New Responsibilities for Officers of Commonwealth Authorities and Companies

15 March 2000

Ian McPhee
Deputy Auditor-General
Introduction

The enactment of the Commonwealth Authorities and Companies legislation has been a very positive development for Commonwealth administration and accountability.

- it adopted a consistent legislative approach to articulating the reporting, accountability and other rules for Commonwealth authorities and companies
- replacing a patchwork of existing legislative provisions and variable policy positions
- it did not seek to override Corporations Law requirements pertaining to government-owned companies; rather complementary legislative provisions were put in place to ensure:
  - responsible Ministers were kept informed of key developments;
  - the Auditor-General had audit responsibility; and
  - annual reports were tabled in Parliament
- officers’ duties (including directors) were articulated for the first time for a number of statutory bodies and modelled on Corporations Law requirements
- there was thus a marked increase in interest in these requirements
- it allowed Ministers to tailor the accountability arrangements to suit their own purposes
- for partly-owned companies (like Telstra), the legislation is very light handed only requiring auditing by the Auditor-General and tabling of the annual report.

Inquiries into the CAC Act

The CAC Act has been in place for more than 2 years now and its operation has been subject to inquiry by the JCPAA:

- in relation to corporate governance arrangements for GBEs (JCPAA Report 372 tabled December 1999); and
- in its own right, with its stable-mate, the Financial Management and Accountability Act (to be tabled 16 March 2000)

Interestingly, one of the issues explored by the JCPAA in its GBE governance inquiry was whether the CAC Act should be discontinued or rolled back as far as its approach to GBEs was concerned:
Some GBEs informed the Committee that the CAC Act created additional compliance costs relative to private sector competitors and therefore was inconsistent with competitive neutrality provisions.

ANAO argued that CAC Act strengthens Ministerial and Parliamentary oversight and accountability.

In the event the Committee did not support removing GBEs from their current obligations under the CAC Act.

On the matter of the application of Administrative Law (Freedom of Information) Act 1982, the Ombudsman Act 1976, the Administrative Appeals Tribunal Act 1975 and the Administrative Decisions (Judicial Review) Act 1977, the Committee recommended the Minister for Finance and Administration review its application on a case by case basis.

Moving from GBEs to the wider population of CAC bodies, the most contentious provisions have related to the responsibilities of directors and officers. The following issues were raised in submissions to the JCPAA inquiry into the FMA and CAC Acts Joint Committee of Public Accounts and Audit, Inquiry into the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997. Volume 1 Submissions 1 - 49:

The CAC Act could be used to capture generic processes of appointment, termination and remuneration of chief executives, board directors and chairpersons (Submission by the Department of Health and Aged Care of 27 August 1999)

DoFA advised that for companies, the Corporations Law provides for the appointment and termination of directors (essentially the powers rest with shareholders). For authorities, there is a wide diversity in the enabling legislation relating to the appointment of directors and chairpersons (i.e. provisions relating to the particular attributes/skills of directors, their numbers etc). Provisions relating to the termination of directors are reasonably uniform. DoFA nevertheless accepted there may be scope for consolidating into the CAC Act generic principles for the appointment and termination of directors, chairpersons and CEOs, based on good corporate governance practice. (Submission by DoFA to the JCPAA of 1 November 1999.)

Section 26(1)(b) of the CAC Act prevents a CAC body from indemnifying directors or officers involved in circumstances where they have acted with a lack of good faith. The ABC has indicated it indemnifies its employees in relation to defamation action brought against them by reason of their involvement in the preparation of items broadcast by the ABC; and has raised the issue about
whether their employees’ indemnity may be unlawful in certain circumstances. The ABC has advised that this is a matter of legal uncertainty that has not yet been resolved. (Submission by the ABC to the JCPAA inquiry dated 23 August 1999)

- The provisions of the CAC Act relating to indemnification and insurance replicate the equivalent provisions in the Corporations Law.

- The definition of ‘officers’ who are deemed to have management responsibilities is seen by some as requiring clarification because it flows into questions of directors’ and officers’ liability insurance, and disclosure of remuneration of officers (above $100 000) in financial statements. (Submission by the Special Broadcasting Service to the JCPAA inquiry dated 23 August 1999; submission by CSIRO dated 3 September 1999.)

- The definition of ‘officer’ in the CAC Act replicates the definition of ‘officer’ in the Corporations Law.

There is little doubt that because CAC has raised the possibility of personal liability, directors of CAC bodies have more regularly considered and sought advice in understanding their responsibilities including in respect of potential conflict of interest matters. In this context, Stephen Skehill (formerly Secretary to the Attorney-General’s Department and now with Mallesons) wrote an article in the AFR on 6 March 1998 where he indicated that pre-CAC

‘For many, the offer of a part-time place on a Commonwealth statutory body was a welcome recognition of their achievements in their chosen field, an opportunity to extend their influence, and a chance to make a community contribution.

I was frequently asked about the nature of the new role, about the time it would take, and about the remuneration attaching to it.

But seldom was I asked about the potential legal liabilities that might flow from mistaken or negligent action of appointees or those reporting to them. And I was always thankful when those questions weren’t asked because they were difficult and the answers almost always obscure.’

He went on to say that

‘What might previously have been a bit of a sinecure to be accepted and
performed without too much critical examination is now something well worth careful thought.'

'Directors and officers of CAC bodies must not only act honestly but also exercise the degree of care and diligence that a reasonable person in a like position in a Commonwealth authority would exercise in the authority's circumstances...'

Skehill’s bottom line was that

'...to protect their personal interests, members of the councils and board of CAC bodies would be well advised to be well advised.'

The ANAO, in its own submission to the abovementioned JCPAA inquiry, made the point that the CAC Act is modelled on the Corporations Law and potential changes to the Act are therefore strongly influenced by developments in the Corporations Law and other rules and guidelines relating to public companies such as the ASX Listing Rules and publications of the Australian Institute of Company Directors (AICD). The ANAO suggested that a provision such as that in relation to the establishment of audit committees might be replaced by a broader requirement relating to corporate governance practices along the lines of Listing Rule 3C(3)(j) of the Australian Stock Exchange which requires each Australian company to include in its annual report a statement of the main corporate governance practices in place during the company’s reporting period. To assist companies to prepare the statement the ASX has included an indicative list of matters which a company may take into account when making the statement.

It is fairly clear that the governance model applicable to CAC bodies will in future draw heavily on Corporations Law developments.

Corporate Governance

The ANAO has utilised developments with respect to the CAC legislation as a stepping stone to promote better corporate governance in CAC bodies.

Our position reflects our view that while an audit opinion on financial statements provides an important level of assurance, the way to encourage better performance overall is through emphasising corporate governance and risk management.
The ANAO has produced a discussion paper, ‘Principles and Better Practices - Corporate Governance in Commonwealth Authorities and Companies’, which provides useful material covering:

- the general obligations of Boards, Ministers and Management;
- the complex inter-relationships in the public sector (involving e.g. Parliament and the Finance Minister);
- better practice governance processes ranging from suggestions for induction training for new members, strategy setting, performance assessment and review, just to mention a few;
- a summary of legal requirements; and
- a listing of further references.

In preparing the discussion paper we had the benefit of comments from a number of bodies including the ASX, Telstra, Australia Post, ABC, SBS and the CSIRO. We have received a favourable response to the publication of the paper.

In looking at some of the literature available, there is a risk in viewing corporate governance as a matter of compliance or ‘box ticking’. This is not intended and the more contemporary material emphasises this point. It is as much about performance as conformance. This was emphasised by the Cadbury Committee on the Financial Aspects of Corporate Governance, Report of the Committee on the Financial Aspects of Corporate Governance, London Stock Exchange, December 1992. in the UK where the Committee said:

'(Boards) must be free to drive their companies forward, but exercise that freedom within a framework of effective accountability.'

The principles outlined in the ANAO publication should be applied flexibly and with common sense to the circumstances of the authority or company. As indicated by the Business Round Table Business Round table - Statement of Corporate Governance, 1997:

'good corporate governance is not a one size fits all proposition.'

And the key to success is in the application of informed and independent judgements by suitably qualified and experienced people on the board - directors cannot rely upon ignorance, a failure to inquire or blind reliance on the judgement of others as a protection against liability for negligence (AWA Court of Appeal Judgement). And, of course, the chairman’s role in securing good corporate governance is critical.
Conclusion

It is fair to say, though, that directors and officers generally feel an ever-constant pressure associated with the need to achieve better performance particularly against the heightened level of performance standards and transparency expected. It is also fair to say that good corporate governance is a necessary foundation for long run performance.

The CAC Act has made a positive contribution to enhancing governance and accountability standards in the public sector. While its future is likely to be closely tied to Corporations Law developments, its solid foundations provide a sound basis for public sector companies and authorities to meet their accountability obligations.