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Arm's length bodies in the Australian Capital Territory — time for review?

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Introduction

In the *Governing the City State* report released in February 2011, reviewer Allan Hawke observed that 'there were currently around 180 boards and committees supported by the ACTPS ACT Public Service (ACTPS), many of which have a statutory basis.... While there are undoubted benefits from these structures, there are inevitable costs to the decision making process, principal among which is "dispersion of government entities and resulting lack of readability of the institutional system"' (Hawke, 2011: 99, quoting from OECD, 2002: 24). Hawke believed the system needed tidying up: along with recommendations relating to several particular entities, he wanted all ACT (Australian Capital Territory) government boards and committees to be reviewed 'with a view to ensuring the role and function of these bodies is clearly understood and that bodies recommended to continue have clearly designed roles and responsibilities that align with the Government's overall strategic direction and objectives' (Hawke, 2011: 7).

Somewhat similar sentiments have been expressed by reviews in the recent period in a number of countries. There is clearly considerable interest today in the masses of public bodies that inhabit what has sometimes been described as the 'outer public sector', made up of all the non-departmental but still public bodies that contribute so much to the active working of our governmental systems (on the Commonwealth, see Wettenhall 2010: ch.4). This article seeks to develop debate about this issue as it affects the ACT jurisdiction. It reports a limited review of the ACT position, both as a partial response to the relevant sections of the Hawke Report and as an up-date of earlier work in this area undertaken in the ANZSOG Institute for Governance and its forerunner Centre for Research in Public Sector Management (CRPSM) in the University of Canberra.¹ Amongst other things, it serves as a reminder that there has been long use of non-departmental bodies in the ACT, and that this use has been the subject of review by several other inquiry agents before the Hawke exercise.² The original intention was to support the main paper by an appendix reporting case studies of selected ALBs currently operating in the ACT, but that

remains a work for the future. The conclusion at this stage offers commentary and a main suggestion in line with the recommendation for further inquiry contained in the Hawke Report.³

A major outcome of the Hawke report was the restructuring of the ACT public service to constitute a single 'department', with all the old departments redesignated as 'directorates' within that single department.⁴ Just how much difference this has made to the working of the system remains a matter for investigation, and that is not the purpose of this article. However, since almost all the relevant international discourse about departments and their relations with ALBs assumes a multi-department ministerial and public service system, the term 'department' is used when appropriate to facilitate cross-system comparisons, with the term 'directorate' used in the particular post-Hawke ACT context.

A new class-name, and wide international interest

'Arm's length body' has emerged as a new class-name intended to embrace all those non-departmental/non-ministerial bodies that have been such an important feature of most governmental systems in the modern world. Very often in discussing such bodies over the years, the expression 'arm's length' has been used to indicate that they were distanced from ministers in a way that was impossible with regular departments. However, it is only very recently, pushed by the Read Before Burning document that accompanied the accession to office of the Cameron government in Britain (Gash et al., 2010), that the term 'arm's length body' (ALB) has come to be seen as an alternative class-name for those in much longer use such as NDPB or 'quango'.⁵ Whatever the class-name, of course, the arm's length distance could be big or small, which is one of the main lines of relevant discussion and relevant research.

The Read Before Burning exercise was by no means the first, and certainly will not be the last, significant inquiry undertaken in an effort to establish better order among, and better understanding of, Britain's ALBs. It followed others in lamenting the incoherence of the field and, acknowledging that there can be no single pattern, proposed a division of the field into four categories based on required degrees of independence for particular bodies; it also recommended sunset clauses for all new ALBs to ensure that bodies which are no longer 'fit for purpose' are phased out. The report sought 'a clear and sensible division of responsibility between ALBs, their sponsor departments, and ultimately with the public' (Gash et al., 2010: 14, 29, 52, 63). Its novelty lies in large part in its concern for ALBs as instruments of service delivery and its development of a bottom-up (from those receiving services) as well as top-down approach to management issues, thus tempering the 'whole-of-government' or 'joined-up government' emphasis in the past generation of reform-directed inquiries and reports in Britain and elsewhere.⁶ This issue is stressed here because the tide of international thinking about public sector reform appears to be shifting towards an emphasis on service delivery. Whole-of-government is not abandoned as a reform theme, but it is increasingly recognised that it needs to be tempered by a consideration of community needs at the delivery end of ALB

operations. The new focus on service delivery is apparent in recent developments in the Australian Commonwealth system (Moran, 2011).

Long use in Australia

Before considering how the ACT experience fares in this regard, it is important to acknowledge the very long and often quite innovative Australian use of ALB-type bodies. In the form of the statutory authority, ALBs are virtually as old as organised government in Australia: using nominated legislatures to pass the enabling acts, colonial governors of the pre-self-government period (usually up to the 1850s) were frequently importing the established British habit of using 'statutory authorities for special purposes' for functions such as road and bridge construction, public school and savings bank management, convict assignment and land registration (Webb & Webb, 1922; Wettenhall, 1987). The practice carried forward into the self-government period, and after federation in 1901 was adopted also by the new Commonwealth jurisdiction. What was very innovative was that, driven by the high policy importance of economic development and the lack of adequate private capital resources, the states used the same organizational arrangement for new enterprises involved in quasi-commercial but still public ventures like railways and tramways, water and irrigation systems, and many others. The authorities concerned were usually given corporate status at law to facilitate their commercial operations, giving rise to the new term 'statutory corporation'. There is considerable evidence that this innovative 'colonial' stance was influential in guiding movement in Britain itself towards use of the 'public corporation' form for its own public enterprises (Wettenhall, 1990, 1996).

These traditional Australian ALBs were, more often than not, staffed outside the respective public services, so that it could be said by the 1970s (and before the onset of the privatization pandemic) that some three-quarters of all Australia's public sector personnel were engaged directly by their employing authorities and so not part of a unified Commonwealth or state 'public service'. Where commercial operating factors were important, the authorities were also mostly 'off-budget' just as they were 'off-public service'. So the sense of a 'public sector' being much bigger and broader than a public service was well engrained in Australian administrative history. Commercial considerations were important also in the emergence of the government-owned (or state-owned) company as the main organizational variant of the statutory authority/corporation in the ALB field. In the 1980s–90s, the government-owned company became a popular alternative — with many statutory bodies converted to the new form — though doubts were often expressed that the resulting organizations were less accountable because of the non-involvement of parliament in their creation.⁷

Some structures at the weak end of the autonomy spectrum have remained fairly closely tied to supervising departments, so that the degree of separation has been doubtful in these cases — it may be convenient now to regard them as quasi-ALBs. In Britain the term 'executive agency' emerged in this context, and to a degree the

term, and the organizational conditions loosely covered by it, have been applied in Australia too.⁸

Use in the ACT: Pre-self-government foundations⁹

Early applications of the statutory authority form in the pre-self-governing ACT were simply extensions of the Commonwealth system. For territory governance as a whole, the Federal Capital Commission (1924-31) and the National Capital Development Commission (1957-88) played vitally important roles. For specific functions, operational bodies active in fields like electric power, theatre, cemetery and hospital management, policing, liquor licensing, professional and vocational registration and bush fire control performed much as did their counterparts in the states, except that oversight came from Commonwealth ministers. There were a few novelties, such as milk distribution administered by an ACT Milk Authority, and services like those provided by the Retail (Food) Markets and Showgrounds Trusts that might elsewhere have been within the province of local governments. And complications came from the long-standing practice of identifying particular public service positions within departments as registrars, directors, inspectors, controllers etc in statutes and regulations creating a variety of powers and responsibilities: these became statutory officials of a kind, though of a vastly different kind from significant, separate and clearly autonomous 'statutory officials' like ombudsmen and auditors-general.

As the issue of self-government gained increasing attention (Grundy et al., 1996), there were suggestions by Commonwealth ministers Enderby and Bryant that an adequate form of 'self-government' would consist of having many statutory authorities to cover a wide range of ACT services, with self-government achieved simply by seating members of a still-advisory-only territorial assembly on their boards to represent the community. However such schemes failed to attract support and the movement of the ACT to a far more conventional form of self-government in 1988-89 brought into being an also-conventional territorial public sector with its complement of ministerial departments and ALBs very largely consistent with the pattern customary in the Australian states — except, of course, that in the ACT a single government performed both state-type and municipal-type functions.

It is not so surprising that the ACT's situation as a small yet separately governed jurisdiction within a federal collection of states all larger than it — mostly much larger — has been a major factor in conditioning the evolution of its governing arrangements. Politicians, public servants and sometimes members of inquiry bodies all familiar with the arrangements in the states have together been the main designers of the ACT machinery, and they have usually been content to follow the example of the state systems in their designs. The consideration that economies of scale might suggest other arrangements has rarely been present. So often, in consequence, the ACT has emerged with more administrative units than are needed, on any rigorous assessment, to serve its small population. There is little awareness of advantages that might come from merging functions and establishing larger units better able to develop strong specialist and professional cadres. Against that, of

course, there are the 'small is beautiful'-type advantages that come from closeness to the constituencies being served. The point is simply that pros and cons of these kinds have rarely been consciously identified and weighed in an effort to ascertain the best interests of the ACT community as a distinctive governance jurisdiction. What is customary in the states has been assumed to be good enough for the ACT, and the copying operation has therefore been the dominant style. There have of course been some adjustments, but mostly of a fairly minor kind, crowding out any possibility of radical redesign.

An outer ACT public sector emerges: many ALBs, including a few TOCs

In one important respect, however, the ACT was soon to depart from the now-traditional state pattern. It would follow New South Wales in adopting a new corporate model for the management of state-owned enterprises developed in New Zealand to suit the aspirations of governments committed to state-shrinking agendas. The impetus in the ACT came from an inquiry by the Priorities Review Board (PRB) established by the Kaine Alliance Government in February 1990. The Board reported (with obvious surprise) that it had found the new and separate territory administration contained 92 non-departmental units in a government service less than half the size of a large state government department (PRB, 1990: 30, 38). It wanted as many of them as possible eliminated and their functions unambiguously returned to departments; but for several (like the ACTION bus network, the forest estate and the nominal 'housing trust'), it proposed movement to the New Zealand/NSW 'corporatisation model' (PRB, 1990: 63).

The Legislative Assembly acted speedily to pass the *Territory-Owned Corporations Act 1990*, which authorized the establishment of government-owned companies to operate under the national companies legislation: they would not be entitled to crown immunity and there would be no Territory liability for debts they incurred (unless the Territory agreed to be liable), they were required to make tax-equivalent payments and pay dividends out of earnings to the Territory, and the Chief Minister would determine who were the voting shareholders and hence board members. Before long three enterprises were brought within its compass: the totalizator betting agency ACTTAB, the electricity and water authority Actew (sometimes ACTEW), and the Mitchell Health Services complex which became Totalcare Industries Ltd. In one way or another, they have played a large and important part in the governance of the ACT: with some reduction in its functions, Totalcare became Rhodium, which was eventually disposed of under controversial circumstances;¹⁰ Actew has joined with the private AGL to form a major, continuing and effective public-private partnership (Wettenhall, 2007); and ACTAB continues more-or-less in its original form notwithstanding the privatization (and therefore disappearance from the several public sectors) of most of its state counterparts. What is at first glance surprising is that more ACT ALBs have not been brought into this territory-owned corporations (TOC) system: as the observations of the Hawke report and the

other inquiries preceding it make clear, inconsistencies and anomalies continue generally to infect this part of ACT governance.

Serious moves were made through the 1990s to bring the ALBs into a single public sector management framework. The Follett Labor Government's *Public Sector Management Act 1994* completed the process of separating the ACT Public Service from the Commonwealth Public Service and, infused by the whole-of-government thinking that was becoming a major stimulus for public sector reform generally, it brought the staffs of many ALBs into the notionally 'unified' public service. Then the Carnell Liberal Government's *Financial Management Act 1996* closed a number of trust funds which had aided the autonomous operation of some ALBs, and introduced into the system the concept of a purchaser-provider relationship under which portfolio ministers would buy services from ALBs within their portfolios. In the TOC companies, these ministers were also the principal voting shareholders, leaving them in a serious potential conflict-of-interest situation: so, in 1998, the ministerial arrangements were changed to make the Chief Minister and Deputy Chief Minister the main voting shareholders of the TOC companies, and to create a Government Business Enterprise (GBE) Monitoring Group initially within the Chief Minister's Department but moved to the then Treasury when that was established as a separate department. While aimed especially at the TOC enterprises, these changes affected many other ALBs; the functions of the GBE Monitoring Group soon settled in the Treasury's Finance and Budget Division.¹¹

Subsequent experience shows, however, that these changes were not sufficient to introduce order into the sector. Allegations of maladministration in the Stadiums Authority and several other members of the ACT family of ALBs led to special performance audits conducted by the Auditor-General's office around the turn of the century: the first looked particularly at problems with the redevelopment of Canberra Stadium in the lead-up to the hosting of Olympic Games Soccer matches (Auditor-General 2000), and the second looked more generally at a group of 16 statutory authorities with operational functions.¹² The findings were scathing about lack of accountability and conflicts of responsibility across the whole group, running to inadequate safeguards to prevent ministers from interfering unduly in authority affairs, unsatisfactory arrangements for appointing board members, inconsistencies that lacked apparent justification (eg, in remunerating part-time board members), and ambiguous guidelines generally on how authorities should be governed. There was recognition that different authorities had different needs; nonetheless it was considered that an effort should be made to prepare standard guidelines to aid all concerned in the operation of statutory authorities (Auditor-General, 2002; Hannaford, 2002). It became clear also that the Chief Minister's Department had issued a document entitled *Ethical Requirements for Appointees to ACT Government Boards and Committees: A Guide for ACT Government Agencies* in September 1999, but that 10 of the 16 authorities involved in the performance audit exercise declared that they had not seen it (Auditor-General, 2002: 60–61).

Disorder in the outer public sector

Studies of the ALB situation in many countries have commented on the characteristic untidiness of this part of the machinery of government, leading to efforts to classify the several forms of ALBs (on which see Wettenhall, 2003a). Thus, in another document associated with the recent British review, academic-consultant Matthew Flinders (2010: 35–36) noted that inquiry action had easily located around 900 ALB-type bodies but also that there were more created ‘off the radar’, and that many ministers he had worked for did not even know what bodies they were responsible for. The ACT situation is obviously far less complex, and most governance-savvy observers would have little difficulty in listing a dozen or 20 or so of the main ALBs operating in this jurisdiction. There are others, however, which rarely attract much attention and would be missed in many such listings, yet receive occasional mentions in the daily press. How many, without serious prompting, would include the Nominal Defendant of the ACT, the ACT Victims of Crime Commission, the ACT Insurance Authority, or the Public Advocate? What exactly is their status? What about Victims Support ACT, Territory Venues and Events (the owner of Manuka Oval), No Waste, or Health Safety Services? Are they ALBs too, or just parts of central directorates (departments)? Are they included in the Hawke count of ‘around 180 boards and committees supported by the ACTPS’?

When ACT citizens get their drivers’ licenses and car registration documents, they find they are issued by the Road Transport Authority. And those interested in environmental matters will have many reasons to be aware of the Environment Protection Authority. Many will also know of the Housing Commissioner. In their titles, these agencies sound like the normal run of ALBs, and it is possible that they figured in the Hawke count. However a check of the establishing statutes indicates that, while there are specified statutory functions to be performed in each case (and these agencies are therefore in a sense statutory bodies), they are otherwise regular public servants appointed to discharge those functions, housed within directorates, and subject in the normal way to their ministers. In the roads and housing cases, the director-general himself doubles as the ‘authority’ (and is constituted as a corporation in the housing case); in the environment case, the director-general appoints one of his senior officers to be the ‘authority’. As agencies, they are thus in no sense independent of, or separate from, the directorates. Whether including them or not, the Hawke count is muddled by these arrangements.

The last-mentioned dispositions are, of course, sourced in statutes, and are therefore unquestionably ‘official’. But there are other listings that appear in public information guides prepared by governmental agents of one kind or another that must be seen as equally ‘official’, and yet can in no way satisfy those seeking machinery-of-government clarity. Before the advent of the directorates, the *Canberra Connect* website was presenting information on ‘ACT Government organisations’ that purported to list the ACT departments but included several ALBs among the departments, and then provided a second but strikingly different list of ‘ACT government agencies’ that mixed information on these ALBs with more on departments, identifying separately some departmental branches, divisions,

related networks etc, and other ALBs including some statutory officers (*Canberra Connect* 2005). A 2012 *ACT Government Directory* website provides relevant information split into a dozen-or-more indexed sections of which two have particular machinery-of-government relevance ('ACT Government Directorates' and 'Boards, commissions, advisory councils and committees'), and then opens immediately with an un-indexed section on the ACT Auditor-General's Office (not otherwise noted). The currently existing directorates are then explained, followed by identification of a miscellaneous and unclassified group of 19 bodies including a variety of assessment committees, advisory councils, a couple of offices internal to directorates, and some smaller ALBs (or groups of them) which may or may not have been noticed elsewhere in this article (*ACT Government Directory*, 2012). All this may perhaps help members of the public make contact with particular agencies or programs that can be of use to them, but it does nothing to encourage systematic thought about how the whole government structure is assembled.

A secretive review, a 'shared services' regime, and integrity agencies as a special case

Through late 2005 and early 2006, the ACT lived through a close examination of 'every nook and cranny of the way this city-state is governed' (Uhlman, 2006) by the Strategic and Functional Review headed by Michael Costello, managing director of the ACTEW TOC. Controversially, the report presented to Labor Chief Minister Stanhope in April 2006 was treated as a 'cabinet-in-confidence' document and never released. But it soon became clear that its main concern was with the comparatively high cost (in Australian terms) of the delivery of territory services, especially in health and education, and a drastic and also highly controversial program of school closures followed. In our submission, we in the University of Canberra's CRPSM drew attention to machinery-of-government issues such as the role of departments and ALBs and the relationship between them (Aulich & Wettenhall, 2006), but given the secrecy involved we have no sense of how that submission was processed.¹³ Doubling as Treasurer and about to present the 2006-2007 budget, however, Stanhope entered the numbers game: he was reported as saying that the effect of the review would be that 'as many as 80 statutory authorities and smaller offices ... would be merged into mainstream departments to save costs' (Mannheim & Dutt, 2006).¹⁴

To counter the heavy volume of contemporary criticism about the secrecy surrounding this operation, the government had former NSW Chief Justice Sir Laurence Street appointed as an 'independent arbiter' to assess its argument that a document of this sort needed protection under the doctrine of executive privilege, and that argument gained the arbiter's support. However the 2006-2007 Budget Papers gave a few indications of matters included in the review report. Notably for present purposes, they revealed that the review recommended 'reduc[ing] the number of public sector agencies', 'bring[ing] agency costs closer to the national average', and 'streamlin[ing] our public sector, removing duplication and reducing overheads'. The underlying thinking was made apparent in this passage: '...the

Territory's public services were generally high quality but costs are, on average, 20 to 25 per cent higher than the national average. Our structures tend to mirror larger jurisdictions and do not reflect our status as a small city/state' (ACT Treasury, 2007).¹⁵

The ACT's ALB population has inevitably been affected by the adoption of what has been called the 'Shared Services model' (Hawke, 2011: 290) for the undertaking of administrative ('corporate') services common to most directorates and agencies. No doubt influenced by this secretive Costello review report, a Shared Services unit became operational as a 'business unit' of the Treasury in February 2007 (now Commerce and Works directorate: Shared Services 2012). The services thus shared include health and safety, staff recruitment, payroll, employment relations, staff development and training, IT and records, financial services and procurement. For all parts of the public sector subject to this arrangement, the intention is to remove duplication of common functions and enhance efficiency, but there is argument that the focus of the officials involved is so heavily on process that understanding of, and support for, the functions of particular directorates and agencies is often lacking. These pluses and minuses exist in all applications to ALBs, and of course the system is to that extent an inhibitor of agency autonomy (Hawke 2011: 291–93).

Rising interest in the subject of integrity in government over the past decade has focused particular attention on a group of ACT ALBs far removed in function from the more commercialized bodies at the centre of the TOC reforms of the early self-government period, and this group has furnished some of the more spectacular cases involving ALBs and their relations with members of the political executive over the recent period. There has been serious discussion about the need to recognise members of this group — notably Auditor-General, Ombudsman, Electoral Commissioner and Human Rights Commission — as 'officers of parliament' (from New Zealand origins, as with the TOCs). In keeping with this broadening discussion, a workshop on integrity agencies was convened by the ANZSOG Institute for Governance at the University of Canberra in July 2009, and some insights arising from that workshop have been published separately.¹⁶

A trigger for the Hawke inquiry

It was another clash involving an ALB and the political executive that triggered the establishment of the Hawke inquiry itself. Planning and land development had long been difficult areas providing many governance problems in the ACT, with ministers and their departments, and some ALBs, heavily involved. The respective roles have not been well defined, and it has been virtually inevitable that differences of opinion have emerged as affected citizens have sought to gain maximum advantage to themselves through the operations of the system, and in so doing pushed ministerial and ALB involvements to and beyond the limits of their respective formal responsibilities.

Cabinet documents obtained by the ACT Liberal opposition under an FOI (Freedom of Information) application revealed 'months of infighting' between the chief

executive of the ACT Planning and Land Authority (ACTPLA), Neil Savery, on the one hand, and Chief Minister Stanhope and the land release section of the ACT public service on the other hand, over the issue of supermarket competition. Among other things, Savery asserted that, through his interventions, Stanhope had made it impossible to achieve the government's stated aim of 'taking politics out of planning', and argued that the level of interference he experienced in trying to carry out his statutory functions would 'not be encountered by other statutory office bearers'. The Chief Minister was reported by the press to have reacted furiously, he got legal support for his own position, and — despite a soft apology — the Chief Planner was left with little alternative but to resign his office (as reported in Towell, 2011a). Stanhope then made no secret of the fact that this damaging row was the catalyst for commissioning Allan Hawke to undertake his root-and-branch review of the ACT bureaucracy, the result being 'the biggest shake-up of the public service since self-government' (Towell, 2011b). Not surprisingly, 'the planning bureaucracy' was hit hard in the Hawke review, which explained unambiguously that '[c]oncerns about the fragmentation of responsibility for issues relating to land release, land use ... planning, and development loomed as the largest areas of structural focus for the Review'. These concerns, it added, were highlighted by 'the number and respective roles and responsibilities of [departments] and the other agencies, or parts of agencies that comprise the extraordinary number of 26 entities involved in approving development in the ACT' (Hawke, 2011: 179).

The Hawke review also specifically named a few other ALBs as deserving of remedial attention (Hawke, 2011: 110–115). But what is important here is the more general finding, noted in the introduction, that there were currently around 180 boards and committees supported by the ACT Public Service, that a consequence was 'dispersion of government entities and resulting lack of readability of the institutional system', and that review was necessary to ensure that 'the role and function of these bodies is clearly understood and that [they] continue have clearly designed roles and responsibilities that align with the Government's overall strategic direction and objectives' (Hawke, 2011: 7, 99).

Legislative inconsistency as a cause of confusion?

It would be too much to suggest that there can be a single, or a main, cause of the uncertainties that exist. And observers with experience with systems of governance in other jurisdictions, like Britain's Matthew Flinders quoted above, will be quick to point out that the ACT is by no means alone in demonstrating disorder in its outer public service. However a careful study of several system-establishing statutes designed to regulate the whole ACT public sector suggests that serious inconsistencies exist in the relevant provisions of the statutes themselves, and leads to a recommendation that those statutes need thorough review and revision in order to remove some of the present confusions. To this end, this article concludes by contrasting the listing and defining of relevant organizational categories in three main statutes, the *Legislation Act 2001*, the *Public Sector Management Act 1994*, and the *Financial Management Act 1996*.

In its 2006 inquiry into proposed changes to the planning and development legislation, the attention of the relevant Assembly Standing Committee was drawn to the considerable incoherence in the way the ACT government presented information about its administrative arrangements, with the observation that that incoherence inevitably flowed over to the way ACT LPA (Planning and Land Authority) and LDA (Land Development Authority) were regarded within the system. Five different ways of explaining the machinery-of-government arrangements, all endorsed officially in government documentation, were noted; the CRPSM submission urged the importance of sorting out the issues involved in order that all concerned — ministers and departments, the legislature and its committees, ALBs and their stakeholders — could move to a better understanding of roles, responsibilities and relationships, and so contribute to a smoother and more transparent governance system (Wettenhall, 2006). The Standing Committee observed briefly (SCPE 2006: 47) that, virtually simultaneously with its assessment of the draft planning and development legislation, the Costello Functional and Strategic Review was conducting its own inquiry. It therefore judged it appropriate to leave consideration of such machinery-of-government matters to that inquiry.

In virtually all efforts to classify the various types of bodies to be found in the ALB fringes of most government systems, sub-categories have been required. Thus the British report which gave great currency to the ALB term, noted above, divided the field into four categories based on required degrees of independence (Gash et al., 2010). It is likely, however, that few such efforts contain such blatant overlaps and inconsistencies as does the ACT effort, with (as noted in the Hawke Report) 'around 180 boards and committees currently supported by the ACTPS' and operating in a comparatively small jurisdiction. It appears that there are two essential traditions at work, those of the Chief Minister and Cabinet Department/Directorate and the Treasury Department/Directorate; that others within the system seem ready enough to ignore both and 'do their own thing'; and that what little effort there has been to attempt to reconcile these two 'systems' is to be found in the *Legislation Act 2001*. In significant ways, however, the *Public Sector Management Act* and the *Financial Management Act* fail to reflect that effort. The appendix lists the main organizational categories so identified, and seeks to chart their inter-relationships. The inconsistencies can be easily seen.¹⁷

Argument restated

This article reports on a review of the evolution of the NDPB or ALB sector of ACT governance within the broad context of ALB usage across a range of governmental systems. It has shown that disorderliness is a common characteristic of 'outer public sectors' populated by these ALBs, and that the ACT's outer public sector certainly shares that characteristic. There can be no argument that many of these ALBs perform well and give good service to the ACT community. The argument is rather that the system-at-large is made more complicated and difficult to understand because of the variety of class-names found within it and the lack of consistency in this matter across several pieces of major legislation that are surely

vital to its successful functioning as a system, and across various directories that seek to facilitate that successful functioning.

There is no question that categories are needed to sort members of the ALB population — the need for such categories is recognised in all the serious treatments elsewhere such as the British *Read Before Burning* report. The argument is again that the inconsistencies in the categorizing treatment across those pieces of ACT legislation and associated directories make the comprehending process more difficult than it need be, and this leads to a central recommendation. This is that a serious effort should be made within the ACT administration (1) to work out a few categories of ALBs (not too many) that will most suit the ACT situation, and then (2) to build this single set of categories into all those system statutes which serve to regulate the use of ALBs, and to ensure that the compilers of directories, administrative arrangements orders, etc, conform to those categories. Of course further effort will be needed to determine these categories and get agreement on them. However, all concerned with the operations of the outer public sector should benefit, not only those at the service-delivery end running the ALBs and receiving their services, but also those at the centre responsible for policy development and system-wide management. A reform of this sort should thus be seen as one that simultaneously serves both centralizing (whole-of-government) and decentralizing (closer to community and better service delivery) forces. ▲

Endnotes

1. The most comprehensive survey is Wettenhall & Laver, 2002.
2. Several in the lead-up to self-government, notably JCACT, 1974; Craig, 1984; Pearson et al., 1984. After self-government: PRB, 1990; Pettit, 1998; Auditor-General, 2002.
3. I acknowledge the helpful assistance of Graeme Chambers as Research Associate in the early stages of this project. Graeme had work experience as an executive in several present and past ACT ALBs.
4. This major change was effected in late 2011 amendments to the basic machinery-of-government statutes: *Public Sector Management Act 1994* and *Financial Management Act 1996*. See also Gallagher, 2011a, 2011b.
5. The class-name ‘non-departmental public body’ (NDPB) is generally considered to have taken off from the report on the relevant British experience by Sir Leo Pliatzky commissioned near the beginning of the Thatcher government: Pliatzky, 1980. ‘Quango’, introduced after a series of international discussions in the 1970s, emerged as an acronym for ‘quasi-non-governmental-organization’: see Wettenhall, 1981. In a wide-spread but very imprecise application, the word ‘agency’ is also often used in this sense, along with the process word ‘agencification’ on which see note 8 below. On earlier exercises in classification, see Wettenhall, 2003a.
6. The experiences of many countries are canvassed in the international ‘COBRA’ survey centred on the Catholic University of Leuven in Belgium, on which see eg Verhoest et al 2012. For the Australian part of this survey (which included some work on ACT bodies) see Aulich et al., 2010, Aulich & Wettenhall, 2012.
7. On the relevant Commonwealth experience, see Wettenhall, 2003c.
8. In the Commonwealth, creation of such executive agencies was authorized by the amending *Public Service Act* in 1999, but only a few emerged (Wettenhall, 2003b). Some observers have recognised that older bodies like ‘bureaus’ associated with departments have some

similar features (Podger, 2011: 3, drawing attention to a generally neglected comment in Walsh, 1987: 7). Christopher Pollitt and his colleagues had much to do with the coining of the word 'agencification', giving rise to a popular but contested view that, from the late 1980s on, there was a huge increase in the number of ALBs around the world under the stimulus of NPM (New Public Management)-type thinking (Pollitt et al., 2001, 2004; Wettenhall, 2005a).

9. For fuller treatment of the issues covered in this and the next section, see Wettenhall & Laver, 2002.
10. Those who have followed the Totalcare and Rhodium fiascos are likely to regard it as a supreme irony that the initial core component of this enterprise, the ACT laundry service now trading as Capital Linen Services, is back within the central government framework as a business unit of the Territory and Municipal Services Directorate, serves private as well as public clients, and is praised as one of the top 10 commercial laundries in Australia (TAMS, 2012; Inman, 2012).
11. One other effect of this late-1990s series of changes was to further the development of 'business units' within departments, falling short of separate organizational identity but gaining reporting recognition in audit reports and the like. Libraries ACT, ACTION bus service, Road Transport Authority, Commissioner for Housing, WorkSafe ACT (under a Work Safety Commissioner), and Shared Services are such units.
12. To mention a few: Canberra Public Cemeteries Trust, Cultural Facilities Board, ACT Gambling and Racing Commission, Legal Aid Commission, National Exhibition Centre Trust, University of Canberra.
13. Our argument was repeated in a submission (primarily related to the Rhodium enterprise) to the Assembly's Standing Committee on Public Accounts, on which see SCPA, 2008.
14. As noted, Hawke identified around 180 boards etc in the ACT public sector, and Flinders's UK tally stood at around 900 ALB-type bodies (and more still 'off the radar'). Around the time of the Coombs Royal Commission in Australia in the mid-1970s there were various counts putting the Australian Commonwealth tally at 241 (or over 500 if the then ACT administration was included), 220, 198 and 120; when the Victorian (state) Public Bodies Review Committee was in session in 1980, there was press speculation that it might find 1,000, but its search eventually located more than 9,000 (Wettenhall, 1979: 181 and 2005b: 4).
15. This economies-of-scale argument was put strongly in interview (23 May 2012) by Andrew Kefford, ACT Public Service Commissioner. Kefford was chief of staff of the Secretariat assisting Allan Hawke in his *Governing the City State* inquiry. For the political debate about the secrecy of the Strategic and Functional Review report and the Street assessment of it, see Legislative Assembly, *Hansard*, 2009 Week 6 (7 May), pp. 2043–55. Sufficient information became available after presentation of the report to indicate that it scheduled at least one ALB (Australian Capital Tourism Corporation) for closure, and others for serious revision of their role. On this review, see also Uhlman, 2006; Bartos, 2006; Waterford, 2006.
16. A special issue of the journal *Policy Studies* was developed in part from papers presented at this workshop: Aulich, Wettenhall & Evans, 2012. Several Standing Committees of the ACT Legislative Assembly have also conducted relevant inquiries: SCPA, 2011, SCJCS, 2011, SCAP, 2012.
17. There are still other efforts to classify. Thus the Legislative Assembly's Standing Committee on Administration and Procedure noted that there can be three quite distinct staffing arrangements for organizations headed by statutory office-holders (SCAP, 2012: 66–67). However, in what is virtually a category-denying exercise, the annual *Financial Audit Reports* prepared by the Auditor-General use the term 'agency' to embrace

departments /directorates as well as non-departmental bodies in a simple alphabetical listing (eg, Auditor-General, 2010). And, mixing these approaches, the *Insurance Authority Act 2005* recognises ‘agency’ (s.10.3) as a broad generic category made up of ‘administrative units’ (as recognised elsewhere) and ‘territory entities’ (a new category), and subdivides the latter (s.6) into two groups: ‘territory authority’ (as recognised elsewhere), and ‘public sector company’ (presumably more than ‘territory-owned corporation’ as recognised elsewhere).

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APPENDIX

ALB CATEGORIES IN SYSTEM-REGULATING A.C.T. LEGISLATION

Legislation Act 2001 (from Dictionary, Part 1)

Territory authority: 'a body established for a public purpose under an Act, but ... not ... a body declared by regulation not to be a territory authority'.

Territory instrumentality: 'a corporation ... established under an Act or statutory instrument, or under the Corporations Act ... and is a territory authority under the *Public Sector Management Act 1994*'.

Territory-owned corporation: a corporation established under the *Territory-owned Corporations Act 1990*.

Statutory office-holder: 'a person occupying a position under an Act or statutory instrument (other than a position in the public service)'.

This categorization is obviously intended for ALBs only: there is no attempt to define department or directorate.

Public Sector Management Act (PSMA) 1994

Administrative unit: The Act declares that the ACT Public Service is made up of administrative units established at the discretion of the Chief Minister and allocated to nominated ministers along with 'enactments and matters' for which the minister is responsible (ss.12-14). [Primary reference is, of course, to the departments/directorates which are the central structures of the Public Service.]¹

Territory instrumentality: A body corporate, with or without a board, established under a special statute or under the corporations law, and 'subject to control or direction' by a minister.²

Statutory office-holder: The relevant organizations are not declared to be either administrative units or territory instrumentalities; however, like instrumentality chief executives, these office-holders hold powers under PSMA *as if* the units they head were administrative units under that Act.

Financial Management Act (FMA) 1996

Territory authorities: Bodies that are corporations, may sue and be sued in their corporate name, may have a seal, and represent the Territory when exercising their functions unless otherwise provided by law (s.73). These, of course, are the 'instrumentalities' of PSMA, for which 'authorities' do not need to be incorporated.³

Notes to Appendix

1. These arrangements are effected as 'notifiable instruments' which have the force of law under the *Legislation Act*. In them it is the departments/directorates that are listed as the *administrative units* — and apparently there has only been one exception to this, when ACT PLA was accorded 'administrative unit' status for a limited period from 2003 (SCPE, 2006: 45).

2. These are also referred to as *autonomous instrumentalities*, and discretion is given (s.24) for individual creating acts to provide that their staffs may be employed under the *PSMA*, in which case their chief executive will hold powers of a director-general *as if* they were administrative units under *PSMA*. The *as if* formula has frequently been in use in the Commonwealth public sector, where statutes create ALBs and then provide that their staffs will be appointed under *Public Service Act* procedures with their chief executives holding powers under the *Public Service Act* as if they were departmental chiefs in respect of those staffs. There is, however, a sense in which whatever *PSMA* prescribes about the separate existence of ALBs is cancelled out by their treatment in the *Administrative Arrangements Orders*. Dozens of ALBs (or the statutes that create them and that they administer) appear in these orders simply as ‘matters’ within the responsibility of the listed ministers and therefore as functions of the respective administrative units. In other jurisdictions, such as that of the Commonwealth, they would be clearly separated from departments, and seen instead as outer parts of the portfolios of the various ministers.
3. In the current version of *FMA*, some 15 such authorities are named specifically (this list includes the Land Development Agency), and others can be added by amendment to the *Financial Management Guidelines* (s.54). Then there is an escape clause: the Treasurer may declare by notifiable instrument that a ‘stated body is not a territory authority for this Act or a stated provision of this Act’ (s.3B): such notifiable instruments issued in 2003 and 2005 have exempted ACT PLA, health professions boards, the ACT Architects Board, the Government Solicitor, the Registrar-General and several others. There are some special provisions for territory authorities that have governing boards (s.56), introducing another form of categorization.