The Constitution of South Australia

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Chapter 13

Crown Corporations

13.1 CORPORATIONS SOLE

A number of corporations sole are recognised by the common law. Her Majesty, the Queen of Australia is a corporation sole.[1] Most other common law corporations sole were ecclesiastical officers.

Apart from Her Majesty, all other corporations sole relevant to the operations of the Crown in right of the State of South Australia, are established by or pursuant to a statute. The State Government of South Australia is not a corporation sole by common law; nor is the Governor.[2]

Ministers may be established as a corporation sole either pursuant to the express provision of an Act or pursuant to a proclamation made under s 7 of the *Administrative Arrangements Act* 1994.[3] Where a minister has been created a corporation sole under an Act administered by that minister, and the administration of that Act is then committed to some other minister, the latter minister then becomes the corporation sole.[4]

Public officers may also be established as a corporation sole pursuant to an Act.[5]

The occupant of a corporation sole is presumed to have been duly in possession of his or her office unless the contrary is proved.[6]

At common law, a corporation sole possessed the power to purchase, hold and demise real property, but did not have the power to lease land or to hold personalty.[7] By statute, corporations sole have now been given all the powers of a natural person.[8] In any event, as the person is an agent for the Crown in both personal and corporate capacity, any lack of power is probably of little significance; any property acquired by the corporation sole is held for and by the Crown.[9]

The doctrine of ultra vires applies to a corporation sole, although the doctrine is less readily applied than in the case of a statutory authority.[10] The powers of the corporation can only be exercised for the functions of the corporation. Those functions can be determined either from the terms of the constituting instrument or by implication. Where the corporation sole is created by a statute then it can be assumed that the functions of the corporation sole are those functions necessary or incidental to the proper administration of the statute. Where no functions can be inferred from the constituting instrument (eg where the minister is constituted a corporation sole by proclamation made under the *Administrative Arrangements Act* 1994), the functions of the corporation sole must be inferred from the nature of the office. The functions of the office can and probably do vary over time. The functions are ambulatory which has the effect that the powers and functions of the corporation sole are ambulatory also. Nevertheless, it would seem clear that a minister or public officer established as a corporation sole does not thereby have greater functions than the minister or public officer would have as agent of the Crown, although the function may be more readily inferred if the relevant person is a corporation sole.

As corporations sole are agents of the Crown there is probably little legal advantage in the creation of corporations sole, at least in respect of ministers. The broad powers of delegation and of transfer of administration given by the *Administrative Arrangements Act* 1994, together with the provisions of s 35 of the *Acts Interpretation Act* 1915 mean that problems of succession can usually be resolved by administrative means.[11] The *Crown Proceedings Act* 1992 has resolved the problem of suing the Crown.[12] On the other hand, the creation of a corporation sole may result in some administrative convenience eg the ability to use a corporate seal.

13.2 STATUTORY BODIES

Statutory bodies are usually established with power to sue and be sued, with power to hold land and property and to enter contracts and with standing authority to establish and to expend moneys from their own accounts without need for further appropriation authority.[13] These powers can only be exercised in pursuance of the functions of the body.

1 See *Halsbury's Laws of England* (4th ed), Vol 9, para 1207.
2 *Sloman v Governor and Government of New Zealand* (1876) 1 CPD 563; *Commonwealth v O'Donoghue* [1979] VR 441; *West Lakes v South Australia* (1980) 25 SASR 389 at 407.
3 See the proclamation of ministers' titles, of their corporate status and of the Acts administered by them: Government Gazette of 14 December 1993 at p 2977. The proclamation was made pursuant to the *Administration of Acts Act* 1910 (now repealed) but is continued under the *Administrative Arrangements Act* (see Schedule to that Act).
4 *Administrative Arrangements Act* 1994, s 8(3).
5 See eg the Crown Solicitor by the *Crown Proceedings Act* 1992, s 18; the Commissioner of Highways by the *Highways Act* 1926, s 8; the Public Trustee by the *Administration and Probate Act* 1919, s 74.
6 *Halsbury's Laws of England* (4th ed), Vol 9, para 1206 n 7.
7 Ibid paras 1349 and 1361.
8 *Law of Property Act* 1936, s 24D.
9 See *Town Investments Ltd v Dept of Environment* [1976] 1 WLR 1126 at 1137, 1145; reversed on other grounds: [1978] AC 359.
10 *McVicar v Commissioner for Railways* (1951) 83 CLR 521 at 528, 534.
11 This may not be entirely true where the minister has significant land holdings. It may be more convenient that such holdings be held in the minister's corporate name.
12 *West Lakes v South Australia* (1980) 25 SASR 389 at 407 and see Chapter 11.
13 Even if the power to operate accounts is not given by the constituting statute, it can be given under the *Public Finance and Audit Act* 1987, s 7.

13.2.1 Reasons to create statutory bodies

Statutory bodies differ from ordinary private sector trading enterprises in several fundamental respects:

- [They] have essentially dual objectives:
  - (a) commercial and
  - (b) public service.

  While (some of them) operate along commercial lines, they are often obliged to pursue policies to provide social benefits to the community.
- As a practical matter, Government is directly responsible for their required finances. Their existence is mostly assured due to the absence of the risk of liquidation and other disciplines imposed by free capital markets.
- Most (statutory authorities) operate in a monopoly or near monopoly situation and thus have very limited influence on their operations from the demand side.
- They are subject to continuous and varying degrees of political pressure from the Government.
- They usually have a large asset base and those assets are of long life and used mostly for a stated purpose.[14]

In the conventional wisdom, there are a variety of reasons for the establishment of statutory corporations.[15] These include:

(a) To lessen ministerial responsibility: Some government activities are too large for a minister to be actively involved on a day to day basis with administrative details. These activities are placed under the control of a statutory body which is responsible for management.

(b) To extend borrowing powers: The restrictions imposed by the previous Financial Agreement could be avoided, in part, by establishing statutory bodies to undertake the borrowings. Finally all State borrowings were brought under Loan Council supervision in the "global limit" arrangements of the 1980's and now in the new Financial Agreement.[16] The formation of new statutory bodies no longer has any effect upon the State's borrowing limits and this reason for establishing a statutory authority is no longer relevant. Indeed, the very opposite now applies. It is now necessary to centralise and control borrowings by statutory authorities. The establishment of the Government's central borrowing authority, the South Australian Government Financing Authority ("SAFA"), was an acknowledgment that uncoordinated borrowings by statutory authorities is now inefficient and serves no useful purpose.[17]

(c) To enter into trade: There are at least three elements of this:

(i) Before the enactment of the *Crown Proceedings Act* 1972 (now repealed) procedures for suing the Crown were either non-existent or cumbersome. Liability depended on specialised rules and was subject to special immunities. This had the effect that the Crown was at a commercial disadvantage when operating major trading enterprises. It was thought that by establishing a statutory body with power to sue and be sued this would place the authority on an ordinary commercial footing, and that third parties could enter into commercial dealings with the authority with some confidence. As pointed out elsewhere, this intention was not fully realised,[18] and statutory authorities continued to enjoy some of the privileges and immunities of the Crown. In any event, the enactment of the *Crown Proceedings Act* 1992 and the creation of Special Deposit Accounts[19] have reduced whatever significance this element may have had.

(ii) To facilitate trading activities interstate and overseas.[20] Again it would not appear that this has been wholly successful. It would seem that statutory bodies still enjoy any remaining Crown immunities at least when acting interstate.[21]

(iii) Statutes establishing the body often contain provisions requiring the body to comply with laws that normally do not bind the Crown. In this way they ensure that the government does not carry out the activity with an improper advantage over commercial competitors.[22]

(d) To enable the government to take over a previously non-government, independent Corporation: ie "nationalisation". This has been more frequent in England than in Australia. However, the creation of the Electricity Trust of South Australia ("ETSA") is an example of this.

(e) To enable the government to raise and apply revenues for particular purposes: For example, the Metropolitan Fire Service has particular sources of revenue and for this reason required separate accounts. The creation of Special Deposit Accounts has largely reduced the significance of this factor.

(g) To avoid the rules relating to government employment. A number of industries are covered by unions and industrial awards and practices which are very different from those applying to Crown employment. The creation of a separate statutory body with power to employ its own staff enables that authority to treat with the unions and to be covered by the awards relevant to that industry.

(h) To give special interest groups a management and policy role: For various political or other reasons, it is often desirable to give special interest groups a role, and often the major role, in managing the body. This is

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14 Miah, "The Financial Accountability and Control Structure of Public Sector Utilities" (1988) 47(3) *AJPA* 263 at 264.

15 There has been a very significant use of statutory authorities by all Australian Governments. Such bodies are a distinguishing feature of Australian Government: see Wettenhall, "Corporations and Corporatisation: An Administrative History Perspective" (1995) 6 *PLR* 7 at 12-17.

16 See Chapter 9.11.

17 See *Government Finance Authority Act* 1982.

18 See Chapters 10.2.7 and 14.6.

19 See Chapter 9.6(e).

20 See eg *Chaff & Hay Acquisition Committee v J A Hemphill* (1947) 74 CLR 375.

21 See eg *Breavington v Godleman* (1988) 169 CLR 41.

22 See eg 13.3.6.

generally the case with marketing and industry authorities. It should be noted that a statutory body is not the only means of achieving this. The power of the Crown to contract and administratively to appoint delegates and agents can achieve a similar effect.[23] However, such administrative mechanisms are often unacceptable to the relevant industry.

(i) To create greater efficiency: It is sometimes argued that statutory corporations are a more efficient means of conducting government activity than by means of government departments. This is now the most significant and often cited reason for creating a statutory body. The process and its objectives are now described as "corporatisation".[24] This process consists not only in establishing a corporate structure, but in attempting to emulate and incorporate within that structure certain aspects of what are perceived as private sector structures eg the adoption of commercial objectives, of clear and non conflicting roles, of a commercial financial framework (eg the payment of guarantee fees, the payment of dividends, the payment of taxation equivalents) etc.[25] The *Public Corporations Act* 1993 reflects this process (see 13.3).

The increased flexibility in government management under the *Public Sector Management Act* 1995 and the *Public Finance and Audit Act* 1987 together with the adoption of the new Financial Agreement have removed some reasons which previously existed for the creation of statutory bodies.[26]

13.2.2 Powers of statutory bodies

By definition, the powers of a statutory body are defined by statute. In considering those powers it needs to be remembered that the establishment of a statutory body involves a significant loss of power and control by both the parliament and the executive. As statutory bodies invariably have the power to maintain their own accounts, parliament loses the power to control the expenditure of the body. As the body invariably has some degree of independent action, the executive loses its power of "hands on" control. The extent of that loss of power depends upon the particular statutory regime, but the body will only have such powers as are expressly or impliedly conferred by statute, and can only exercise those powers in

23 The Adelaide Convention Centre Board has been established in this way. The Minister of Tourism has been appointed by Cabinet as agent to administer the Convention Centre. The minister has been empowered to make minor appointments under s 68 of the Constitution. The Governor has appointed the board members pursuant to s 68 of the *Constitution Act* 1934. The chairperson of the board has been authorised by the minister to act as agent for the minister, but is required to do so only in compliance with a majority decision of the board.

24 See eg Report of the SA Commission of Audit, *Charting the Way Forward* (1994), p 352.

25 Ibid, pp 354-379.

26 This does not mean that existing statutory authorities will be dissolved in the future. When responsible government was established in 1857 an attempt was made to dissolve the then existing statutory authorities on the basis that they were no longer necessary. The attempt failed. It has been suggested by some that this was because of the patronage dispensed by the authorities: Jaensch (ed), *The Flinders History of South Australia – Political History* (1986), p 163. A more obvious reason is that it is considerably harder to dissolve an existing structure than to create one.

furtherance of the objects for which the body was created.[27] By reason of this loss of power courts read and interpret the powers of a statutory body narrowly, unlike the approach taken in relation to other corporations.[28] So, for example, although a power to contract or purchase personal property would authorise the body to enter into borrowing or lending contracts for the purpose of the body,[29] it would not normally include a power to hold or purchase shares because of the capacity that might give to expand the functions of the statutory body.[30] On the other hand, if there were power to carry out joint projects[31] or to make investments, then this might authorise the purchase of shares.

The most notorious case in recent times dealing with the powers of statutory bodies is *Hazell v Hammersmith & Fulham London Borough Council*.[32] This case concerned the powers of English local government authorities to enter into interest rate swap transactions. Initially the council entered into swap transactions for the sole purpose of speculative profit. After initial concerns about this practice, later swap transactions were designed to hedge potential liabilities on the initial swap contracts. Although the relevant powers of the authority are not detailed in the judgment, a consideration of the *Local Government Act* 1972 (UK) highlights just how limited those powers were. Revenues might be raised by rates or by limited asset sales. Receipts were required to be paid into specific accounts[33] which were subject to detailed audit. Powers to borrow or lend were strictly limited both as to amount and as to purpose.[34] There was no general investment power.[35] The House of Lords held that swap transactions were speculative, even when they consisted of replacement or re-profiling of existing swap transactions; that the powers of local government did not include speculative trading activities and that the entering into of swap transactions was ultra vires.

27 *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 128, 130, 138, 143, 156; *Nuhan Ltd v Jewel Super Fund* [1980] 2 NSWLR 304 at 310; *Humphries v Proprietors "Surfers Palm North" Group Titles Plan* (1994) 179 CLR 597 at 604; *Deuchov v Gas Light & Coke Co* [1924] 1 Ch 422 at 428-429. Compare the approach to the lease of underused assets in *Unley v South Australia* (1996) 67 SASR 8 at 24-27 which may take too narrow a view: see Street, *Ultra Vires* (1930), p 154.

28 *Earl of Shrewsbury v North Staffordshire Railway Co* (1865) LR 1 Eq 593 at 618; *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 130; *Hazell v Hammersmith & Fulham LBC* [1992] 2 AC 1; *McCarthy & Stone Developments Ltd v Richmond upon Thames LBC* [1992] 2 AC 48 at 68-70; *Botany MC v Federal Airports Corp* (1992) 175 CLR 453; Nardell, "The Quantock Hounds and the Trojan Horse" [1995] *PL* 27; Seddon, *Government Contracts* (1995) at 60-62. A broader view may be taken of the powers of previously non-government bodies which have been privatised: *Charles Roberts & Co v British Rail* [1965] 1 WLR 396 at 400.

29 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672.

30 *Re Lands Allotment Company* [1894] 1 Ch 616; see also *Credit Suisse v Allendale BC* [1996] 4 All ER 129; *Credit Suisse v Waltham Forest LBC* [1996] 4 All ER 176 at 185, 187-188.

31 *Kathleen Investments (Aust) Pty Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117.

32 [1992] 2 AC 1.

33 See eg s 147 of the Act.

34 See Sch 13 to the Act and *Hazell v Hammersmith & Fulham LBC* [1992] 2 AC 1 at 31-34.

35 Although a limited power might be inferred from the power to maintain accounts. In Australia it has been held that a general power to raise and spend significant moneys necessarily implies a general power of investment: *Nuhan Ltd v Jewel Super Fund* [1980] 2 NSWLR 304 at 310.

The decision of the House of Lords was plainly correct, although the reasoning may be questioned. The powers of the councils were so limited that it may be doubted that they had the power to enter into swap transactions at all and certainly did not have power to do so for speculative purposes. As even the later transactions were for the purposes of hedging liabilities arising under the speculative trading, they remained ultra vires. However, it is at least arguable that the House of Lords expressed itself too broadly in saying that swap transactions are necessarily speculative. An Australian court may not take this view, but may take the view that a body with power to borrow could enter into swap transactions for the purpose of hedging liabilities under a borrowing contract.[36]

This decision seems to have caused considerable concern in Australia about the capacity of any statutory authority to enter into any financial transaction. Concerns were even raised about the powers of the States' central borrowing authorities to enter into financial transactions. These bodies are established as central borrowing and investment authorities, with broad, indeed almost unparalleled, powers to enter into financial transactions.[37] Obviously *Hazell* has nothing whatever to do with the powers of these authorities. There is little doubt that at least the South Australian Government Finance Authority could enter into swap transactions even for speculative purposes.

In each instance it is necessary to have regard to the actual statutory powers in order to ascertain the power of the relevant authority to enter into the particular contract.

Where the purported contract is ultra vires, it was thought that the other party to the transaction faced a considerable financial risk.[38] Estoppel was often not available to protect the other party because an estoppel cannot operate to avoid a statutory limitation.[39] However, the courts have recently adopted the new developments in the law of restitution to fill the gap. Where money is paid pursuant to an ultra vires contract occasioned by a mutual mistake of law, the money is repayable at simple interest and without any set off.[40] The defence of change of position cannot be relied upon if the change of position is based upon the assumed validity of the ultra vires transaction.[41] Although restitution is always based upon its own particular facts, the effect of these decisions is that it is the statutory authorities that are most at risk if the contracts are ultra vires.

13.2.3 Direction and control

The degree to which public interest is to predominate over commercial or sectional interests in the operation of the statutory body is usually reflected in the structure of the body. In particular:

(a) If the body is involved in politically sensitive activities affecting a large section of the community or if it is deficit funded, or guaranteed by the Crown, the body will ordinarily be subject to ministerial direction and control. Such direction and control is usually expressly provided for in the constituting statute. There are two forms of such direction and control:

   (i) that the body is subject to "general" direction and control. The minister has power to give general directions relating to both policy and practice, but cannot give a specific direction as to how the authority should deal with a particular issue unless the issue can be characterised as sufficiently important to be of "general" significance to the authority.[42] Obviously there is a degree of flexibility in this. For example, a direction as to what policy should be applied by the authority may well be determinative of a particular issue being considered by the authority. The purpose of the use of the word "general" is to make it clear that the minister is not to be personally involved in the day to day management of the authority.

   (ii) merely that the body is subject to direction and control. In this instance the minister's powers are not limited in any way. Indeed, unless there is some other exclusion, the minister has greater power of direction than he or she would have in respect of his or her departments.[43]

The minister cannot direct the body to do or to perform any act which would be unlawful or ultra vires of the body. Failure of the body to carry

36 In this regard it is to be noted that the English courts have usually taken an extremely narrow view of the powers of local government authorities: see for example *Prescott v Birmingham Corporation* [1955] Ch 210; *Bromley LBC v Greater London Council* [1983] 1 AC 768; *In re Westminster City Council* [1986] AC 668; Carnwath, "The Reasonable Limits of Local Authority Powers" [1996] *PL* 244.

37 See eg ss 5(2) and 11 of the *Government Financing Authority Act* 1982.

38 See eg Loughlin, "Innovative Financing in Local Government: The Limits of Legal Instrumentalism Part II" [1991] *PL* 569 at 575. As a result of these concerns, some statutory protection has been provided. For example, where the authority is a public corporation (see 13.3) the transaction will still be valid notwithstanding the lack of authority by the corporation, providing that the other party was unaware and should not have been aware of the deficiency of power: *Public Corporations Act* 1993, s 39. See also *Public Finance and Audit Act* 1987, s 20a.

39 McDonald, "Contradictory Government Action: Estoppel of Statutory Authorities" (1979) 17 *Osgoode Hall LJ* 160; *Gardner v Dairy Industry Authority* [1977] 1 NSWLR 505 at 520-521.

40 *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 at 994-995; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669; *State Bank v FCT* (1995) 132 ALR 653 at 659-667; Seddon, *Government Contracts* (1995), pp 62-66; Mason & Carter, *Restitution Law in Australia* (1995), p 959. Restitution may not be available if there is a statutory scheme for repayment: see *ACI Operations v Commonwealth* (1996) 63 FCR 21 at 27-31.

41 *South Tyneside BC v Svenska International* [1995] 1 All ER 545.

42 See *Paul Dainty Corp Pty Ltd v National Tennis Centre Trust* (1990) 94 ALR 225 at 250; *Aboriginal Legal Service v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 139 ALR 577 at 578-579, 587-588, 590-593.

43 Cf *Public Sector Management Act* 1995 s 15.

out the lawful directions of the minister is ultra vires. It can be corrected by judicial review or by dismissal of the members.

(b) If the body is involved in activities affecting a relatively small group within the community and is not funded from the public accounts, then the managing committee or board usually represents that group and is not subject to ministerial direction. Many of the marketing authorities have this structure.

It is constitutionally inappropriate that a statutory body required to act in the public interest and using public funds, not be subject to ministerial direction. It is by means of such direction that the authority is made accountable to parliament. As was pointed out in the Western Australian "Commission on Accountability":

> The Commission understands the concept of accountability – when used in a Westminster style political or Government context and when applied to Government departments and Government instrumentalities and agencies (referred to collectively in this report as "Government agencies") which invest public moneys or, by the exercise of an authority granted by statute to the executive to guarantee liabilities which the Government agency may incur, have the capacity to create liabilities which, at the end of the day, may be a charge upon consolidated revenue, simply means that legislative authority should exist authorising the investment or the creation of the contingent liability, and that each Government agency should be subject to the control of a Minister of the Crown and through that Minister it should at all times be ready and able to account to the Parliament for all that it has done in the exercise of its statutory authority; for the manner in which it has done it; and for the ends sought to be achieved by the doing of it. It is an idea which is fundamental to and which, in practice, conditions the operation of responsible Government.[44]

13.2.4 Members of board

Where a statutory body comprises a board or committee, the members of that board or committee hold public office but are probably not employees of the Crown. Even if the authority is subject to direction, the members are not personally so subject[45] and are independent of the Crown.

The liabilities and duties of a board member are not necessarily governed by statute[46] as is the liability and duty of a company director. There are generally three different bases for legal liability of members of boards:

(a) Liability to the Corporation: Board members owe a fiduciary duty to the Corporation and (because they hold public office under the Crown) the

44 Commission on Accountability: *Report to the Premier* (1989, WAGP), p 3; see also Reports of the Senate Standing Committee on Finance and Government Operations into the Australian Dairy Corporation (1981, AGPS) and into the Superannuation Fund Investment Trust (1985, AGPS); see also Goldring, "Accountability of Commonwealth Statutory Authorities and 'Responsible Government'' (1980) 11 *FL Rev* 353.

45 See *Bennetts v Board of Fire Commissioners of NSW* (1968) 87 WN (Pt 1) (NSW) 307; *Molomby v Whitehead* (1985) 63 ALR 282 at 292; Leigh, "Local Authorities, Party Groups and the Law" [1988] *PL* 304. Members must exercise an independent judgment in the best interests of the authority.

46 Compare where the body is a public corporation: 13.3.

Crown. The board member may be liable to the corporation and the Crown for breach of that duty (eg the member may be liable to account for profits) or for negligence (on a similar basis to company directors).[47] Subject to any statutory limitation, board members have the duties of public officers (see Chapter 12.1).

(b) Liability in Contract: The board member is not liable for breach of contract by the corporation, even if the member voted in favour of the action that constituted the breach.[48] Where the board member enters into a contract purportedly on behalf of the corporation but without the board's authority, the board member may be liable for breach of warranty of authority.

(c) Liability for personal torts: The board member is not liable for a tort committed by the authority even if the board member voted in favour of some decision which constituted or resulted in the tort.[49] However, if the board member performed the executive function of directing that the board decision be carried out (ie if the board member "authorised, directed or procured" the tortious act) then the board member may be liable.[50] (When performing an executive function the member may be an employee.) The board member is also liable for his or her own actions eg if a board member assaulted another board member at a meeting.

The members of some boards enjoy a statutory protection or immunity from some liability; usually the constituting statute provides that such liability vests in the Crown.[51] Other boards have no statutory immunity. Some board members are personally indemnified by the government in respect of some activities. A decision to give such an indemnity would usually be made by Cabinet.

13.2.5 Suits against the Crown

Statutory bodies, even if subject to ministerial direction, may have the capacity to sue each other and to sue the Crown.[52] However, a court may decline jurisdiction on the basis that the issue is non-justiciable (in that it should be resolved within government) unless some other factor, such as private insurance, is applicable.

47 *South Australia v Clark* (1996) 66 SASR 199 at 221. As to the right of a former Board member to access Board documents if sued by the corporation: see *South Australia v Barrett* (1995) 64 SASR 73.

48 See *Salomon v Salomon & Co* [1897] AC 22.

49 See *British Thomson-Houston Co v Sterling Accessories Ltd* [1924] 2 Ch 33.

50 See *C Evans Ltd v Spitebrand Ltd* [1985] 1 WLR 317 at 329.

51 For example, complete immunity is given in the *State Opera Act* 1976, s 27. Examples where liability is transferred to the Crown include *Government Financing Authority Act* 1982, s 7; *Workers Rehabilitation and Compensation Act* 1986 s 13. As to the requirements of bona fides before the liability is transferred to the Crown: see *South Australia v Clark* (1996) 66 SASR 199 at 228-237; see also *Barrett v South Australia* (1994) 63 SASR 208.

52 *Ex p Workers Compensation Board of Queensland* [1983] 1 Qd R 450; and see *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 8.

13.3 PUBLIC CORPORATIONS

Some statutory corporations are subject to the *Public Corporations Act* 1993.[53] Where the Act applies:

13.3.1 Direction and control

The public corporation is subject to ministerial direction, although the direction must be published in the Government Gazette and tabled in the House.[54] The public corporation must provide information and records to the minister if so requested and the minister can appoint an observer to attend at board meetings.[55] The minister must be consulted before a CEO is appointed.[56]

13.3.2 Operation

In carrying out its commercial activities, the public corporation is required to act prudently and to achieve a reasonable level of profit; in carrying out its non commercial activities the public corporation is required to act in an efficient and effective manner.[57]

13.3.3 Charter

The public corporation must comply with its charter which is prepared by the minister and the Treasurer in consultation with the corporation. Subject to the constituting Act, the charter sets out the role, functions and powers of the corporation. It must be tabled in parliament.[58] After consultation with the public corporation, the minister and the Treasurer also prepare annual Performance Statements setting out the performance targets for the public corporation in the ensuing financial year.[59] The Performance Statements may be commercially confidential and are not required to be tabled.

53 The Act is intended to provide a template for the structure, functions and accountability of commercial statutory bodies. To a certain extent the Act is a reaction by the parliament to the collapse of the State Bank of South Australia and an attempt to increase the accountability of statutory bodies whilst retaining the benefits of such bodies. Section 5 provides that the provisions of the Act (or any of them) can be applied to a statutory corporation by regulation or by statute. The whole Act has been applied to SA Water, SA Ports Corporation etc. Specific provisions of the Act have also been applied to some corporations. For example, the provisions relating to the creation of subsidiaries have been applied to the Treasurer (a corporation sole) who has exercised that power to establish SAICORP, the government's "captive" insurer.

54 *Public Corporations Act* 1993, s 6; there is provision for more restrictive publication if publication of the direction would be prejudicial.

55 Ibid, ss 7 and 8.

56 Ibid, s 35.

57 Ibid, s 11.

58 Ibid, s 12.

59 Ibid, s1 3.

13.3.4 Board

The duties and responsibilities of the board and its members are specified. The board has the primary goal of securing improvements in performance and protecting the long term viability of the public corporation.[60] The board has a broad power of delegation.[61] Each member of the board has a duty to exercise reasonable care and diligence. The member may be criminally and civilly liable for culpable negligence, for dishonesty and for conflicts of interest;[62] where the member is not liable to criminal prosecution any civil liability is transferred to the corporation.[63] Provision is made as to the remuneration of members.[64]

13.3.5 Subsidiaries

The public corporation is not able to establish a subsidiary or to purchase or obtain shares without the approval of the Treasurer;[65] on the other hand, there is power to establish subsidiaries by regulation.[66]

13.3.6 Financial provisions

There are specific financial provisions applicable to public corporations.[67] These include the provision of a Treasurer's guarantee and the payment of fees for the guarantee, the payment of tax equivalents, the payment of dividends, the obligations in respect of internal and external audit etc. The minister also has particularly broad powers to investigate the affairs of a public corporation or its subsidiaries.

13.4 CORPORATIONS UNDER THE CORPORATIONS LAW

There are difficulties if the Crown wishes to operate through a company. Appropriations for a departmental purpose do not usually authorise the purchase of shares, so that it would normally be necessary to obtain approval by Cabinet and then payment from the Governor's Appropriation Fund in order to proceed with

60 Ibid, s 14.

61 Ibid, s 36.

62 Ibid, ss 15, 16 and 17. Executives also are subject to prosecution and civil suit for conflicts of interest: ss 37, 38.

63 Ibid, ss 21 and 22. The director's immunity only applies to "honest" acts; compare the discussion of "bona fide" acts in *South Australia v Clark* (1996) 66 SASR 199 and see *Chief Commissioner for Business Franchise Licences v Century Impact* (1996) 40 NSWLR 511 at 520-523.

64 Ibid, s 34.

65 Ibid, s 23.

66 Ibid, s 24 and see Schedule to the Act. The purpose of these provisions is to provide a more appropriate vehicle where it is necessary or desirable to establish a subsidiary. For example, the powers of the subsidiary can be restricted; it can be made subject to direction; and proper provision can be made for the audit and reporting of the subsidiary etc.

67 Ibid, Pt 6.

such a purchase. Statutory authorities do not have power to purchase shares, or only have such power for a limited purpose, unless the power is expressly conferred.[68]

Generally it may be said that companies are not an appropriate vehicle for government activity. In particular:

(a) Directors must be natural persons; they cannot be designated by office or by corporate status.[69] This causes difficulties in nominating ministers or other designated office holders as directors. Nor can directors be immediately replaced if their relationship with the government is altered.

(b) Directors owe their duties to the company and not to those that appoint them.[70] The directors may be under a duty to the company to act contrary to what the government might perceive as the public interest.

(c) Directors may not make improper use of information gained by virtue of their position as directors. This means that, in some circumstances, directors may not be able to communicate information to the government. They may, on the other hand, be under a duty to communicate any government information they may have to the company.

(d) Companies do not have the benefit of the "Shield of the Crown" even if the company is wholly owned by the Crown.[71] They do not have the benefit of any other Crown immunities or privileges.

(e) If the Crown purchases shares in a company, then it must rely upon the Corporations Law to define its rights and entitlements. On general principles, the Crown is then bound by the Law in respect of that company.[72]

(f) Unless acting as agent or trustee for the Crown, the company is subject to Commonwealth taxation and is subject to laws made under the Commonwealth corporations power.

In view of the difficulties in obtaining authority to establish companies, and the problems of accountability, control and other practical difficulties arising from the use of companies as vehicles for government activity, companies are usually inappropriate for this purpose.[73]

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68 See 13.2.2.

69 *Corporations Law*, s 221(3).

70 *Levin v Clarke* [1962] NSWR 686 at 700; *Re Broadcasting Station 2GB* [1964-5] NSWR 1648 at 1662; Finn, *Fiduciary Obligations* (1977), p 54.

71 *Commonwealth v Bogle* (1953) 89 CLR 229. A wholly owned company is not an "agent" of the Crown merely because it is wholly owned; see *Credit Suisse v Allendale BC* [1996] 4 All ER 129 at 145, 174.

72 *Sparling v Quebec* (1988) 55 DLR (4th) 63 at 70-71.

73 See Report of the Committee of Inquiry, *Public Duty and Private Interest*, (the Bowen Report) (1979, AGPS), p 92; Commission on Accountability, *Report to the Premier* (1989, WAGP), pp 22-23. See also the potential operation of the "implied guarantee": Chapter 15.1.9.