon. Joe Hockey, were in keeping with Uhrig’s recommendations. The Minister explained that agency boards had served ‘a very useful role when Ministers had agencies within their policy portfolios’. However, he added that the creation of a new department responsible for service delivery required direct accountability to the Minister, consistent with the Prime Minister’s endorsement of the Uhrig Review.²⁰ Accordingly, the Minister announced that the agencies’ boards would be abolished to establish a more direct ministerial role in their operation.

As mentioned above, Uhrig had insisted that boards could not function where Ministers have a key role in the determination of policy. In establishing the DHS, the Howard Government has argued that agency boards interfere with the new department’s coordinating role, and its charter to deliver services effectively and efficiently. The intent is to establish an Advisory Board of Human Services which will advise the Secretary of the DHS, who will in turn advise the Minister.²¹ The purpose of the board is to coordinate the six agencies’ operations.

The Uhrig Review does not comment on this issue of coordination *across* statutory authorities. The Report predated the announcement of the DHS arrangements. The requirement that the six agencies rely on departmental planning, and coordinate their reporting to the department, raises two fundamental problems.

The first is the difficulty in coordinating agencies that function under different legislative frameworks. Centrelink, CRS Australia, and the Child Support Agency operate under the *FMA Act*; the Health Insurance Commission and Australian Hearing operate under the *CAC Act*; Health Services Australia has responsibilities under the [Corporations Act 2001](#). The differences in these Acts are not insignificant. For example, sub-section 180(3) of the *Corporations Act* requires ‘business judgement’, while sub-section 44(1) of the *FMA Act* requires ‘efficient, effective and ethical use’ of Commonwealth resources. The role of the DHS in ‘building a culture of inter-agency cooperation’

will benefit from the agencies’ common non-board structure. However, it will be tested by heightened ministerial demands on the corporatised CAC agencies.²²

The second issue is that the FMA agencies now have reporting requirements to both a policy department and the DHS. For example, CRS Australia operates as a commercial business within the Department of Health and Ageing and is accountable to the departmental secretary. Under the new arrangements, the CRS General Manager will also report to the Minister for Human Services. This system—where an agency reports to one departmental secretary on policy matters and another on service delivery—potentially complicates the accountability framework. Mr Hockey has acknowledged there have already been some ‘creative tensions’ between portfolios.²³

Statutory authorities in other nations

The Uhrig Review was criticised for its failure to consider the overseas experience.²⁴ A useful source is a 2002 Organisation for Economic Cooperation and Development report titled *Distributed Public Governance*.²⁵ It notes that the Blair Government’s efforts to promote service delivery also coincided with efforts to distance itself from agency-centred public management. The March 1999 [Modernising Government White Paper](#) made services delivery central to departmental performance. This contrasts with the Canadian experience where the government established three large statutory authorities—accounting for 35 per cent of total public sector employment. The agencies’ governance structures differed according to their role and operating context.²⁶ Perhaps the most interesting case is New Zealand, which has recently passed the [Crown Entities Act 2004](#). The Act sets a common framework for relationships between Crown entities’ boards, ministers, and the Parliament. It classifies Crown entities in terms of their relationship to the portfolio minister, specifying the conditions where a minister may direct an entity to conform with government policy (s. 103–106).²⁷ The Act also empowers the minister to direct Crown entities to work together to provide a ‘whole of government’ outcome (s. 107).

Accountability or centralisation?

Arguments for the need to reduce the number of statutory authorities are not new. The 1975 *Royal Commission on Australian Government Administration* argued that:

greater flexibility be given to departmental operations and structural arrangements should make it possible to reduce the number of independently operating bodies by using instead the established machinery available to governments.²⁸

This analysis was based on a report by Dr Roger Wettenhall, which recommended that the creation of statutory agencies should be ‘justified as exceptional cases’. Wettenhall welcomed ‘occasional scrutiny of authority affairs by parliamentary committees’ and added, ‘I really see no good reason for subjecting authorities in any way to departments’.²⁹

While this last sentiment is clearly at odds with the Uhrig Review, both Uhrig and Wettenhall emphasised the need for statutory agencies to retain their independence. This issue has not been of concern in the current debate. However, the Secretary of the Department of Prime Minister and Cabinet, Dr Peter Shergold, has expressed concern that devolution threatens the ‘whole of government’ ethos. A strong supporter of the Uhrig Review, Shergold fears that statutory authorities ‘will fail to see themselves as part of a greater whole’.³⁰ The need for coordination across portfolio boundaries requires greater concentration of power within portfolios. In November 2004, Shergold described statutory agencies as ‘creatures of historical vicissitude rather than strategic design’, and the DHS as ‘the first shot in the battle against bureaucratic proliferation’.³¹ He also noted that five other statutory authorities were moving back to departments—the Australian National Training Authority, the National Occupational Health and Safety Commission, the National Oceans Office, the Australian Greenhouse Office, and the Australian Government Information Management Office.

It is important, however, to distinguish between Uhrig’s emphasis on greater accountability of statutory agencies, and efforts to subordinate or abolish these agencies entirely. If Uhrig’s core concern with accountability is to be met, statutory agencies must have a degree of legal and operational autonomy. Professor Allen Schick, a Visiting Fellow at the Brookings Institution, puts the case well:

Until now agencies and departments have been rivals. The ascendancy of one has spelled subordination of the other. In the future, departments and agencies will coexist ... but with each having its own zone of responsibility. When things are going well, the two will stay out of each other’s way. When they aren’t, each may blame the other, and the challenge for government will be to make sure that accountability does not fall between the cracks.³²

1. The term ‘agency’ and ‘authority’ are used interchangeably.
2. The Hon. John Howard, *Press Release*, 14 November 2002.
3. Dr R. Wettenhall, ‘Report on Statutory Authorities’, *Royal Commission on Australian Government Administration*, Appendix 1, 1975, pp. 319–321.
4. This includes the 27 Commonwealth companies and eight ‘Executive Agencies’ under the *FMA Act*.
5. Department of Finance and Administration, *List of FMA and CAC agencies*, August 2004, at www.finance.gov.au/finframework/fma_agencies.html; www.finance.gov.au/finframework/cac_bodies.html
6. Australian Public Service Commission, *State of the Service Report 2003–04*, 2004, pp. 261–64. This excludes the Department of Human Services which was formally created in December 2004. The 68 statutory agencies listed in Appendix 1 of the [2003–04 State of the Service Report](#) employed 75 831 staff.
7. In 1997, Austel was renamed the Australian Communications Authority (ACA).
8. See T. O’Loughlin, ‘Uhrig response ‘right direction’’, *Australian Financial Review*, 13 August 2004, p. 4.
9. See The Hon. John Anderson, *CASA Charter Letter*, 23 November 2003, at

<http://www.casa.gov.au/corporat/charter.htm> (accessed 22 April 2005).

10. C. Scott, ‘Paradoxes of Independence and Accountability in Commonwealth Regulatory Governance’, *Appraising the performance of regulatory agencies*, M Barker (ed.), 2004, p. 15.
11. J. Uhrig, *Review of the corporate governance of statutory authorities and office holders*, June 2003, p. 6.
12. The first agencies to be reviewed will be Australia Post, the Reserve Bank, APRA, ASIC, Centrelink, the Health Insurance Commission, the ATO and the ACCC.
13. Editorial, ‘Uhrig proposals a big step forward’, *Australian Financial Review*, 16 August 2004, p. 62.
14. See T. O’Loughlin, ‘Uhrig response ‘right direction’’, *Australian Financial Review*, 13 August 2004, p. 4.
15. A. Fels and F. Brenchley, ‘Chance missed to give regulators more teeth’, *Australian Financial Review*, 16 August, 2004, p. 63.
16. *ibid.*
17. I. Holland, ‘The Review of the corporate governance of statutory authorities and office holders’, *Public Administration Today*, September–November 2004, pp. 64–66.
18. C. Scott, *op. cit.*, p. 15.
19. The Hon. J. Howard, ‘Fourth Howard Ministry’, *Press Conference*, 22 October 2004.
20. The Hon. J. Hockey, ‘Making Life Easier—The role of Human Services in Improving Commonwealth Service Delivery’, *Address to the National Press Club*, 20 April 2005, p. 19, at http://www.joehockey.com/content/national_press_club_address_200405.pdf (accessed 21 April 2005).
21. P. Malone, ‘Boards go in Public Service changes’, *The Canberra Times*, 23 October 2004, p. 5.
22. Commonwealth of Australia, *Department of Human Services*, at <http://www.humanservices.gov.au> (accessed 20 April 2005).
23. A. Fabro and C. Murphy, ‘Hockey flags portfolio changes’, *Australian Financial Review*, 21 April 2005, p. 3.
24. I. Holland, *op. cit.*
25. Organisation for Economic Cooperation and Development, ‘Distributed Public Governance: Agencies, authorities and other government bodies’, 2002.
26. *ibid.*, p. 56.
27. See J. Diplock, ‘Public Sector Reform in New Zealand and Australia’, 30 August 2004.
28. Commonwealth of Australia, Royal Commission on Australian Government Administration, *Report*, 1976, p. 82.
29. R. Wettenhall, *op. cit.*, p. 342.
30. V. Burgess, ‘Umm ... this might hurt a bit’, *Australian Financial Review*, 19 November 2004, p. 66.
31. P. Shergold, ‘Regeneration: New structures, new leaders, new traditions’, *Speech*, 11 November 2004.
32. *op. cit.*, p. 52.

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