# MINISTERS, STATUTORY AUTHORITIES AND GOVERNMENT CORPORATIONS: THE AGENCY PROBLEM IN PUBLIC SECTOR GOVERNANCE

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*This article analyses the governance of statutory authorities and government corporations through the lens of the 'agency problem' and argues that the governance framework for these entities creates an intractable agency problem which centres on the position of the Minister. Ministers exercise powers analogous to the functions performed by boards of directors and shareholders in relation to private sector companies but are also expected to hold statutory authorities and government corporations to account under the conventions of responsible government. The hybrid public–private nature of public governance which applies to non-departmental entities cannot meaningfully solve the agency problem because it requires Ministers to scrutinise entities for whom they bear some level of political responsibility.*

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## I Introduction

Statutory authorities[1] and government corporations[2] are important features of modern government in all Australian jurisdictions, carrying out functions ranging from regulation, to disability support, to broadcasting, to water supply.[3] The use of non-departmental entities has a long history in Australia.[4] At the Commonwealth level alone there are 169 statutory authorities and 18 government corporations, in addition to 14 departments.[5] The structure of non-departmental entities around Australia differs depending on the type of entity and the provisions of the governing legislation; but all, to a greater or lesser extent, adopt concepts and structures derived from private sector notions of corporate governance.[6] Government corporations are closely modelled on the private corporation, adopting typical private sector structures such as shareholders and boards of directors. Statutory authorities are usually less closely modelled on the corporation, but also adopt aspects of private sector governance.

Non-departmental public sector entities are also subject to important elements of public law regulation, including the constitutional overlay of responsible government, which provides a framework for political accountability centred on the Minister,[7] administrative law remedies such as judicial and merits review, and codes of conduct applicable to public sector employees and officials,

1 A variety of different terms are used in the literature to describe these bodies, including statutory authorities, statutory corporations, non-departmental bodies, executive agencies, public corporations and arms' length bodies.

2 In this article I refer to statutory authorities and government corporations collectively as non-departmental entities.

3 See, eg, Victorian Ombudsman, *A Review of the Governance of Public Sector Boards in Victoria* (Report, December 2013) 13–20 [42]–[76].

4 See generally Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987).

5 'Flipchart of PGPA Act Commonwealth Entities and Companies', *Department of Finance* (19 April 2022) <https://www.finance.gov.au/government/managing-commonwealth-resources/structure-australian-government-public-sector/pgpa-act-flipchart-and-list>.

6 Public Accounts and Estimates Committee, Parliament of Victoria, *Inquiry into Corporate Governance in the Victorian Public Sector* (Parliamentary Paper No 129, May 2005) 11, 121, 194–5; Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (Cth) 7 [47]; Meredith Edwards et al, *Public Sector Governance in Australia* (Australian National University E Press, 2012) 1–2; Meredith Edwards, 'Public Sector Governance: Future Issues for Australia' (2002) 61(2) *Australian Journal of Public Administration* 51, 52; Productivity Commission, 'Financial Performance of Government Trading Enterprises, 1997–98 to 2001–02' (Research Paper, 2003) 35, 39. Note that '[t]he corporatisation frameworks adopted by Australian governments differ in the degree in which they emulate the private sector and in the autonomy they give to boards': at xiv.

7 See generally Geoffrey Lindell, 'Responsible Government' in PD Finn (ed), *Essays on Law and Government: Principles and Values* (Law Book, 1995) vol 1, 75.

supervised by public service commissions. In every Australian jurisdiction, governance duties, modelled on the duties applicable to company directors, apply to officials of public sector entities.[8] Government corporations and statutory authorities are therefore hybrid entities, exhibiting aspects of both public and private law. Some consider this to be a singular advantage, in that they are, in President Franklin D Roosevelt's words, 'clothed with the power of government but possessed of the flexibility and initiative of a private enterprise'.[9]

Given the importance of the functions performed by statutory authorities and government corporations, it is highly desirable to ensure that they are subject to an effective governance framework. This article analyses the governance framework applicable to statutory authorities and government corporations through the lens of the 'agency problem'. In the corporate sector, company directors are subject to governance duties designed to reduce the risk that directors will engage in shirking or prefer their own interests, by aligning the incentives of directors with their company. This is achieved by imposing liability where directors and senior officers fail to act with care and diligence, or fail to perform their functions in the best interests of the company.[10] Similarly worded duties have been imposed on officers of non-departmental entities, which suggests that these duties are intended to address a similar agency problem in the public sector context.

This article argues that the governance framework applicable to both statutory authorities and government corporations creates an intractable agency problem, which centres on the position of the Minister. This arises as a result of the accountability and oversight structures which exist in relation to both government corporations and statutory authorities, and the tensions created by the constitutional overlay of responsible government. In relation to both statutory authorities and government corporations, Ministers exercise crucial accountability functions. Under the conventions of responsible government, statutory authorities and government corporations are accountable to a Minister for the performance of their functions, and the Minister is accountable to Parliament. Ministers are also the shareholders in government corporations (note that sometimes the Minister who holds the shares in the corporation is not the

[8] See, eg, *Public Governance, Performance and Accountability Act 2013* (Cth) ss 25–9 ('*PGPA Act*'). For an analysis of these duties, see Benjamin B Saunders, 'The Public Sector Duty of Care and Diligence' (2019) 42(2) *University of New South Wales Law Journal* 652.

[9] EL Normanton, *The Accountability and Audit of Governments: A Comparative Study* (Manchester University Press, 1966) 313, quoting Letter from Franklin D Roosevelt to Congress, 10 April 1933.

[10] See, eg, *Corporations Act 2001* (Cth) ss 180–1 ('*Corporations Act*').

responsible Minister) and so exercise a dual supervisory role as responsible Minister and shareholder.

There are three ways in which an agency conflict arises. The first conflict arises from the potential for conflict between the interests of the Minister and those of the public. When exercising his or her function of supervising the activities and performance of a statutory authority or government corporation, there is a possibility that the Minister may be acting for personal or political reasons rather than in the public interest. Placing Ministers in this position solves one set of agency problems by creating another.

Secondly, Ministers are vested with considerable power in relation to both statutory authorities and government corporations, such as the power to determine strategy, issue directions and make board appointments.[11] These powers are analogous to the functions performed by boards of directors and shareholders in relation to private sector companies. The conventions of responsible government also mandate a particular relationship of control and oversight by the Minister, and Ministers wield considerable informal power under the Westminster system.[12] That power has the potential to, and sometimes does, constrain the ability of boards or executives to govern their entities. In addition, under the conventions of ministerial responsibility, a key function of Ministers is to hold non-departmental entities to account. As a result of these overlapping private and public functions, the Minister effectively holds a role analogous to that of a director, shareholder, and, in some cases, regulator. However, if the Minister exercises key strategic powers in relation to a non-departmental entity, then the Minister's own actions may have contributed to its performance. It is unlikely that the Minister will be able to judge his or her own performance dispassionately, and so the Minister's director-like and shareholder-like functions are inherently in tension with the Minister's role in holding the entity to account.

Thirdly, the constitutional conventions of responsible government make portfolio Ministers accountable for the performance of statutory authorities and government corporations. Although there is debate as to the extent to which Ministers are responsible for the actions of non-departmental entities within their portfolio, legislation confers many powers on Ministers in relation to such entities, and Ministers will be responsible for the exercise of these powers. More generally, the government is responsible for the executive as a whole. Therefore, where a statutory authority or government corporation underperforms, or engages in some form of mismanagement, the relevant Minister will

[11] See below Part III(A).

[12] See below Part III(C).

likely bear some responsibility for those failures. The net result is that Ministers are expected to scrutinise entities for whom they bear some level of political responsibility.

The major implication of this argument is that the hybrid public–private nature of public governance which applies to non-departmental entities cannot meaningfully solve the agency problem. Ministers are likely to be unable to perform the function of holding statutory authorities and government corporations to account effectively. The argument in this article is both explanatory and predictive. The evidence that exists suggests that there are inherent problems with public sector governance, relating in particular to a persistent lack of clarity as to the respective roles of key parties such as the Minister, the board, and the department, including the powers exercisable by Ministers in relation to public sector entities.[13]

While previous studies have recognised the problems of public sector governance, this article offers a unique explanation which centres on the hybrid public–private nature of non-departmental entities and the constitutional and statutory role played by the Minister under the principles of responsible government. This article argues that the reasons for this stem from the structure of ministerial oversight (in relation to both government corporations and statutory authorities) and ministerial shareholding (in relation to government corporations). This article also provides a testable hypothesis which serves as a basis for further empirical research in relation to the governance of public sector entities.

Australian law maintains a fundamental distinction between public and private, and, as the former Auditor-General noted in 2002, private sector concepts of governance cannot simply be applied to the public sector without understanding the distinctive context of public sector regulation.[14] Undiscriminating attempts to replicate the structures of private sector models in the public sector without clearly understanding the distinctive constitutional framework within which the public sector operates have led to the failure of those models to achieve their intended goals, particularly in relation to hybrid public sector entities which share many of the characteristics of private sector companies. One implication of this article is that reforms are necessary to achieve meaningful enforcement of public sector governance duties and that such reforms will need

[13] Victorian Ombudsman (n 3) 12 [39], 23 [81], 32 [104]; John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Report, June 2003) 5–6 ('*Uhrig Report*').

[14] Pat Barrett, 'Achieving Better Practice Corporate Governance in the Public Sector' (Seminar Paper, International Quality and Productivity Centre Seminar, 26 June 2002) 3.

to ensure that the enforcement mechanisms avoid the agency problems discussed in this article.

## II The Private Sector Model of Corporate Governance and the Agency Problem

Statutory authorities and government-owned corporations are modelled to a greater or lesser extent on private sector companies, applying corporate law concepts within the system of public law accountability. This Part discusses the private sector structures of corporate governance; it also discusses the agency problem in corporate governance which this article draws on in Part IV as a framework for analysing public governance in Australia.

Companies have two principal decision-making organs — the board of directors and the shareholders — each with their own demarcated areas of decision-making authority. Wide powers of management are typically conferred on the board, with the business of a company being managed 'by or under the direction of the directors'.[15] According to the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*, which sets out recommended corporate governance practices for ASX-listed entities, the responsibilities of a company board of directors typically include:

- Defining the entity's purpose and setting its strategic objectives;
- Approving the entity's statement of values and code of conduct to underpin the desired culture within the entity;
- Appointing the chair and the chief executive;
- Overseeing the performance of management and ensuring that an adequate framework exists for information to be reported by management to the board;
- Approving operating budgets and major capital expenditure;
- Overseeing the integrity of the entity's accounting and corporate reporting systems; and
- Ensuring that the entity has in place an appropriate risk management and governance framework and monitoring the effectiveness of the entity's governance practices.[16]

[15] *Corporations Act* (n 10) s 198A(1). While this is a replaceable rule, most company constitutions adopt a provision to this effect.

[16] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, February 2019) 6. The list has been truncated from the original.

Important powers are also conferred on shareholders by company law, such as the power to amend the company's constitution, appoint and remove directors, alter the rights attached to shares, and approve certain alterations to the company's capital structure.[17] Shareholders also perform an important function in monitoring the board's performance and holding it to account. Given that in many companies no one shareholder holds a controlling stake, the actual decision-making power in practice wielded by individual shareholders is often limited.[18]

A helpful summary of the respective roles of the board of directors and the shareholders was provided by the *Cadbury Report*:

> Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship.[19]

The *Corporations Act 2001* (Cth) ('*Corporations Act*') and the general law impose duties on directors of private sector corporations. These include the duties to act with care and diligence,[20] to act in good faith in the best interests of the corporation and for a proper purpose,[21] to avoid using their position or information to gain an advantage for themselves or cause detriment to the corporation,[22] and to avoid insolvent trading.[23] Directors are also required to disclose material personal interests in matters that relate to the company's affairs.[24]

[17] See, eg, *Corporations Act* (n 10) ss 136, 201G (note that this is a replaceable rule), 203D (for public companies), 257C–257D, pt 2F.2; ASX, *Listing Rules* (at 1 December 2019) r 7.1; ASX, *Listing Rules* (at 30 September 2001) r 11.2.

[18] This was classically explained in Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Harcourt, Brace & World, rev ed, 1968) ch 1. See also Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Report, November 1989) 7 [2.1], [2.3].

[19] Committee on the Financial Aspects of Corporate Governance, *The Financial Aspects of Corporate Governance* (Report, 1 December 1992) [2.5] ('*Cadbury Report*').

[20] *Corporations Act* (n 10) s 180(1).

[21] Ibid ss 181(1), 182(1).

[22] Ibid s 182(1).

[23] Ibid s 588G.

[24] Ibid ss 191, 195.

Enforcement of the duties occurs in two ways. First, a company may bring proceedings against a director for breach of the duties.[25] Where the company refuses or is unable to do so, the statutory derivative action mechanism allows a shareholder to bring legal action on behalf of the company.[26] The shareholders therefore play an important role in governance, by both enforcing the duties owed by directors and overseeing the management of the company by the directors, reflecting the traditional private law model of corporate governance. Directors owe their duties to the company,[27] whose interests were traditionally seen as broadly equivalent to those of the shareholders,[28] except when the company was nearing insolvency.[29] As a matter of private concern between the participants to the corporate enterprise, shareholders could ratify breaches of duties by directors.[30]

Recent developments have challenged this private conception of corporate law. The corporate regulator, the Australian Securities and Investments Commission ('ASIC'), now plays an important role in sanctioning breaches of directors' duties under the civil penalty regime. The *Corporations Act* empowers

[25] Ibid s 1317H.

[26] Ibid pt 2F.1A. See generally Ian M Ramsay and Benjamin B Saunders, 'Litigation by Shareholders and Directors: An Empirical Study of the Australian Statutory Derivative Action' (2006) 6(2) *Journal of Corporate Law Studies* 397.

[27] *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 463 [84] (Spigelman CJ); *Australian Securities and Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623, 628 [22] (Gordon J); *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 399 [104] (Brereton J); *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502, 583 [445] (Beach J); *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209, 296 [456], 300 [474] (Edelman J) ('*Cassimatis [No 8]*'). For the common law position: *Percival v Wright* [1902] 2 Ch 421, 425 (Swinfen Eady J); *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd* [1983] Ch 258, 272 (May LJ); *Coleman v Myers* [1977] 2 NZLR 225, 267, 273 (Mahon J); *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 546 [40] (Handley JA); *Residues Treatment & Trading Co Ltd v Southern Resources Ltd* (1988) 51 SASR 177, 198 (King CJ); *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260, 263 (Kirby P).

[28] Often cited cases include *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286; *Parke v Daily News Ltd* [1962] Ch 927; *Ngurli Ltd v McCann* (1953) 90 CLR 425. Simon Deakin has, however, noted that 'it is surprisingly difficult to find support within company law for the notion of shareholder primacy': Simon Deakin, 'The Coming Transformation of Shareholder Value' (2005) 13(1) *Corporate Governance* 11, 11. See also Jean J du Plessis, 'Directors' Duty to Act in the Best Interests of the Corporation: "Hard Cases Make Bad Law"' (2019) 34(1) *Australian Journal of Corporate Law* 3.

[29] *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722, 729–30 (Street CJ); *Walker v Wimborne* (1976) 137 CLR 1, 6–7 (Mason J).

[30] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 150 (Lord Russell); *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666, 672 (Glass JA).

ASIC to institute proceedings alleging a breach of duty.[31] If proven, the court has power to make a range of orders, including disqualification, pecuniary penalties and compensation orders.[32] This reflects a 'public model' of enforcement whereby ASIC uses its enforcement powers strategically to encourage officers to comply with the law rather than seeking compensation where individuals have suffered loss.[33] The purpose of civil penalty proceedings is not simply to protect the company, but also to prevent officers who have contravened corporations legislation from having the opportunity to do so again.[34] Therefore, courts have held that shareholders cannot ratify a breach of statutory duty given that 'civil penalty proceedings involve public rights',[35] and breaches of duty may have consequences that extend beyond the company.[36] In important recent decisions, courts have held that the interests of the company are not identical to those of its shareholders, but also include such things as its reputation and compliance with the law, irrespective of whether this confers a financial benefit on the shareholders.[37] Developments such as these have prompted commentators to discern a 'publicisation' of Australian corporate law in the form of an increasing adoption of characteristics of public law.[38]

These mechanisms aim to address what is considered to be the key problem of corporate governance, namely, the concern that directors will act in their

[31] *Corporations Act* (n 10) pt 9.4B. Criminal liability may also apply where the director or officer acts recklessly or is intentionally dishonest: at ss 184, 588G(3).

[32] Ibid ss 206C, 1317G(1), 1317H(1).

[33] Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42(1) *Federal Law Review* 217, 231.

[34] *Forge v Australian Securities and Investments Commission* (2004) 213 ALR 574, 654 [381] (McColl JA) ('*Forge*'); *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd [No 2]* (2005) 53 ACSR 305, 314–15 [28]–[32] (Palmer J) ('*Australian Investors Forum*'); *Cassimatis [No 8]* (n 27) 296–7 [456]–[457] (Edelman J).

[35] *Forge* (n 34) 654–5 [381], 655 [384] (McColl JA); *Capricornia Credit Union Ltd v Australian Securities and Investments Commission* (2007) 159 FCR 69, 90 [76] (Dowsett, Edmonds and Besanko JJ).

[36] *Australian Investors Forum* (n 34) 315 [33]–[35] (Palmer J); *Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640, 654 [70] (Robson J); *Gillfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460, 514 [228], 515–16 [234] (Sackville AJA).

[37] *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533, 639–40 [453], 643 [470]–[471] (Thawley J); *Cassimatis [No 8]* (n 27) 301–2 [478]–[484] (Edelman J); *Australian Securities and Investments Commission v Flugge [No 2]* (2017) 342 ALR 478, 482 [24] (Robson J).

[38] Michael J Whincop and Mary E Keyes, 'Corporation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and the Publicisation of Private Corporate Law' (1997) 25(1) *Federal Law Review* 51; Ross Grantham, 'The Proceduralisation of Australian Corporate Law' (2015) 43(2) *Federal Law Review* 233.

own interests at the expense of the company, or fail to act with proper care and diligence in the performance of their functions.[39] Corporate governance is intended to ameliorate this 'agency' problem by aligning the incentives of directors with those of the shareholders. The agency problem is frequently associated with agency theory and the 'contractarian' theory of the corporation, which have been highly influential in corporate law scholarship, especially in the United States, but no longer hold the dominant position they once held. According to the contractarian theory, the company is a 'nexus for contracting relationships' between factors of production such as shareholders, directors, employees and customers.[40] The company is simply a legal fiction which provides a process for bringing the conflicting objectives of individuals into equilibrium.[41] The contract metaphor emphasises the voluntary nature of the corporate form; therefore, for contractarian scholars, the goal of corporate law is to enact rules which approximate the rules that private contracting parties would adopt if they were able to negotiate with perfect information and minimal cost.[42] Investors and managers should, however, have freedom to adopt different rules by agreement.[43]

According to the nexus of contracts theory, the contracts entered into by participants are determined by the imperative of minimising agency costs.[44] The managers who implement the key decisions 'are not the major residual claimants and therefore do not bear a major share of the wealth effects of their decisions'.[45] The interests of the managers or directors may diverge from those of the investors or shareholders, and there is the potential for managers or

[39] Ross Grantham, 'The Governance of Government Owned Corporations' (2005) 23(3) *Company and Securities Law Journal* 181, 185; Commonwealth Treasury, 'Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors' (Proposals for Reform: Paper No 3 — Takeovers, Corporate Law Economic Reform Program, 1997) 9.

[40] Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305, 311. See also Eugene F Fama and Michael C Jensen, 'Separation of Ownership and Control' (1983) 26(2) *Journal of Law & Economics* 301, 302.

[41] Armen A Alchian and Harold Demsetz, 'Production, Information Costs and Economic Organization' (1972) 62(5) *American Economic Review* 777, 794; Eugene F Fama, 'Agency Problems and the Theory of the Firm' (1980) 88(2) *Journal of Political Economy* 288, 289.

[42] Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991) 34.

[43] Robert C Clark, 'Contracts, Elites, and Traditions in the Making of Corporate Law' (1989) 89(7) *Columbia Law Review* 1703, 1706; Christopher A Riley, 'Contracting out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts' (1992) 55(6) *Modern Law Review* 782, 783.

[44] William W Bratton Jr, 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) 74(3) *Cornell Law Review* 407, 417–18.

[45] Fama and Jensen (n 40) 304.

directors to shirk their responsibilities or otherwise prefer their own interests.[46] Monitoring the actions of management to ensure they are discharging their duties properly is, however, difficult and costly.[47] Reducing agency costs — losses incurred by the shareholders as a result of management action, together with costs incurred by shareholders in monitoring management — is a core preoccupation of contractarian economic analysis.[48] Agency theory seeks to determine the most efficient contractual terms between principals and agents in a variety of situations, given certain assumptions about people.[49] Due to the emphasis on aligning the interests of managers with those of the shareholders, agency theory is closely associated with shareholder primacy, which is considered to best promote managerial accountability to the shareholders.[50]

Agency theory and the nexus of contracts view dominated economics and corporate law scholarship in the late 20th century, but have been subjected to powerful critiques.[51] Ronald J Gilson has argued that single factor governance models — such as agency — are too simplistic to explain the structure and operation of companies.[52] Other critics have argued that neither the contract nor the principal–agent paradigm accurately describes either the reality of decision-making within companies, or the nature of corporate regulation. To attempt to describe the relationship between investors and management in publicly held corporations, or the process of bargaining, in contractual terms strains the 'contract' concept beyond recognition.[53] Likewise, describing directors as 'agents' of the shareholders 'grossly misrepresents' the nature of that

[46] Daniel R Fischel, 'The Corporate Governance Movement' (1982) 35(6) *Vanderbilt Law Review* 1259, 1262–3.

[47] Jensen and Meckling (n 40) 308.

[48] See generally Fama and Jensen (n 40).

[49] Kathleen M Eisenhardt, 'Agency Theory: An Assessment and Review' (1989) 14(1) *Academy of Management Review* 57, 58.

[50] Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89(2) *Georgetown Law Journal* 439; Benedict Sheehy, 'Scrooge — The Reluctant Stakeholder: Theoretical Problems in the Shareholder–Stakeholder Debate' (2005) 14(1) *University of Miami Business Law Review* 193, 225. Cf Elaine Sternberg, 'The Defects of Stakeholder Theory' (1997) 5(1) *Corporate Governance* 3.

[51] Some of these critiques are noted in Michael Whincop, 'Of Fault and Default: Contractarianism as a Theory of Anglo-Australian Corporate Law' (1997) 21(1) *Melbourne University Law Review* 187, 193–5 ('Of Fault and Default').

[52] Ronald J Gilson, 'From Corporate Law to Corporate Governance' in Jeffrey N Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press, 2018) 3.

[53] Victor Brudney, 'Corporate Governance, Agency Costs, and the Rhetoric of Contract' (1985) 85(7) *Columbia Law Review* 1403, 1412.

relationship.[54] Behavioural research has suggested that the model of '[i]ndividual, atomistic, and self-interested decision making' posited by agency theory does not hold true universally and does not adequately capture the complexity of human behaviour.[55] Thus, while agency theory may yield important insights, its assumptions 'limit its generalizability'.[56] The 'reductionist and individualistic' depiction of the company presented by the nexus of contracts view is both its strength — by providing 'a simplified and intellectually digestible portrayal of an otherwise complex and multi-faceted subject matter' — as well as its major conceptual weakness.[57] Finally, shareholder primacy has been challenged by scholars who argue that it does not reflect actual decision-making processes within corporations, which, in turn, further weakens the basis of the agency paradigm.[58]

The contractual and agency models therefore fail to offer a complete, universally accepted model for analysing the company. They nevertheless offer useful insights. The problem of agency costs arises in all organisations and cooperative efforts where the interests of participants in the joint enterprise have the potential to diverge.[59] It is not necessary to accept that directors will always be seeking to enrich themselves at shareholders' expense, or that the agency problem is the only problem with which corporate law ought to be preoccupied. Nor is it necessary to accept that there is the potential for divergence between the directors of companies and the company, including its shareholders, and that one purpose of corporate law is to solve or mitigate that problem. It is therefore meaningful to speak of the agency problem without accepting all the tenets of agency theory.[60] The agency problem is widely accepted as relevant to

[54] Margaret M Blair and Lynn A Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) *Virginia Law Review* 247, 291. See also at 288. Note that the authors consider their view to be consistent with the nexus of contracts approach: at 254.

[55] Chris Doucouliagos, 'A Note on the Evolution of *Homo Economicus*' (1994) 28(3) *Journal of Economic Issues* 877, 881.

[56] James H Davis, F David Schoorman and Lex Donaldson, 'Toward a Stewardship Theory of Management' (1997) 22(1) *Academy of Management Review* 20, 24.

[57] Marc T Moore, 'Understanding the Modern Company through the Lens of Quasi-Public Power' in Barnali Choudhury and Martin Petrin (eds), *Understanding the Company: Corporate Governance and Theory* (Cambridge University Press, 2017) 91, 91.

[58] See, eg, Daniel Attenborough, 'How Directors Should Act when Owing Duties to the Companies' Shareholders: Why We Need to Stop Applying Greenhalgh' (2009) 20(10) *International Company and Commercial Law Review* 339, 342; D Gordon Smith, 'The Shareholder Primacy Norm' (1998) 23(2) *Journal of Corporation Law* 277, 290–1.

[59] Jensen and Meckling (n 40) 308–9.

[60] See, eg, Michael Klausner, 'Corporations, Corporate Law, and Networks of Contracts' (1995) 81(3) *Virginia Law Review* 757.

Australian law[61] and is a standard tool of analysis for the problems of governance in the public and private sectors.[62] This is so even though Australian corporate law cannot be reduced to a single theory, whether contractarian or otherwise.[63] Analysing the agency problem in government corporations, particularly the potential for the interests of directors to diverge from the interests of the community and the means adopted to solve that divergence, does not entail acceptance of all the features of agency theory.

In the private sector, several mechanisms exist to constrain agency costs.[64] The market for corporate securities, which provides information about the value of a company's shares, is a mechanism for monitoring company performance; the market for corporate control can leave an underperforming company vulnerable to a takeover where the company's assets are considered to be worth more than the share price;[65] and the 'competition for managerial services' encourages directors to act in the interests of shareholders because underperforming directors are liable not to be reappointed.[66] In addition, legal rules such as directors' duties, which aim to align the interests of managers with those of the company, can be an important constraint on agency costs.[67] Legal rules are especially important in relation to public sector entities which are not subject to the normal disciplines of the market. Many statutory authorities and government corporations perform a monopoly function and therefore do not face competition for their goods and services; the shares of government

61 See, eg, Justice RP Austin, HAJ Ford and IM Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2005) 212 [5.4]; Paul Redmond, *Corporations and Financial Markets Law* (Lawbook, 7th ed, 2017) 228–9 [5.10].

62 Christos Mantziaris, 'Interpreting Ministerial Directions to Statutory Corporations: What Does a Theory of Responsible Government Deliver?' (1998) 26(2) *Federal Law Review* 309, 317–22. See *Uhrig Report* (n 13) 21–2.

63 This is not to deny that economic approaches have had some impact on Australian corporate law, for example by the Corporate Law Economic Reform Program ('CLERP'): Whincop, 'Of Fault and Default' (n 51) 188. See also Grantham, 'The Proceduralisation of Australian Corporate Law' (n 38) 238, 251, where it is argued that Australian corporate law has become 'proceduralised', and that this is consistent with the agency approach to corporate law.

64 Stephen Bottomley et al, *Contemporary Australian Corporate Law* (Cambridge University Press, 2018) 51–2; Mariana Pargendler, 'The Corporate Governance Obsession' (2016) 42(2) *Journal of Corporation Law* 359, 370.

65 Henry G Manne, 'Mergers and the Market for Corporate Control' (1965) 73(2) *Journal of Political Economy* 110, 112.

66 Henry N Butler and Larry E Ribstein, 'Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians' (1990) 65(1) *Washington Law Review* 1, 27.

67 Fischel (n 46) 1264.

corporations are held by shareholding Ministers and not listed on a securities exchange, and so they do not face investor and market scrutiny.[68]

There is comparatively little literature applying agency theory in the public sector. Scholars have analysed the agency problems in public sector entities, examining means by which public sector entities may be incentivised to act in the interests of society as a whole. Studies have examined typical principal–agent problems, such as information asymmetry and monitoring costs, in general terms, as well as in more specific contexts such as contracting and procurement.[69]

## III The Hybrid Nature of Statutory Authorities and Government Corporations

Statutory authorities and government-owned corporations are the two main types of non-departmental agencies in Australia[70] and have been created by legislation in all Australian jurisdictions. This Part examines the legal structure of these types of entities and the applicable governance framework, including the key features of the public law system within which they function. Government corporations are companies created either under the *Corporations Act* or by state legislation and designated as government corporations, thereby subjecting them to a uniform governance regime.[71] Statutory authorities are established by special Acts of Parliament which define their structures, powers and purposes.[72] Statutory authorities can also be structured as corporations, and these entities are typically referred to as statutory corporations rather than government corporations.

[68] See below Part III(A).

[69] See, eg, Jerry L Mashaw, *Greed, Chaos, & Governance: Using Public Choice to Improve Public Law* (Yale University Press, 1997); Agnieszka Chrisidu-Budnik and Justyna Przedańska, 'The Agency Theory Approach to the Public Procurement System' (2017) 7(1) *Wroclaw Review of Law, Administration and Economics* 154; Clara Brando de Oliveira and Joaquim Rubens Fontes Filho, 'Agency Problems in the Public Sector: The Role of Mediators between Central Administration of City Hall and Executive Bodies' (2017) 51(4) *Brazilian Journal of Public Administration* 596.

[70] Roger Wettenhall, 'Non-Departmental Public Bodies under the Howard Governments' (2007) 66(1) *Australian Journal of Public Administration* 62, 63.

[71] These statutes are: *Territory-Owned Corporations Act 1990* (ACT); *State Owned Corporations Act 1989* (NSW); *Government Owned Corporations Act 2001* (NT); *Government Owned Corporations Act 1993* (Qld); *Public Corporations Act 1993* (SA); *Government Business Enterprises Act 1995* (Tas); *State Owned Enterprises Act 1992* (Vic); *Statutory Corporations (Liability of Directors) Act 1996* (WA). For an example of legislation creating a government corporation, see *Hunter Water Act 1991* (NSW) s 4 ('*Hunter Water Act*').

[72] See, eg, *National Disability Insurance Scheme Act 2013* (Cth) s 117 ('*NDIS Act*').

### A *Government Corporations*

Government corporations, also known as Commonwealth companies, Government Business Enterprises or State/Territory-Owned Corporations, are corporations in which the shares are held by or on behalf of the government. Government corporations are expressly modelled on the structure of private companies but operate within the structures of public law accountability. Government corporations are typically created to insulate the provision of a particular function from political pressure or to enable certain functions to be provided with greater effectiveness than is possible within traditional departmental structures.[73]

Legislation in the Commonwealth, Australian Capital Territory ('ACT') and Queensland provides for government companies to be established under the Commonwealth *Corporations Act*, with shareholding vested in government Ministers, or (in the Commonwealth) under the control of the Commonwealth.[74] The governance framework applicable to private companies as discussed in Part II therefore applies to government corporations in these jurisdictions, subject to any relevant modifications.

Legislation in the other jurisdictions provides for companies or statutory corporations to be designated as government corporations.[75] The legislation defines the objectives, functions, and powers of government corporations;[76] provides for the establishment of boards of directors to oversee the management of the corporation; and stipulates the manner of their appointment.[77] Duties modelled on the duties applicable to company directors are imposed on the

[73] Terence Daintith and Yee-Fui Ng, 'Legal Form and Function in the Public Sector: The Government-Owned Company in the United Kingdom and Australia' (2020) 136 (April) *Law Quarterly Review* 292, 293.

[74] *PGPA Act* (n 8) ch 3; *Territory-Owned Corporations Act 1990* (ACT) s 13; *Government Owned Corporations Act 1993* (Qld) ss 75, 78. Note that s 13 of the ACT legislation provides for shareholding to be vested in persons approved by the Chief Minister.

[75] See, eg, *State Owned Corporations Act 1989* (NSW) ss 4, 20A; *Government Owned Corporations Act 2001* (NT) s 5; *Public Corporations Act 1993* (SA) s 5; *Government Business Enterprises Act 1995* (Tas) s 3(1) (definitions of 'Government Business Enterprise', 'statutory authority'); *State Owned Enterprises Act 1992* (Vic) s 17.

[76] *State Owned Corporations Act 1989* (NSW) ss 8, 20E; *Government Owned Corporations Act 2001* (NT) s 4; *Public Corporations Act 1993* (SA) s 11; *Government Business Enterprises Act 1995* (Tas) ss 7–10; *State Owned Enterprises Act 1992* (Vic) ss 18–19. For an example of special purpose legislation, see, eg, *Hunter Water Act* (n 71) s 4A.

[77] *Territory-Owned Corporations Act 1990* (ACT) s 12; *State Owned Corporations Act 1989* (NSW) ss 10(1), 20J; *Government Owned Corporations Act 2001* (NT) s 13; *Government Owned Corporations Act 1993* (Qld) s 88; *Public Corporations Act 1993* (SA) s 14; *Government Business Enterprises Act 1995* (Tas) ss 11–12, 14; *State Owned Enterprises Act 1992* (Vic) ss 23–5.

directors of government corporations.[78] The legislation provides for the shareholding or capital structure of government corporations and the payment of dividends.[79] The shares in government corporations are held by Ministers: namely, the portfolio Minister or another Minister, such as the Finance or Treasury Minister.[80]

There are important differences between government corporations and private companies. In particular, legislation confers extensive powers on Ministers in relation to government corporations, some of which go well beyond the powers typically exercised by shareholders in private companies. In many jurisdictions the Minister has the power to issue directions to government corporations.[81] Government-owned corporations are required to prepare a corporate plan or statement of corporate intent in consultation with the Minister or the voting shareholders, specifying such matters as the corporation's objectives, undertakings and performance targets.[82] Government corporations are required to comply with ministerial directions and the agreed corporate plan. Government corporations need ministerial approval to engage in certain transactions, such as transferring property to subsidiaries.[83] Ministers also have extensive rights to obtain information relating to the corporation.[84] These mechanisms give Ministers powers to determine, or at least significantly contribute to, the strategy and business operations pursued by government corporations, and preserve ultimate ministerial control over the corporation.[85] The legislation in several jurisdictions confers power on the Minister to bring

[78] *State Owned Corporations Act 1989* (NSW) sch 10 cls 3, 13; *Public Corporations Act 1993* (SA) ss 15–19; *Government Business Enterprises Act 1995* (Tas) ss 24–5; *State Owned Enterprises Act 1992* (Vic) s 36; *Statutory Corporations (Liability of Directors) Act 1996* (WA) ss 5, 9–12.

[79] *State Owned Corporations Act 1989* (NSW) s 20H, sch 1 cls 3, 5, sch 6 cl 3; *Public Corporations Act 1993* (SA) s 30; *State Owned Enterprises Act 1992* (Vic) ss 46–9. See also *Government Business Enterprises Act 1995* (Tas) ss 82–9.

[80] *Territory-Owned Corporations Act 1990* (ACT) s 13; *State Owned Corporations Act 1989* (NSW) s 6, sch 2 cl 3, sch 6 cl 3; *Government Owned Corporations Act 2001* (NT) ss 7–7A; *Government Owned Corporations Act 1993* (Qld) s 78. Note s 13 of the ACT legislation allows for non-voting shareholdings to be vested in persons other than Ministers with the approval of the Chief Minister.

[81] *State Owned Corporations Act 1989* (NSW) ss 7A, 20D, 20P; *Government Owned Corporations Act 1993* (Qld) s 115; *State Owned Enterprises Act 1992* (Vic) ss 16C, 41(9)–(11), 45. See generally Mantziaris (n 62).

[82] *State Owned Corporations Act 1989* (NSW) s 21; *Government Owned Corporations Act 1993* (Qld) ch 3 pts 7–8; *State Owned Enterprises Act 1992* (Vic) ss 41–2.

[83] See, eg, *Government Business Enterprises Act 1995* (Tas) s 10.

[84] See, eg, *Government Owned Corporations Act 1993* (Qld) s 122; *State Owned Enterprises Act 1992* (Vic) s 53.

[85] Edwards et al (n 6) 139.

proceedings against a director of a state business corporation who breaches his or her duties.[86]

These are significant powers, combining elements of the powers customarily exercised by both directors and shareholders of companies and, in the case of Victoria, the powers exercised by the corporate regulator.[87] A Minister's role therefore extends well beyond the role typically associated with shareholders and includes the power to determine the strategy of the corporation and a veto power over key decisions.

Government corporations adopt a corporate form, managed by boards of directors who are subject to duties which mirror those applicable to directors of companies. State-owned corporations often have a shareholding structure, with the shares held by one or more Ministers, who represent the public and exercise ultimate control and oversight. In discharging their functions, including their functions as shareholders of government corporations, Ministers are subject to the constitutional conventions of responsible government and are accountable to Parliament for their performance, thereby providing a key link in the chain of accountability between the executive and the people.[88] Government corporations are therefore a unique hybrid of both corporate and public forms, centred on the position of the Minister, who exercises typically 'corporate' as well as 'public law' functions.

### B *Statutory Authorities*

The structure of statutory authorities varies widely depending on the terms of the establishing legislation. Statutory authorities typically adopt either a board or executive management model. Under the executive management model, which normally applies only to authorities carrying out non-commercial functions,[89] the entity is managed by an executive team that reports directly to the Minister: for example, a chief executive officer in whom key powers are vested.[90] Such bodies may or may not have legal identities separate from the Commonwealth or state governments. Under the board model, which is the typical

[86] See, eg, *Public Corporations Act 1993* (SA) s 21(2); *Government Business Enterprises Act 1995* (Tas) s 29(2); *State Owned Enterprises Act 1992* (Vic) s 37.

[87] *State Owned Enterprises Act 1992* (Vic) s 37, which provides that the relevant Minister may recover from directors debts due to the corporation, mirroring ASIC's ability to make directors liable for debts under the *Corporations Act* (n 10) s 588G.

[88] See below Part III(C).

[89] *Uhrig Report* (n 13) 67.

[90] See, eg, *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 209–12 ('*AML and CTF Act*'); *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) ss 105-5–110-15 ('*ACNC Act*').

model for incorporated entities, the entity is governed by a board of directors, which exercises powers similar to those exercised by directors of companies.[91] Some authorities are a hybrid of these models, possessing a governing board but also vesting powers of management in a chief executive officer or managing director.[92]

The power to appoint key officers of statutory authorities is typically vested in Ministers or in the Governor-General (or state Governor), which practically means that the Cabinet collectively makes appointment decisions. Ministers have power to determine the terms and conditions of appointment where these are not specified in the relevant legislation.[93] Notwithstanding important areas of similarity with private sector companies, there remain significant differences, even where statutory authorities adopt a board model. First, Commonwealth and state legislation subjects statutory authorities to a range of centralised controls (such as reporting requirements). For example, at the Commonwealth level, the *Public Governance, Performance and Accountability Act 2013* (Cth) ('*PGPA Act*') requires all Commonwealth entities to comply with a range of controls, including compliance with government policy,[94] and planning, budgeting, financial reporting and auditing requirements, among others.[95] Secondly, Commonwealth and state legislation often confers powers on Ministers to issue directions to statutory authorities within their portfolios, although the extent to which they are subject to ministerial control and direction varies markedly.[96] In relation to some statutory authorities, Ministers have power to direct the inclusion of matters in the entity's corporate plan.[97] Finally, under the conventions of responsible government, Ministers are responsible for the activities and performance of statutory authorities. This is an important layer of public law regulation which has no private sector counterpart.[98]

Thus, as with the role played by Ministers in relation to government corporations, it can be seen that Ministers combine many important functions in relation to statutory authorities, although the precise nature of the relationship

[91] See, eg, *NDIS Act* (n 72) ss 117, 123–4; *Reserve Bank Act 1959* (Cth) ss 7, 8A–10C; *Regional Investment Corporation Act 2018* (Cth) ss 7, 14–15.

[92] See, eg, *Australian Broadcasting Corporation Act 1983* (Cth) ss 7–10.

[93] See, eg, *ACNC Act* (n 90) s 115-40.

[94] *PGPA Act* (n 8) ss 21–2, 93.

[95] Ibid pt 2.3.

[96] Enid Campbell, 'Ministers, Public Servants and the Executive Branch' in Gareth Evans (ed), *Labor and the Constitution 1972–1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (Heinemann, 1977) 136, 140.

[97] See, eg, *Australian Postal Corporation Act 1989* (Cth) s 40 ('*Postal Corporation Act*').

[98] See below Part III(C).

will vary depending on the terms of the relevant legislation. Ministers typically have power to appoint key officers (which is analogous to the role exercised by shareholders in appointing company directors), often have the power to determine key aspects of the entity's strategy (a typical board function), and also play a key accountability role (a typical shareholder or regulatory role).

### C *The Public Governance Framework*

Government corporations and statutory authorities exist within a regulatory framework of public law, which includes administrative law and the structures of ministerial responsibility.[99] Responsible government is one of the defining features of the *Constitution*[100] and of the systems of government of all states and self-governing territories.[101] However, it is not codified or defined in any constitutional text, and so, notwithstanding its centrality, there is disagreement over precisely what the principles of responsible government are.[102] The core principles are nevertheless clear. First, the head of state must act on the advice of the executive government or ministry. Secondly, the executive government or ministry must possess the confidence of the Lower House of Parliament in order to hold office and must resign when it ceases to command that

[99] See Benjamin B Saunders, 'Responsible Government, Statutory Authorities and the *Australian Constitution*' (2020) 48(1) *Federal Law Review* 4.

[100] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 706–7; George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 1, 59, 71–85; Brian Galligan, 'The Founders' Design and Intentions regarding Responsible Government' (1980) 15(2) *Politics* 1; Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) ch 5; *Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 146–7 (Isaacs J for Knox CJ, Isaacs, Rich and Starke JJ); *Commonwealth v The Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 438–9, 446 (Isaacs J); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 114 (Evatt J); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Marks v Commonwealth* (1964) 111 CLR 549, 557–8 (Kitto J); *New South Wales v Commonwealth* (1975) 135 CLR 337, 364–5 (Barwick CJ); *Victoria v Commonwealth* (1975) 134 CLR 338, 384 (Stephen J), 405–6 (Jacobs J); *Williams v Commonwealth* (2012) 248 CLR 156, 202–3 [56] (French CJ).

[101] Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 257.

[102] See RS Parker, 'The Meaning of Responsible Government' (1976) 11(2) *Politics* 178; RS Parker, 'Responsible Government in Australia' (1980) 15(2) *Politics* 11; JR Archer, 'The Theory of Responsible Government in Britain and Australia' (1980) 15(2) *Politics* 23; HN Collins, 'What Shall We Do with the Westminster Model?' in RFI Smith and Patrick Weller (eds), *Public Service Inquiries in Australia* (University of Queensland Press, 1978) 360.

confidence.[103] Thirdly, the Cabinet is collectively responsible for all Cabinet decisions, and, under the convention of individual ministerial responsibility, individual Ministers are deemed responsible for the actions of their departments.[104]

Although some of the traditional elements of the Westminster system have been weakened — to the point where some have queried whether it still exists in Australia[105] — responsible government has proven resilient. Leading scholars have argued that the High Court has shown a willingness to give 'constitutional status' to some of the elements of responsible government.[106] In essence, responsible government is the principle that the government is a creature of, and accountable to, Parliament, which is elected by the people and is supposed to play a key role in scrutinising the actions of the executive and holding it to account. Accordingly, two primary concerns underlie the formal principles of responsible government: accountability and popular sovereignty. Although the status of popular sovereignty in the *Constitution* is controversial,[107] the political basis of representative government is that 'all powers of government ultimately belong to, and are derived from, the governed':[108]

> The core principle is that those in government who are invested with political and legal power exercise that power for and on behalf of the people, whatever the ultimate foundation for this public trust.[109]

The principal means whereby this occurs is through ministerial responsibility and parliamentary scrutiny.

103 Sir Samuel Walker Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (Government Printer, 1896) 17–18; Quick and Garran (n 100) 704.

104 David Hamer, *Can Responsible Government Survive in Australia?* (Department of the Senate, 2nd ed, 2004) 142.

105 Hamer (n 104).

106 Winterton (n 100) 4–5; Geoffrey Lindell, *Responsible Government and the Australian Constitution: Conventions Transformed into Law?* (Federation Press, 2004) 2 ('*Responsible Government and the Australian Constitution*'). See generally James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) ch 12.

107 See Paul Finn, 'Public Trust and Public Accountability' (1993) 65(2) *Australian Quarterly* 50, 50; Paul Finn, 'A Sovereign People, a Public Trust' in PD Finn (ed), *Essays on Law and Government: Principles and Values* (Law Book, 1995) vol 1, 1, 3 ('A Sovereign People'); Owen Dixon, 'The Law and the Constitution' (1935) 51 (October) *Law Quarterly Review* 590, 597; Benjamin B Saunders and Simon P Kennedy, 'Popular Sovereignty, "the People" and the Australian Constitution: A Historical Reassessment' (2019) 30(1) *Public Law Review* 36; GJ Lindell, 'Why Is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29, 37; Simon Evans, 'Why Is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25(1) *Adelaide Law Review* 103.

108 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ).

109 Edwards et al (n 6) 31.

The structures of responsible government have a strongly centripetal tendency, arising from a prima facie presumption of legitimacy in favour of the elected representatives and the government which retains the confidence of the Lower House of Parliament. This contributes to the high levels of power concentrated in the ministry and the executive dominance which is characteristic of Australian governments. By contrast, public sector bodies lie outside the structure of government departments and are not elected, and therefore do not possess this legitimacy.

Other areas of public law also provide important remedies in relation to public sector entities: judicial and merits review apply in relation to administrative decisions under administrative law; there are avenues to obtain information under freedom of information laws; and bodies such as Ombudsmen can investigate complaints. Further, codes of conduct apply to public sector employees and officers, stipulating expected standards of behaviour. However, remedies for judicial review have very limited application to government-owned companies and somewhat limited application to statutory corporations.[110] In addition, independent institutions such as Ombudsmen and Auditors-General provide important aspects of public law scrutiny.

### D *The Agency Problem and Public Sector Entities*

In each Australian jurisdiction, legislation has imposed duties on directors and officials of statutory authorities, and on directors of boards of government corporations, which are modelled on the private sector duties.[111] The legislation varies, however, from jurisdiction to jurisdiction, with key differences relating to the content of the duties, whom the duties apply to, and the applicable penalties and enforcement mechanisms. The duties include a duty to act with care and diligence,[112] to act in good faith and for a proper purpose,[113] and to avoid

[110] Yee-Fui Ng, 'In the Moonlight? The Control and Accountability of Government Corporations in Australia' (2019) 43(1) *Melbourne University Law Review* 303, 327–9.

[111] *State Owned Corporations Act 1989* (NSW) sch 10 cls 3, 13; *Government Owned Corporations Act 2001* (NT) s 20; *Public Corporations Act 1993* (SA) ss 15–19; *Government Business Enterprises Act 1995* (Tas) ss 24–5; *State Owned Enterprises Act 1992* (Vic) s 36; *Statutory Corporations (Liability of Directors) Act 1996* (WA) ss 5, 9–12.

[112] *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(3); *Government Owned Corporations Act 2001* (NT) s 20; *Public Corporations Act 1993* (SA) s 15(1); *Government Business Enterprises Act 1995* (Tas) ss 24–5; *State Owned Enterprises Act 1992* (Vic) s 36(2); *Statutory Corporations (Liability of Directors) Act 1996* (WA) s 10.

[113] The duty is framed differently in each jurisdiction: see, eg, *PGPA Act* (n 8) s 26; *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(2); *Public Corporations Act 1993* (SA) s 16(1); *Government Business Enterprises Act 1995* (Tas) s 25(2); *Public Administration Act 2004* (Vic) ss

using one's position or information gained in the course of one's duties to gain an advantage or cause detriment to the corporation.[114] In Tasmania there is also a duty to avoid insolvent trading.[115]

The enforcement of the duties varies considerably. The primary consequence for contravention of the *PGPA Act* duties, which apply to every official in every Commonwealth entity, is termination of employment.[116] The ACT, Northern Territory[117] and Queensland[118] legislation applies or assumes the operation of the *Corporations Act*, which suggests that the civil penalty enforcement mechanisms contained in the *Corporations Act* apply. In New South Wales, South Australia and Tasmania, breach of the duties is a criminal offence, punishable by fine or (in Tasmania) imprisonment.[119] Tasmanian legislation also confers power to make a disqualification order and impose a penalty up to $200,000, which is similar to the civil penalty powers conferred by the *Corporations Act*.[120] Proceedings may be brought to recover compensation for breach in Victoria and Western Australia,[121] and, in Victoria, the Minister may bring proceedings to recover damages from a person who contravenes the duties.[122]

There has not been a clearly articulated policy rationale for the public sector duties.[123] Given that public sector duties are directly modelled on the law of corporate governance, it seems reasonable to conclude that they are intended to perform a similar function in the public sector as the corporate governance rules play in the private sector. Notwithstanding disagreement about the proper

79(1)(a)–(b); *State Owned Enterprises Act 1992* (Vic) s 36(1); *Statutory Corporations (Liability of Directors) Act 1996* (WA) s 9.

114 See, eg, *PGPA Act* (n 8) ss 27–8; *State Owned Corporations Act 1989* (NSW) sch 10 cls 3(4)–(5); *Government Business Enterprises Act 1995* (Tas) ss 24(6)–(7); *State Owned Enterprises Act 1992* (Vic) ss 36(3)–(4); *Statutory Corporations (Liability of Directors) Act 1996* (WA) ss 11–12.

115 *Government Business Enterprises Act 1995* (Tas) s 25.

116 *PGPA Act* (n 8) s 30(1). The notice of termination of employment must be tabled before each House of Parliament: at s 30(4). See also Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (Cth) 29 [206].

117 See, eg, *Territory-Owned Corporations Act 1990* (ACT) s 12; *Government Owned Corporations Act 2001* (NT) s 20.

118 *Government Owned Corporations Act 1993* (Qld) s 76.

119 See, eg, *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(3); *Public Corporations Act 1993* (SA) s 15(4); *Government Business Enterprises Act 1995* (Tas) ss 24–6.

120 *Government Business Enterprises Act 1995* (Tas) ss 29(3)(a)–(b).

121 *State Owned Enterprises Act 1992* (Vic) s 37; *Statutory Corporations (Liability of Directors) Act 1996* (WA) s 14.

122 *State Owned Enterprises Act 1992* (Vic) s 37.

123 Marco Bini, 'Duty to Act in the Best Interests of the Public Entity: Control and the Importance of Values' (2016) 34(6) *Company and Securities Law Journal* 438, 444; Benjamin B Saunders, 'The Public Sector Duty of Care and Diligence' (n 8) 665–7.

role and nature of corporate law,[124] there is widespread agreement that one key purpose of directors' duties is to align the interests and incentives of directors with those of the company.[125] Given that corporate law expressly imposes such a duty on directors, it would be difficult to deny this.[126] The application of equivalent duties in the public sector suggests that directors of government corporations and officials of statutory authorities occupy an analogous position to company directors, and that public sector governance is intended to serve a similar function.

If the directors and officials are the 'agents', who or what is the 'principal' for whose benefit they must act? As noted, both statutory authorities and government corporations are accountable to Ministers; further, the shares in government corporations are held by one or more Ministers. As such, those Ministers, or 'the government' of which they are part, could be seen as the principal. However, this is unlikely to be a satisfactory explanation. Ministers do not act for their own benefit in exercising their powers but do so by virtue of their public office as Ministers of the Crown. Ministers exercise their oversight functions, including those conferred by their position as shareholders in government corporations, 'on trust' for the state or the people.[127] Accordingly, the public or the community is best seen as the ultimate principal or beneficiary of the powers exercised by government corporations and statutory authorities,[128] and the duties are intended to align the interests of officers with those of the public.[129] That is, notwithstanding the existence of a developed public law regime of accountability and review, the public governance duties aim to fill a gap in this regime and mitigate agency problems by aligning the incentives of public sector entities with the public interest.

[124] Barnali Choudhury and Martin Petrin, 'Introduction' in Barnali Choudhury and Martin Petrin (eds), *Understanding the Company: Corporate Governance and Theory* (Cambridge University Press, 2017) 1.

[125] See, eg, RP Austin and IM Ramsay, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) 443 [8.010]; Rosemary Teele Langford, *Directors' Duties: Principles and Application* (Federation Press, 2014) 1.

[126] *Corporations Act* (n 10) s 181(1).

[127] Paul Finn, 'A Sovereign People' (n 107) 22.

[128] Stephen Bottomley, 'Corporatisation and Accountability: The Case of Commonwealth Government Companies' (1997) 7(2) *Australian Journal of Corporate Law* 156, 163–5.

[129] John Farrar and Pamela Hanrahan, *Corporate Governance* (LexisNexis Butterworths, 2017) 486, 492, 504.

## IV Agency Problems in Statutory Authorities and Government Corporations

From the discussion in Part III, it is apparent that the structure and governance of non-departmental entities evince several contradictory emphases. Under standard corporate models, directors of companies have high levels of decision-making autonomy. Accordingly, devolving high levels of responsibility onto boards of statutory authorities and government corporations has a centrifugal tendency, devolving power away from the Cabinet and core institutions of government. But these entities also exist within a constitutionally entrenched Westminster system which has a strongly centripetal tendency. Under this system, Ministers are firmly at the centre of governmental decision-making, exercising significant levels of control over Parliament and the entirety of the executive government. Legislation also confers significant powers on Ministers in relation to both statutory authorities and government corporations. This Part argues that the position of the Minister in the context of this constitutional overlay of responsible government creates intractable agency problems in relation to both statutory authorities and government corporations, which hinder the effectiveness of the governance framework applicable to those entities.

### A *Ministers as Principals, Ministers as Agents*

As discussed in Part III, public sector governance duties aim to solve the potential for divergence between the interests of non-departmental entities and the public. The primary role of scrutinising the performance of such officers is performed by Ministers. This occurs through the mechanisms of responsible government: Ministers are collectively and individually responsible for the performance of their functions to Parliament, which includes responsibility for the performance of entities within the Minister's portfolio, including both government corporations and statutory authorities.[130] In this way, responsible government attempts to solve the agency problem through political mechanisms of accountability, although this terminology is not typically used in the public law context. Ministers also hold the shares in government corporations and have a more specific accountability role in relation to those entities. Ministerial responsibility will extend to the performance by a Minister of his or her functions as shareholder in a government corporation.

One difficulty with this position is that it solves one set of agency problems by creating another. As argued in Part III, the ultimate 'principal' is the public, for whose benefit officers of government corporations and statutory authorities

[130] See, eg, Victorian Ombudsman (n 3) 31–2 [103].

ought to act, rather than the benefit of the Ministers who hold the shares in such entities. The structure of responsible government and ministerial shareholding interposes Ministers between the public and the relevant entity, devolving onto Ministers a crucial role in ensuring accountability and rendering Ministers responsible to Parliament for the performance of the entity. In relation to government corporations, Ministers are shareholders, responsible for ensuring that the corporation carries out its functions properly. The performance of a Minister's oversight functions will typically be subsumed within an assessment of the Minister's (or the government's) performance more generally. In both cases, responsibility for ensuring that officers perform their functions properly is devolved onto the responsible Minister.

However, both of these positions introduce the risk of conflict between the interests of the Minister and those of the public. Ministers may be, and frequently are, actuated by personal or political concerns, and so may not act in the interests of the public in discharging their functions. Accordingly, the manner of solving the agency problem in relation to public sector entities introduces another agency conflict, namely the potential for the interests of a Minister, in exercising his or her oversight functions, to diverge from those of the public.

A 2013 Victorian Ombudsman report indicates the potential for another agency problem, namely the potential for conflicts between the interests of departments and non-departmental entities.[131] Although departments are emanations of their Ministers and have no separate legal existence, departments have their own institutional priorities which may differ from those of their Ministers. William A Niskanen famously argued that bureaucrats aim to maximise the total budget of their bureau rather than acting in the public interest, seeking such benefits as salary, reputation and power.[132] Dealings between a Minister and a statutory authority or government corporation will typically be conducted upon the advice of the department; indeed, routine correspondence may be largely conducted by the department with little ministerial input. It is possible, therefore, that departmental advice may conflict with advice provided by the Minister,[133] which creates the possibility of further divergence of interests.

[131] Ibid 36–7 [122].

[132] William A Niskanen, 'Non-Market Decision-Making: The Peculiar Economics of Bureaucracy' (1968) 58(2) *American Economic Review* 293, 293. For discussion of Niskanen's model, see André Blais and Stéphane Dion, 'Are Bureaucrats Budget Maximizers? The Niskanen Model & Its Critics' (1990) 22(4) *Polity* 655.

[133] Victorian Ombudsman (n 3) 37 [122].

### B *Ministers as Shareholders, Ministers as Directors*

Another agency conflict arises due to the nature of the powers conferred on Ministers. Under the principles of ministerial responsibility, Ministers play a key role in supervising government corporations and statutory authorities.[134] It is also the case that, as noted above, legislation confers a wide range of powers on Ministers in relation to these entities. While some of these functions are similar to those held by shareholders in relation to companies, others more closely resemble board-like functions, and in some jurisdictions are analogous to those exercised by the corporate regulator, ASIC.

As noted earlier, typical board functions include appointing the company's chief executive, formulating the company's strategy and business plan, approving budgets and key management decisions, and monitoring the company's performance.[135] Ministers of departments or other centralised bodies possess powers in relation to both government corporations and statutory authorities which are analogous to all of these functions. Statutory authorities are created by legislation, which defines the purposes and functions of the relevant authority.[136] Government corporation legislation in every Australian jurisdiction other than the Commonwealth also specifies in general terms the main functions and objectives of such entities.[137] When establishing public entities, governments often circumscribe their purposes and functions, and require them to comply with specific obligations,[138] which constrains the ability of the board to determine the strategy and objectives of the entity. Government corporations are required to prepare a corporate plan or statement of corporate intent in consultation with the Minister or the voting shareholders, specifying such matters as the corporation's objectives, undertakings and performance targets.[139] Ministers may direct a government corporation to undertake certain functions,

[134] *Uhrig Report* (n 13) 35.

[135] Austin and Ramsay (n 125) 242 [7.060].

[136] See, eg, *AML and CTF Act* (n 90) s 210; *Australian Human Rights Commission Act 1986* (Cth) s 11; *Commonwealth Electoral Act 1918* (Cth) ss 6(2A)(d), 7.

[137] *Territory-Owned Corporations Act 1990* (ACT) s 7; *State Owned Corporations Act 1989* (NSW) ss 8, 20E; *Government Owned Corporations Act 2001* (NT) s 4; *Government Owned Corporations Act 1993* (Qld) ss 14, 17; *Public Corporations Act 1993* (SA) s 11; *Government Business Enterprises Act 1995* (Tas) s 7; *State Owned Enterprises Act 1992* (Vic) ss 18, 69.

[138] See, eg, 'State Owned Enterprises (State Body — VicForests) Order 2003' in Victoria, *Victoria Government Gazette*, No S 198, 28 October 2003, 1, cls 3(2)–(3), (5)–(7); 'State Owned Enterprises (State Body — State Owned Enterprise for Irrigation Modernisation in Northern Victoria) Order 2007' in Victoria, *Victoria Government Gazette*, No G 51, 20 December 2007, 3199, cls 4–5, 7.

[139] *State Owned Corporations Act 1989* (NSW) s 21; *Government Owned Corporations Act 1993* (Qld) ch 3 pts 7–8; *State Owned Enterprises Act 1992* (Vic) ss 41–2.

although the extent of such powers varies from jurisdiction to jurisdiction,[140] whereas in private companies shareholders cannot direct the board as to the exercise of its powers.[141] In every jurisdiction, centralised codes of conduct apply to public sector entities.[142] While Ministers may not themselves directly make these codes, they impose constraints upon the power of the board to determine and set the culture of the entity.

The *OECD Guidelines on Corporate Governance of State-Owned Enterprises* recommends that 'government should allow [state-owned enterprises ('SOEs')] full operational autonomy to achieve their defined objectives and refrain from intervening in SOE management' and that 'boards of SOEs should be assigned a clear mandate and ultimate responsibility for the enterprise's performance'.[143] The constraints noted in the previous paragraph, including the potential for Ministers to interfere in the management of statutory authorities and government corporations, compromise the autonomy of such entities and the clarity of the responsibility of their boards.

In private companies, the directors are typically appointed by the shareholders, while the chief executive officer and senior management are appointed by the board. In many government corporations and some statutory authorities, Ministers exercise both these powers. In government corporations, the power to appoint and remove the members of the board and the chief executive officer is typically conferred on Ministers or the Governor or Governor-General (which makes decisions on the advice of the Cabinet), or, if the power is vested in the board, its exercise requires prior ministerial approval.[144] Where statutory authorities adopt a board model, the directors are typically appointed by

[140] *State Owned Enterprises Act 1992* (Vic) s 45.

[141] *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34, 43 (Collins MR), 45 (Cozens-Hardy LJ); *Quin & Axtens Ltd v Salmon* [1909] AC 442, 443 (Lord Loreburn LC); *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89, 95–6 (Cozens-Hardy MR); *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 837 (Lord Wilberforce for the Court).

[142] See, eg, *Public Service Act 1999* (Cth) s 13; Public Service Commission (Qld), *Code of Conduct for the Queensland Public Service* (1 January 2011) (made under *Public Sector Ethics Act 1994* (Qld) pt 4); Commissioner for Public Sector Employment (SA), *Code of Ethics for the South Australian Public Sector* (July 2015) (made under *Public Sector Act 2009* (SA) ss 14–15); *State Service Act 2000* (Tas) s 9; *Public Sector Management Act 1994* (WA) ss 9(a), 21, 80(b). Note that these codes do not apply to all types of public service entities: see, eg, *Public Sector Ethics Act 1994* (Qld) sch s 2 (definition of 'public service agency').

[143] OECD, *OECD Guidelines on Corporate Governance of State Owned Enterprises* (OECD Publishing, 2015) 18, 26.

[144] See, eg, *State Owned Corporations Act 1989* (NSW) s 20K; *Government Owned Corporations Act 2001* (NT) ss 13(7), 16(4); *Government Owned Corporations Act 1993* (Qld) ss 89, 92; *Public Corporations Act 1993* (SA) s 35; *Government Business Enterprises Act 1995* (Tas) ss 11(2), 18(2), (5), sch 5 cl 8; *State Owned Enterprises Act 1992* (Vic) ss 25, 30(3).

Ministers or the Governor or Governor-General,[145] and the chief executive officer is typically appointed by the board,[146] sometimes requiring the prior approval of the Minister.[147] Government corporations need ministerial approval to engage in certain transactions such as transferring property to subsidiaries or borrowing money.[148]

Some of these functions are similar to those exercised by shareholders: in particular, appointment of the board and holding the board to account. Others, especially the power to appoint the chief executive officer or determine the entity's strategy, much more closely resemble typical board powers. This has two consequences. The first is that boards of government corporations and statutory authorities in important respects lack the powers wielded by directors of private companies. Because Ministers exercise key powers, boards lack full power to act and are significantly constrained by the public sector governance framework. As a result, the board's function is sometimes confined to the delivery of outcomes determined by the government, which limits the ability of boards to provide effective governance.[149]

The second consequence is that, in relation to government corporations and some statutory authorities, Ministers effectively exercise a role similar to that of a director.[150] Some functions that are conferred on boards of private sector companies have been conferred on Ministers in relation to non-departmental entities.[151] Ministers, under the public law structures of responsible government (in relation to both government corporations and statutory authorities) and as shareholders in government corporations, are intended to perform an important accountability function in relation to both types of entities, holding the board to account for the performance of its functions.

Drawing from agency analysis, Ministers are responsible for solving the agency problem and ensuring that directors perform their functions in the public interest. However, given their board-like functions, Ministers are partially responsible for crucial decisions relating to public sector entities, in addition to their shareholder-like function and public law accountability function. As the

[145] See, eg, *NDIS Act* (n 72) s 127(1); *Clean Energy Finance Corporation Act 2012* (Cth) s 16(1) ('*CEFC Act*').

[146] See, eg, *NDIS Act* (n 72) s 160(1); *Infrastructure Australia Act 2008* (Cth) s 29(1).

[147] See, eg, *CEFC Act* (n 145) s 34(1).

[148] *Government Business Enterprises Act 1995* (Tas) s 10; *State Owned Enterprises Act 1992* (Vic) sch 1 pt B cl 8.

[149] *Uhrig Report* (n 13) 40–4.

[150] Marco Bini, 'Generic and Specific Approaches to the Liability and Duties of Directors on Government Boards and Authorities' (2004) 22(7) *Company and Securities Law Journal* 460, 463, 476.

[151] *Uhrig Report* (n 13) 40–1.

*Uhrig Report* noted, the role of the Minister in relation to some statutory authorities 'may be considered to be equivalent to that of a single owner of an organisation who would retain the right to direct the management on critical success factors, making a board redundant'.[152] In practice, Ministers interfere from time to time in the management of government corporations.[153] Thus, the Minister is placed in the position of being required to judge the performance of an entity which the Minister's own actions (or lack thereof) may have contributed to. This blurs the lines of accountability, as potentially more than one party may be responsible for poor performance. Reviews of public sector governance have noted that a lack of clarity as to the respective roles and responsibilities of Ministers, departments, and statutory authorities is a recurring concern in reviews of public governance.[154]

### C *The Responsible Government Problem*

As noted, ministerial shareholders are subject to the constitutional conventions of responsible government in performing their functions. These conventions provide an additional source of agency conflicts in relation to statutory authorities and government corporations. Under the Westminster system as applicable in Australian jurisdictions, individual Ministers are responsible to Parliament for the performance of their functions and for the actions of their departments. Views differ as to the extent to which Ministers are responsible for the performance of non-departmental entities (ie government corporations and statutory authorities) which stand outside the traditional structures of government departments.[155] Some have argued that the incorporation of responsible government into the *Constitution* limits the Commonwealth's power to create bodies for which no Minister is politically responsible.[156] It is true, in a general sense, that 'government, through Ministers, is accountable for statutory authorities'.[157] Christos Mantziaris has argued that

[152] Ibid 35.

[153] Michael J Whincop, *Corporate Governance in Government Corporations* (Ashgate, 2005) 16.

[154] See, eg, *Uhrig Report* (n 13) ch 4; Justice Neville Owen, *Royal Commission into the Failure of HIH Insurance: A Corporate Collapse and Its Lessons* (Report, April 2003) vol 1, 208.

[155] John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) 200.

[156] Geoffrey Lindell, *Responsible Government and the Australian Constitution* (n 106) 18.

[157] *Uhrig Report* (n 13) 17. Ministerial accountability is a prominent theme throughout the *Uhrig Report* (n 13): see, eg, at 34, 42.

> a minister assigned the responsibility for a particular statutory corporation is accountable to Parliament for the affairs of that corporation, and, through the Parliament, to the electorate.[158]

By contrast, George Winterton has argued that 'Ministers are not responsible to Parliament for the activities of statutory authorities over which they have no control'.[159] Where a statutory entity is assigned functions and powers to the exclusion of the executive government, the traditional doctrine of responsible government does not apply in relation to those functions.[160]

For reasons such as these, scholars have cautioned against 'vague and all-embracing assumptions' concerning the degree of a Minister's responsibility for a statutory authority.[161] Nevertheless, in practice Ministers likely retain substantial responsibility for both government corporations and statutory authorities. This is so for several reasons. First, while ministerial responsibility for these entities is more remote than for government departments, in Australian jurisdictions, governments and Ministers retain substantial powers in relation to both government corporations and statutory authorities. As noted, these include the power to appoint directors,[162] give directions,[163] determine corporate strategy,[164] and impose general policy requirements which agencies must comply with.[165] Although the precise scope of the powers available to a Minister depends on the applicable legislation, Ministers will be responsible for the exercise of these powers.[166] In Victoria, legislation specifically provides that the Minister responsible for a public entity is accountable to Parliament in respect of 'the exercise by the public entity of its functions'.[167]

The government retains an ultimate responsibility for the management and governance of the public sector. The constitutional position may therefore be

158 Mantziaris (n 62) 321.

159 Winterton (n 100) 110.

160 WJ Campbell, 'The Statutory Corporation in New South Wales' (1952) 11(3) *Australian Journal of Public Administration* 108, 113.

161 LC Webb, 'Statutory Corporations under Review' (1955) 14(3) *Australian Journal of Public Administration* 158, 162.

162 See, eg, *Postal Corporation Act* (n 97) s 73.

163 See, eg, *Australian Communications and Media Authority Act 2005* (Cth) s 14; *State Owned Enterprises Act 1992* (Vic) ss 16C, 41(9)–(11), 45.

164 *State Owned Corporations Act 1989* (NSW) s 21; *Government Owned Corporations Act 1993* (Qld) ch 3 pts 7–8; *State Owned Enterprises Act 1992* (Vic) ss 41, 42(g).

165 *PGPA Act* (n 8) ss 21–2.

166 RN Spann, *Government Administration in Australia* (George Allen & Unwin, 1979) 142.

167 *Public Administration Act 2004* (Vic) s 85(2)(a). See also Marco Bini, 'The Public Administration Act 2004 (Vic): A New Approach to the Liability and Duties of Directors on Government Boards and Authorities' (2008) 26(3) *Company and Securities Law Journal* 172, 183.

that Ministers bear the ultimate responsibility for the actions of statutory agencies.[168] This is the case in both an individual and a collective sense. A Minister will typically be responsible for the overall direction of agencies within his or her portfolio.[169] Collectively, if there are problems with the functioning of a particular entity, the government will be responsible to ensure that appropriate measures are put in place to fix those problems. For example, regardless of whether or not blame attaches to the government for the performance of an entity, if evidence indicates that legislative amendments are necessary to improve the performance of the entity or to solve certain problems, these will need to be initiated by the government.

Finally, regardless of the 'correct' constitutional position, Ministers may be criticised in Parliament or by the media if there is a perception that they are responsible. If a government corporation does not perform effectively, or engages in mismanagement, the responsible Minister may be criticised for not actively monitoring the entity, or for not setting appropriate policies. In practice, therefore, it may be difficult for Ministers to avoid political accountability for the performance of a portfolio entity.

Accordingly, notwithstanding the attempt to create public sector bodies at arms' length from the government, Ministers will be unable to escape some level of responsibility for government corporations and statutory authorities. At the very least, Ministers will be responsible for the exercise or non-exercise of powers conferred on them in relation to such entities. Poor performance or governance will inevitably become a political question for the government of the day to sort out. For instance, where a director of a government corporation or statutory authority is unsuited for his or her position, or engages in mismanagement, the Minister who appointed that director may be criticised for not having appointed a suitable candidate. Where a government corporation or statutory authority fails to perform effectively, the government or Minister may be criticised for not exercising the power of direction properly or at all. Where there is fraud or misconduct, the government may be criticised for not having implemented a sufficiently robust system of financial controls or oversight.

Commenting on the position in the United Kingdom, Terence Daintith and Alan Page aptly encapsulated the position of Ministers in relation to executive agencies:

[168] John Goldring and Roger Wettenhall, 'Three Perspectives on the Responsibility of Statutory Authorities' (1980) 15(2) *Politics* 136, 139.

[169] Paul Latimer, 'Ministerial Directions to Independent Statutory Commissions (Commissions Causing Trouble for Their Minister)' (2004) 25(1) *Australian Bar Review* 29, 33; Ian Killey, *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009) 113.

> [T]he vesting of functions in ministers is both a consequence and a cause of ministerial responsibility: it is because ministers can be held responsible that functions are vested in them; it is because functions are vested in them that they are held responsible.[170]

That is, the powers of Ministers are commensurate with their level of responsibility. Where Ministers possess powers in relation to statutory authorities and government corporations, they will be responsible for the exercise of those powers.

But it is also the case that Ministers retain an ultimate responsibility for the performance of statutory authorities and government corporations within their portfolios. This suggests that their powers will, in practice, be commensurate with that responsibility, even where an entity has been structured so as to minimise the powers of Ministers in relation to the entity. That is, ministerial responsibility for the performance of non-departmental entities means that Ministers will in practice possess or exercise power in relation to those entities which goes beyond the legal powers conferred by statute. Indeed, the constitutional conventions of responsible government may require that Ministers have powers, such as the power to issue directions to certain entities, notwithstanding that such powers are not conferred by the applicable statute.[171]

This may create pressure or incentives for Ministers to intervene in the management of non-departmental entities, even where that interference is inconsistent with the applicable legislative and governance framework. This is likely to be more acute in relation to government corporations and statutory authorities where there is no legislatively mandated independence. As noted by Mantziaris, the conventions of responsible government may require a Minister to intervene in the affairs of a government corporation in a manner not permitted to the shareholder of a private company.[172] So long as ministerial responsibility remains the principal mechanism of accountability, statutory authorities and government corporations will remain vulnerable to interference.[173]

As a result, Ministers will be politically invested, by virtue of responsible government, in the performance and actions of statutory agencies and

[170] Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press, 1999) 39–40. They continued, at 40:

> The Government, however, set its face against any changes in accountability for the work of agencies, the Prime Minister emphasizing that 'Ministers will continue to account to Parliament for all the work of their Departments, including the agencies' …

[171] *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 231 (Finn J) ('*Hughes*'); Mantziaris (n 62) 327–9.

[172] Mantziaris (n 62) 321.

[173] Daintith and Page (n 170) 45.

government corporations in their portfolios, and will also exercise important functions in relation to those entities which may go beyond the powers formally conferred by statute. The consequence of this is that in many cases a Minister will be unable to evaluate the performance of entities within his or her portfolio impartially because the Minister's own performance will be judged partly by reference to the performance of such entities.

This creates a significant agency problem for the governance and accountability of government corporations and statutory authorities. Ministers are supposed to perform the function of solving the agency problem that exists with respect to such entities by holding their officers accountable. But Ministers themselves are politically invested in those entities and, therefore, are unable to fulfil that role impartially. The extent to which this is the case will depend on the nature and structure of the entity. Some non-departmental entities are structured at arms' length from the government,[174] with significant levels of decisional independence, usually in order to be free from government influence. A Minister's responsibility for such entities may be limited. However, Ministers retain the power to issue directions in relation to many government corporations and statutory authorities, either under the authorising legislation or potentially as a result of constitutional convention.[175]

Some public sector entities are deliberately structured to be vehicles for implementing government policy and remain closely aligned with the government of the day,[176] such that the government can be criticised for any failures in implementation or delivery. These entities raise the agency problem identified by this article in a particularly acute form. It is much more difficult for a Minister to attempt to evade responsibility for an entity through which the government is attempting to implement a major policy commitment. Yet, the Minister remains responsible for overseeing the entity and scrutinising its performance.

One irony of this position is that the more powers are conferred on a Minister by legislation in relation to a statutory authority or government corporation, the greater the level of involvement and oversight the Minister will be expected to provide in relation to that body. However, the more power a Minister has, the greater the level of responsibility the Minister will bear in relation to that entity, and therefore the greater the degree of oversight the Minister should be expected to perform.

174 See, eg, *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 18.

175 *Hughes* (n 171) 246 (Finn J); Mantziaris (n 62) 330–1.

176 See, eg, *NDIS Act* (n 72) s 121, which gives the responsible Minister the power to give directions to the National Disability Insurance Scheme Launch Transition Agency about the performance of its functions.

## V Conclusion

This article has examined the problems that arise as a result of the dual private and public regulatory overlays that exist in relation to statutory authorities and government corporations. It has argued that vesting oversight in relation to these entities in portfolio Ministers who are subject to the conventions of responsible government creates multiple layers of agency problems which hinder meaningful accountability. 'Public' considerations impede Ministers from carrying out their 'corporate' functions, and 'corporate' considerations impede Ministers from carrying out their 'public' functions.

This problem is unlikely to disappear. Government reviews have often noted that a key problem in public sector governance is the persistent lack of clarity as to the respective responsibilities of the Ministers, departments and entities.[177] The constitutional status of responsible government complicates any attempt to attain this clarity. Even where the governing legislation applicable to a non-departmental entity clearly spells out the respective roles of the Minister, the board, and the department, the imperatives of ministerial responsibility may override the terms of the statute given that 'the vesting of functions in ministers is both a consequence and a cause of ministerial responsibility'.[178] That is, because Ministers are responsible, their powers will tend in practice to reflect that constitutional responsibility, notwithstanding the formal legislative position. In short, the responsible government problem means that it will never be precisely clear who is responsible for what.

In order to achieve meaningful governance and accountability in relation to statutory authorities and government corporations, it is necessary to establish mechanisms which avoid those agency problems. A tentative implication of this argument is that effective mechanisms of accountability must lie outside the traditional structures of ministerial responsibility: for example, vesting oversight of the performance of statutory authorities and government corporations in an independent regulator. Complicating any reform proposals is the fact that it is desirable to have consistency in government policy, financial standards, and so on, and ministerial oversight can help achieve this. Unpacking precisely what those measures would entail is a question for future research.

Responsible government is, of course, deeply entrenched in our constitutional system and could not be excised without fracturing our public law. Nevertheless, the constitutional arrangements at the Commonwealth and state

[177] See, eg, *Uhrig Report* (n 13) ch 4; Victorian Ombudsman (n 3) 12 [39], 23 [82], 32 [105]; Legislative Assembly Public Bodies Review Committee, Parliament of New South Wales, *Report on Corporate Governance: Follow-Up Review of Performance Audit Report on Corporate Governance* (Report No 6/53, 21 September 2006) 15 [3.2]; Mantziaris (n 62) 323.

[178] Daintith and Page (n 170) 39.

levels are deliberately non-prescriptive and intended to allow for flexibility in governmental arrangements, including through the creation of other forms of executive accountability mechanisms which are better suited to the changed nature of contemporary society.[179] Responsible government, therefore, does not preclude the formation of creative accountability mechanisms which lie outside the traditional structures of ministerial responsibility.[180]

[179] Mantziaris (n 62) 347.

[180] See Benjamin B Saunders, 'Responsible Government, Statutory Authorities and the *Australian Constitution*' (n 99) 28.