Restoring a Public Focus to Government-Owned Businesses: Is a Duty to the Public the Answer?

Victoria S Baumfield, Bond University

Available at: https://works.bepress.com/victoria_baumfield/5/
RESTORING A PUBLIC FOCUS TO GOVERNMENT BUSINESS ENTERPRISES: IS A FIDUCIARY DUTY TO THE PUBLIC THE ANSWER?

VICTORIA SCHNURE BAUMFIELD

Commercialised government business enterprises (GBEs) have proliferated in recent years. In some cases, profitability has been accorded too much prominence, while the public’s concerns are ignored. This paper proposes that the pendulum has swung too far in favour of treating GBEs like regular businesses, with no regard for their public interest functions. Existing accountability measures must be strengthened. The ministerial responsibility model is insufficient to ensure that GBEs are managed in ways that take account of public concerns. Building on the public trust model, new approaches are required to ensure that GBEs do not neglect their duty, as governmental bodies, to the public. One is an acknowledgement that the Corporations Act in fact extends to certain non-corporatised GBEs. But is that enough? Perhaps a legally-enforceable duty to the public is required. The feasibility of creating and enforcing such a duty will be explored.

I. INTRODUCTION – THE PROBLEM WITH GBEs

Governments have long engaged in commercial activities, providing goods and services to the public as diverse as water, electrical power, telephony, banking and air travel. It is trite to observe that since the 1980s there has been a worldwide trend, including in Australia, towards the commercialisation of these businesses, often accompanied by their removal from direct government control. Government businesses that may previously have been operated by governmental departments have been moved to entities with some or total independence from government including public authorities, government owned corporations (GOCs), and fully or partially privatised companies. This paper is directed towards the first two entities on this list, which, together, may be classified as ‘government business entities’ (GBEs).

While government-run businesses had their flaws (eg, people complained that they were bloated, inefficient, in some cases expensive and lacking in innovative product offerings), the transition to GBEs has created or exacerbated other problems. In particular, as explored in this paper, GBE managers may forget that GBEs are government businesses, which fact implies some expectation (on the part of the public if not the government) that the GBE will act in the public interest.

At heart, the problem with GBEs is an agency problem. Whenever business is carried on by somebody other than the owner, mechanisms are necessary to ensure that the manager acts in

---

1 Senior Teaching Fellow, Bond University Faculty of Law, Gold Coast, Queensland, Australia. BA 1994, University of Pennsylvania; JD 1997, Columbia University. Member, New York Bar.

2 Specifically, in this paper, the term ‘government business entity’ or ‘GBE’ will be used to refer to all State-owned entities with a separate legal personality that engage primarily in commercial functions, including both public authorities and GOCs. See ‘Definition of Terms’ in Berna Collier and Sally Pitkin (eds), Corporatisation and Privatisation in Australia (CCH Australia Ltd, 1999) xv, citing Administrative Review Council, The Contracting Out of Government Services, Issues Paper, AGPS, Canberra, February 1997, ‘Glossary’.
the owner’s interest. As corporate lawyers are well aware, in such a scenario, those responsible for managing the business – directors, in the case of a company – act as agents of the owners. In order to ensure that the agent acts in the best interests of the principal, it is necessary to create means of holding the agent accountable for his or her conduct.

In the case of government businesses – whether run by the government directly or indirectly via a GBE – the owners are, conceptually if not legally, the public at large.\(^3\) When a government runs the business itself – not as a GBE but through a core component of government such as a government department – it does so on behalf of its constituents. The public therefore is the principal and the government is the agent. If the constituents do not like how the government is managing the business, a potentially powerful accountability mechanism exists in the form of elections. While ‘[t]he ballot box is only an infrequent and cumbersome vehicle for the principals to exercise any control over their agents’,\(^4\) even the fear of electoral defeat may give politicians some reason to consider and accommodate where possible the wishes of their electorate.

The same situation does not necessarily obtain once a government business unit is transferred to a quasi-independent GBE. Now the persons running the business are not the government, as such, despite the government’s continuing ownership of the business. And while the government will usually remain ‘responsible for’ the GBE’s conduct to some degree (at least in the public’s eye), in reality, the extent to which the government-owner(s) will be able to influence the running of the GBE will vary from one GBE to another.

Stated in agency theory terms, accountability problems are magnified in the case of GBEs because, in addition to the principal-agent relationship existing between the public and our elected representatives:

> there is another set of principal-agent relationships – between the elected representatives and the managers of GBEs. The existence of multiple and conflicting goals and the proclivity for political intervention renders GBE management virtually unaccountable for the achievement of any objectives. The absence of competition in many of the markets served by GBEs only further reduces accountability – customers often have no ready benchmarks against which to compare the price and quality of a GBE’s outputs.\(^5\)

In other words, a lack of sufficient accountability mechanisms allows GBE management in some instances to place their own interests (whatever they may be) ahead of the interests of the public. What is needed is a device that will restore a public focus to GBEs.

\(^3\) See, eg, Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151, 196 (‘The CAA as I have noted is a public body – a body whose owners are, ultimately, the Australian community whom the authority serves under and in accordance with its statutory mandate.’) (Finn J). See also Michael J. Whincop, Corporate Governance in Government Corporations (Ashgate, 2005) 7 (noting that, while ‘the people’ have ‘little opportunity . . . to trade their interests’, they are a GBE’s ‘residual claimants, as shareholders are in a [business corporation]’).

\(^4\) Euan Morton, ‘Economic Reform of GBEs’ in Berna Collier and Sally Pitkin (eds), Corporatisation and Privatisation in Australia (CCH Australia Ltd, 1999) 54.

\(^5\) Ibid.
II. THE ALLCONNEX DEBACLE – THE PERILS OF CREATING A GBE LACKING ADEQUATE ACCOUNTABILITY MECHANISMS

The phenomenon described above can be observed in one recent example – the case of Allconnex Water (‘Allconnex’). As part of the Queensland government’s response to the protracted drought that affected southeast Queensland for most of the 2000s, the South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (Qld) (the ‘2009 Act’) forced the consolidation of water retailing from individual city councils to new public entities called distributor-retailers, which were to be owned by clusters of local councils in geographic proximity to each other. Allconnex was one such distributor-retailer (of three that were created), taking over the water businesses previously run by the Gold Coast, Logan and Redland City Councils. Within 6 months of the July 2010 forced transfer of water retail and wastewater services from the three city councils to Allconnex, Allconnex had raised prices by 20%, causing an extensive public outcry.\footnote{Matthew Killoran, ‘Lower Water Prices ‘Premature’: Mayor’, Gold Coast Bulletin (online), 28 January 2011 <http://www.goldcoast.com.au/article/2011/01/28/287235_gold-coast-news.html>; Andrew Potts, ‘Water Flip Won't Hit This Year's Budget', Gold Coast Sun (Online), 14 April 2011 <http://www.goldcoast.com.au/article/2011/04/14/307971_gold-coast-news.html>.} The outcry caused the Gold Coast City Council to belatedly request Allconnex to limit its price increases. Allconnex refused, despite the Gold Coast City Council’s status as its majority (approximately 62%) shareholder, claiming that it had no choice but to implement large price rises because it was obligated to maximise returns to its shareholders (the councils).\footnote{See Allconnex Water, ‘A Statement by Allconnex Chairman John Dempsey’ (Media Release, 29 March 2011), stating ‘The [participation] agreement clearly states that we are obliged to “optimise the return on investment” to the [participating] councils. . . . Until those governing principles are changed, price increases of 12-15 per cent are necessary.’} Ultimately, the Queensland government was forced to grant city councils the option of resuming control over water from the new regional distributor-retailers.\footnote{See, eg, Anna Bligh, Premier and Minister for Reconstruction (Qld), ‘Premier Says Enough Is Enough - Water Blame Game Ends’ (Ministerial Media Statement, 7 April 2011).} The Gold Coast City Council voted to withdraw from Allconnex on 26 July 2011\footnote{See, eg, Daniel Hurst, ‘Two Strikes and Allconnex Out’, The Brisbane Times (Online), 8 August 2011 <http://www.brisbanetimes.com.au/queensland/two-strikes-and-allconnex-out-water-retailer-dumped-20110808-1iivz.htm>.} and Allconnex ceased to exist on 1 July 2012\footnote{Queensland Water Commission, SEQ Water Reform (23 March 2012 <http://www.qwc.qld.gov.au/reform/index.html>; South-East Queensland Water (Distribution and Retail Restructuring) and Other Legislation Amendment Act 2012 (Qld) s 23 (new ch 3A pt 2 to the 2009 Act).} – obviously not the result that the State government had had in mind when it created the distributor-retailer structure.

Allconnex was a prototypical GBE in that it was a public authority created for a commercial purpose (to sell water and provide wastewater services). While it was defined as ‘not a body corporate’,\footnote{2009 Act s 9.} it was a statutory body,\footnote{Ibid ss 14-15.} making it a separate legal entity.\footnote{See, eg, Queensland Treasury Department, Statutory Body Guide: Guide Sheet 1 – Legislation, Policies and Guidance (June 2010) 1 <http://www.treasury.qld.gov.au/office/knowledge/docs/statutory-body-guide/index.shtml>.} It had ‘all the powers of an individual, including the power to enter into contracts; acquire, hold, dispose of, and deal with property; employ staff; appoint agents and attorneys; fix charges and other
terms for services and other facilities it supplied.\textsuperscript{14} The same applies to the other two distributor-retailers created at the same time as Allconnex, both of which (unlike Allconnex) continue to exist.

Allconnex’s ownership and governance structures were more complicated than typical for a GBE, creating an extreme form of the accountability problems described in the quoted text above. To begin with, while Allconnex was created by the State government, it – unlike a typical GBE – was owned not by the State (unlike, for example, Queensland GOCs) but by the three city councils whose water businesses it was assuming.\textsuperscript{15} Yet despite being owned by the councils, in some areas Allconnex was accountable not to its council-owners but instead to representatives of the State government such as the relevant portfolio minister. In some cases, Allconnex appears to have been ultimately accountable to neither the council-owners nor the portfolio minister.

The councils’ power boiled down to:

\begin{itemize}
  \item The power to appoint the board;\textsuperscript{16}
  \item Some ability to influence Allconnex’s management decisions through a right of consultation with regard to Allconnex’s strategic plans (which right, however, was not accompanied by the final say over the content of those plans, meaning that it technically was not binding, unlike in the case of, for example, a Queensland GOC);\textsuperscript{17} and
  \item An ability to give binding instructions to Allconnex’s board where it was both ‘necessary’ and ‘in the public interest’ (ie, the councils had what are known as reserve powers, as state owners normally have in the case of GBEs).\textsuperscript{18}
\end{itemize}

\textsuperscript{14} 2009 Act s 12 (Powers).
\textsuperscript{15} See Participation Agreement dated 25 June 2010 concluded by Allconnex and the Gold Coast, Logan, and Redland City Councils (the ‘Participation Agreement’). See also Participation Agreement dated 25 June 2011 incorporating Amendment No 2, 19 sch 1 (technically, the Gold Coast owned 61.6501477% of the participation rights); Allconnex Water, Participation Agreement Summary as at March 2012 2.
\textsuperscript{16} Participation Agreement 6 cl 5.2. Furthermore, the (council-appointed) board, not the portfolio minister, was responsible for appointing the CEO: 2009 Act s 44. Power to appoint (and therefore to sack) the board certainly, in theory, should have given the councils significant influence over Allconnex’s board. In practice, however, Allconnex’s management seemed perfectly comfortable disagreeing with the Gold Coast City Council. This probably was related to the fact that the Gold Coast City Council did not have the power to singlehandedly replace board members despite its status as majority (62%) owner of Allconnex. See n 15 above.
\textsuperscript{17} Compare Participation Agreement 10 cl 6.1(b)(i) (Allconnex was required to ‘consult with the Participants in formulating and reviewing the Five Year Forward Plan’, without any obligation that the council-owners actually agree to the plan) with Government Owned Corporations Act 1993 (Qld) ss 97-98, 107-08 (the GOC and shareholding ministers must agree to the corporate plan, and if unable to do so shareholding ministers may direct the board to take specified steps with regard to the draft plan or make specified modifications to it). See also Ross Grantham, ‘The Governance of Government Owned Corporations’ (2005) 23 Company and Securities Law Journal 182. In Allconnex’s case, it is not clear how the consultation process would have evolved in practice if Allconnex had not been disbanded so soon after its creation. For example, a custom might have developed that Allconnex management would negotiate an outcome that was acceptable to both sides even though technically Allconnex only had to ‘consult’ with its owners during the corporate planning process, not follow their instructions.
\textsuperscript{18} 2009 Act s 49.
The State portfolio minister, meanwhile, had the final say over key aspects of the
council/distributor-retailer relationship including the contents of the shareholder agreement
between the councils and Allconnex (known as the ‘Participation Agreement’) and changes thereto.\(^\text{19}\) The minister also had the power to make customer water and wastewater codes to
provide for the rights and obligations of distributor-retailers and their customers.\(^\text{20}\) Finally,
by statute the portfolio minister was the person to whom Allconnex’s annual reports were to be
directed,\(^\text{21}\) although the Participation Agreement required that a copy also be provided to
the council-owners.\(^\text{22}\)

The portfolio minister did not have input (at least not formally) into the substantive matters of
distributor-retailer management left to the councils.\(^\text{23}\) Since Allconnex was not required to
heed the councils’ wishes in that area unless those wishes were expressed in the form of a
binding direction, it meant that in large part ultimately no one representing the public had a
binding say in how Allconnex ran its business, despite its status as a public authority.

The gaps in government power over Allconnex meant that when the public began to protest
Allconnex’s large price rises (and other conduct that made it appear indifferent to its
reputation with the public, such as a decision to lease expensive office space in a fancy new
office tower), the Gold Coast City Council, despite its position as majority owner, was not
able to force Allconnex to reconsider its strategy. The State government, in contrast, did
have one means of controlling the prices Allconnex was charging – an ability by statute to
impose price caps, which it in fact belatedly did in mid-2011. But by then, the political
damage to Allconnex was done. Allconnex had committed the sin of appearing to thumb its
nose at the public whom it was supposed to serve. The public was demanding blood. And
ultimately, the politicians judged that the only way to satisfy the public was to kill Allconnex.
The public got the last laugh, but at the cost of an entity that should have saved the public
money in the long run through economies of scale.

The Allconnex example raises questions that can be generalised to other GBEs, including:

- What should have been the role of the council-owners in supervising Allconnex?
  Should Allconnex have been ultimately accountable to the councils?
- Should the councils have had any effective say over how Allconnex operated (other
  than through the exceptional use of their reserve powers), in light of Allconnex’s
  position as a monopoly supplier of an essential service?
- Does it matter that Allconnex was conceptually owned by and existed to benefit the
  public at large? Should that have changed how Allconnex was expected to behave?

\(^{19}\) See, eg, 2009 Act ss 23, 24, and 29.
\(^{20}\) Ibid ch 4.
\(^{21}\) Financial Accountability Act 2009 (Qld) s 63.
\(^{22}\) Participation Agreement 12 cl 7.1.
\(^{23}\) The extent to which political power allowed the portfolio minister to influence Allconnex’s strategic plans
despite having no formal right to be consulted as part of the planning process is unclear. But certainly the
portfolio minister’s ability to set overall policy in the water area must have had some effect.
Did the public – again, conceptually, Allconnex’s ultimate owners (as well have its monopoly customers) – have any say over Allconnex’s behaviour? If not, should it have? And how?

If the public’s view(s) should have some relevance, how are they to be determined? Should the public only be taken into account where there is a large and relatively unanimous outcry, as occurred in the Allconnex example?

More generally, the Allconnex example raises the question: what is the optimum level of government involvement with the management of a GBE? The orthodox view is that GBEs were created for the express purpose (among others) of removing government businesses from the direct control and influence of government and politics. Under this view, almost any ability of a government to intervene in the affairs of the GBE would raise concerns about improper influence in the GBE’s management. On the other hand, the Allconnex example illustrates that perhaps the GBE model should include additional room for the government to intervene to address constituents’ legitimate concerns. Perhaps the pendulum has swung too far in favour of treating GBEs like regular businesses, with no regard for their public interest function.

III. THE CONFLICT BETWEEN GBEs’ COMMERCIAL ORIENTATION AND THEIR PUBLIC NATURE: IS A HARMONISATION OF THE TWO POSSIBLE?

The fundamental nature of GBEs is that they are not ‘the government.’ Although they are government-owned, they are separated from it. Not only are they now separate entities from the government itself, but the related trend of commercialisation means that GBEs now are typically required to operate on commercial terms – ie, to break even or even make a profit.  

All of this perhaps inevitably affects how GBEs’ managers view their role and obligations to the business. As Bottomley reported (based on an informal survey), managers of GBEs tend to view their businesses as independent entities, not as part of ‘the government’. They tend to think of themselves in private-sector terms. This was perhaps the goal of transitioning government businesses to GBEs, but from a public interest perspective it is potentially problematic if one considers that there is a reason why these businesses are still publicly-owned.

If a GBE’s primary goal is to make a profit, then how (if at all) do the GBE’s managers take into account the fact that the entity exists to perform services for the public on behalf of the government? What takes precedence – profits or the public? There seems to be a dichotomy

---

24 See generally Collier and Pitkin, above n 2. It is worth contemplating whether government businesses – at least those providing essential services, particular under monopolies – should be aiming to make a profit as opposed to merely covering their costs (if that).


26 Ibid.
between public perceptions of what GBEs’ roles should be and GBEs’ managers and employees’ conception of their role. Allconnex is a perfect example.

The obligation to focus on profits at the expense of the needs, desires or concerns of the public demands a counterweight of equivalent strength. If the obligation to manage the GBE on commercial terms is written into the laws or contracts governing GBEs, then the only way to ensure that the needs of the public are taken into account by GBE management is to enshrine that obligation into the law, too. This is already done to a certain extent by the device of community service obligations (CSOs), which are specific directives that governments issue to GBEs to provide a good or service on particular (normally uncommercial) terms in order to satisfy the government’s social or policy objectives. But CSOs are insufficient. More general obligations to act in the public interest are necessary so that considerations of the effect on the public can factor into everyday GBE decisionmaking. Otherwise, GBE managers risk succumbing to a tick-the-box mentality where the managers will assume that their obligations to the public are satisfied once they have complied with any applicable CSOs.

IV. GBEs AND ACCOUNTABILITY

Developing mechanisms to ensure that the ‘publicness’ of GBEs is properly taken into account raises issues of governance and accountability.

A. Defining Accountability

As discussed in the Introduction, the double agency context in which GBEs operate leads to ‘multiple and conflicting goals’ and a lack of accountability, including to the ultimate principals (the public). Accountability encompasses not only legal restraints such as fiduciary and statutory duties but also ‘systems of self-regulation and the norms of so-called

27 The argument of course assumes that GBEs should be concerned with the public interest. This paper is written from that perspective. How to define the public interest? Generally speaking, at least in the case of monopoly industries (the industries that in the author’s view are of the greatest concern since no other options exist for obtaining the good or service, particularly when that monopoly is supplying an essential service such as water), the public at large would be concerned with the following characteristics, among others: an affordable price; adequate supply; adequate geographical coverage/availability; possibly adequate choice in terms of options for purchasing the good or service; an understanding of what the public needs/desires with regard to the good or service; and cost-consciousness in terms of not wasting the public’s money, which at a more general level is an example of the overarching principle that the government and its accoutrements should treat members of the public with respect (ie, not take them for granted just because they cannot choose to purchase the good or service elsewhere). Some of these elements might be contradictory, but at least they should all be seriously considered by GBE management when deciding how to run the business.

28 For example, a telephone company might be obligated under a CSO to provide telephone service at affordable rates to a rural area where it would be uneconomic to provide the service on those terms (or at all). CSOs must normally be costed, and the GBE is normally entitled to be compensated for any losses arising from its compliance with the CSO. See generally Queensland Treasury Department, ‘Community Service Obligations: A Policy Framework’ (March 1999) http://www.treasury.qld.gov.au/office/knowledge/docs/community-service/community-service.pdf.

29 The GBE is agent of the government which is agent of the people.
“best practice”. Accountability is critical because without accountability, it is impossible to hold GBEs responsible for their conduct.

Accountability can mean a variety of things including ‘answerability, responsibility, efficient management, and adherence to the rule of law.’ Accountability in the public sector context raises different concerns than in the private sector corporate context. A critical question is to whom should entities such as GBEs be accountable? As the International Federation of Accountants Public Sector Committee observes:

[P]ublic sector entities have to satisfy a complex range of political, economic and social objectives, which subject them to a different set of external constraints. They are also subject to forms of accountability to various stakeholders, which are different to those that a company in the private sector has to its shareholders, customers, etc. The stakeholders in the public sector may include the Ministers, other government officials, the electorate (Parliament), customers and clients, and the general public, each with a legitimate interest in public sector entities, but not necessarily with any ‘ownership rights’.

B. Managerialism

Accountability can be achieved through mechanisms arising under the managerialist model, which ‘emphasis[es] the hierarchical structure of public service responsibility, a hierarchy which is based on direct authority relationships’ from lower to senior managers to ministers and thus to parliament, and hence makes public servants accountable to ministers in a ministerial responsibility model characteristic of the Westminster system.

That comports with the ‘unavoidable political reality’ that a public bottom line . . . expects ‘the government’ to be accountable for expenditure of public funds; exercise of public power and authority; and ultimately, for meeting the needs of the electorate who also happen to be customers of statutory authorities and other public bodies. The minister’s capacity to use organisational form as a ‘shield’ in limiting ministerial responsibility beggars public acceptance.

33 Bottomley, ‘Corporatisation and Accountability’, above n 25, 159-60. This is done through ministerial involvement in management of the entity through corporate planning and other requirements: at 161.
Managerialism is based on the ultimate sanction that responsible politicians can lose their job if the public is dissatisfied. This most extreme form of accountability comes when members of parliament are up for re-election. But in a complex world with multiple issues in the public’s eye at any one time, elections seem like a less and less effective mechanism for holding politicians accountable for any one specific issue, unless that issue has truly captured the public’s attention and is identified as the (or a) key issue driving the election – and unless the issue is raised before final decisions with regard to it have been made. Accordingly, it is suggested that managerialism is most likely to be effective in and of itself (ie, without the aid of other accountability mechanisms) where:

1. The minister has the ability to force his or her will on the GBE; and
2. The issue is receiving a lot of public attention (and hence might be considered a true election issue).

C. The Public Trust Model

An alternative view holds that ministerial responsibility is insufficient to make GBEs and other public sector entities adequately accountable to the public for their conduct and that other mechanisms are required instead of or in addition to that principle. Proponents of this view, which can be called the ‘public trust model’, ‘begin[] from the proposition that government companies [and authorities] exercise public power and use public resources, and therefore . . . should be subject to wider notions of trust and responsibility than their private sector counterparts.’ These institutions and those who run them become in a sense if not in actual law the fiduciaries or trustees of the people. Thus, they should be accountable not only through ministerial responsibility, but also through other avenues including:

first, by direct accountability to members of the public (for example, through the courts and tribunals, and Freedom of Information legislation); secondly, by answering to ‘accountability agencies’ such as the Ombudsman, the Auditor General and parliament (especially through its standing committees); thirdly, through accountability of officers to

35 Ironically, for example, in the 2012 Queensland state elections, which saw the defeat of the Labor government by the Liberal National Party, the level of spending under the Labor government (including on water infrastructure) did turn out to be one of the driving issues. But \textit{ex post facto} punishment by the public did not constrain state government spending at the time it was taking place.

36 For example, Bottomley quotes the ‘WA Inc’ Royal Commission Report as “‘rejecting[ing] categorically the suggestion, behind which officials so often take refuge, that the ‘Westminster’ derived principle of individual ministerial responsibility is a sufficient and effective external accountability measure.’” Bottomley, ‘Corporatisation and Accountability’, above n 25, 164. See also WB Lane and Simon Young, \textit{Administrative Law in Australia} (Lawbook 2007) 293-94, 301-02.

37 Bottomley, ‘Corporatisation and Accountability’, above n 25, 163-64.

superiors who are themselves accountable to accountability agencies (this includes the idea of Ministerial responsibility).

D. Are Current GBE Accountability Models Adequate?

The Allconnex example provides a useful scenario for judging the sufficiency of current theories of GBE accountability. In Allconnex’s case, the ministerial responsibility model was insufficient to ensure that it was managed in a way that took account of the public’s concerns. According to that model, Allconnex should have heeded the public outcry and taken steps to rein in its price increases because it should have known that it would be called to account by the people or entities to which it was accountable (either the council-owners or the portfolio minister). But Allconnex’s management remained intransigent even after Allconnex’s majority shareholder, the Gold Coast City Council, took issue with its pricing policies. And the State basically did nothing until it was too late. As previously noted, the State’s first step to resolve the situation was to announce in April 2011 that city councils would be given a one-time opportunity to withdraw from their regional distributor-retailers. Ironically, not long after this, the Queensland Parliament enacted legislation restricting retail water price rises (but not the price of bulk water) to the consumer price index (CPI) for a two-year period from 1 July 2011 through 30 June 2013. But by that point consumer anger towards Allconnex had solidified to such an extent that the Gold Coast City Council eventually concluded that had no choice but to exercise the extreme option of voting to withdraw from Allconnex, resulting in its demise. This hardly can be called a successful

39 Bottomley, ‘Corporatisation and Accountability’, above n 25, 164, citing the ‘WA Inc’ Royal Commission Report. Bottomley notes that ‘[t]he Royal Commission appears to have drawn heavily upon Finn’s views, who was an adviser to the Royal Commission’: at 164, n 35. See also Lane and Young, above n 36, 293-94, 301-02.
40 Public concerns, not surprisingly, often have to do with costs. For example, in Allconnex’s case, the public was outraged by Allconnex’s raising prices for an essential good over which it held a monopoly. The fact that it at the same time seemed to be spending irresponsibly just fed into the outrage. See, eg, Andrew Potts, ‘Water Flip Won’t Hit This Year’s Budget’, Gold Coast Sun (Online), 14 April 2011 <http://www.goldcoast.com.au/article/2011/04/14/307971_gold-coast-news-html> (noting Allconnex’s hiring of additional staff on high salaries and decision to move to expensive offices); Queensland, Parliamentary Debates, Legislative Assembly, 14 February 2012, 51 (Alex Douglas) (noting that Allconnex ‘took long leases over very expensive premises’, ‘embarked on a $5 million plus office fit-out’, ‘appointed a vast number of staff on very high remuneration and embarked on a wide media campaign’).
41 See, eg, Anna Bligh, Premier and Minister for Reconstruction (Qld), ‘Premier Says Enough Is Enough - Water Blame Game Ends’ (Ministerial Media Statement, 7 April 2011). This was in direct response to what had turned into a dispute between the Gold Coast City Council and Allconnex over the 20% price increases. It bears mentioning that while national water pricing agreements meant that Allconnex had no choice but to pass on to consumers increases in the wholesale price of water, Allconnex did have control over how much of a markup to add on to the wholesale price. This issue is discussed in much greater detail in Victoria Schnure Baumfield, ‘The Allconnex Water Debacle: Lessons in Devising Appropriate Governance Mechanisms for Government Business Entities’ (2012) xx Bond Law Review xxx (forthcoming).
outcome from either the GBE’s perspective or even the public’s, since, as noted above, the alternative of going back to three council-based water businesses eliminated the possibility of efficiencies to be gained through consolidation of resources and economies of scale.\(^4^3\)

The Allconnex scenario also exposes the limits of the public trust model as currently conceived. The additional accountability mechanisms conceived under that model including Freedom of Information, judicial review, oversight by accountability agencies such as the Ombudsman, Auditor General or parliament, or accountability under the ministerial responsibility model were simply inapplicable to the pricing issues that were behind the public’s anger. With regard to the mechanisms other than the ministerial responsibility regime, those mechanisms simply did not have jurisdiction over pricing. The ministerial responsibility regime didn’t work, among other reasons, because the large holes in the accountability regime governing Allconnex resulted in no one having ultimate authority over Allconnex with regard to pricing.

Accordingly, while the public trust model as currently formulated in the literature is useful, there is room to expand its scope to make it applicable to a wider array of matters affecting the public. The model should be supplemented to include additional tools to ensure that GBEs do not neglect their overarching obligation, as governmental bodies, to act in the public interest. Two non-mutually-exclusive possibilities include an expanded use of remedies under the \textit{Corporations Act 2001} (Cth) (**Corporations Act**) and the creation of a legally-enforceable duty to the public.

\section*{V. Additional Tools for Ensuring that GBEs Adequately Consider and Respond to the Public’s Interests and Concerns}

\subsection*{A. Applicability of the Corporations Act to GBEs that Are Not Corporations}

GBEs that are corporations may be subject to the \textit{Corporations Act}. This proposition has been discussed elsewhere and does not merit additional discussion here. What does not seem to be generally appreciated is that certain statutory authorities, too, may be subject to the \textit{Corporations Act}. The significance of these entities being subject to the \textit{Corporations Act} is that it opens the door to expanded remedies for breach of duty and it drastically expands who may have standing to seek a remedy. This makes the \textit{Corporations Act} a potentially powerful tool for assuring the accountability of the subset of GBEs subject to the \textit{Corporations Act}.

\footnote{Indeed, Allconnex made just this argument in response to the Gold Coast City Council’s announcement that it was withdrawing from Allconnex. It said, in effect, that there was no way that separate council water businesses could produce lower costs than Allconnex’s economy of scale. See ‘Gold Coast Water Split From Allconnex Is ‘Crazy’ Says Minister’, \textit{Courier Mail} (Online), 26 July 2011 \texttt{<http://www.couriermail.com.au/news/queensland/gold-coast-water-split-from-allconnex-is-crazy-says-minister/story-e6freoof-1226101871320>}.}
As noted above, the language of the *Corporations Act* appears to cover certain statutory authorities even though they are not corporations. This occurs in the counterintuitive situation where they are *not* a body corporate. The analysis is as follows:

Section 57A(1) of the *Corporations Act* defines ‘corporation’ to include ‘(c) an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose.’ This definition would include, for example, Allconnex and its fellow distributor-retailers even though they are (or, in Allconnex’s case, were) not body corporates because as statutory bodies, and as holders of ‘all the powers of an individual’, the distributor-retailers may sue (and presumably be sued), bringing them within s 57A(1)(c)’s definition. In obvious recognition of the fact that the definition of ‘corporation’ could pick up public authorities, s 57A(2)(a) specifically exempts ‘exempt public authorit[ies]’ from the ‘corporation’ definition. Not all public authorities are ‘exempt public authorities’, however: s 9’s definition of ‘exempt public authority’ is limited to public authorities or other government agencies that are ‘a body corporate’.

For example, the legislation creating Allconnex and the other distributor-retailers specifically states that a distributor-retailer is ‘not a body corporate’. Therefore, although their creators may be surprised to learn this, it is clear that there is a subset of public authorities, including, for example, Allconnex (when it existed) and its sister distributor-retailers, that are subject to the *Corporations Act*.

This is not to suggest that the *Corporations Act* in its entirety applies to non-exempt public authorities. Public authorities that qualify as corporations will be subject to the *Corporations Act* provisions that apply specifically to corporations. Such provisions include:

- the general directors’ duties (ss 180-185);
- certain defences to claims of breach of duty (ie, s 189 (reliance));
- the provisions dealing with the disqualification of directors (Part 2D.6);
- the receivership provisions (Part 5.2) (but not the provisions dealing with voluntary administration and winding up);
- the provisions setting forth the civil consequences of contravening civil penalty provisions (eg, s 1317E *et seq*); and
- certain remedies (ie, injunctions under s 1324).

These provisions will apply unless and until the relevant State or Territory passes a law declaring the GBE to be an excluded matter pursuant to s 5F of the *Corporations Act* in relation to the applicability of some or all of the provisions in the *Corporations Act*.

Of course, GBEs that meet the definition of ‘corporation’ will not thereby be subject to the sections of the *Corporations Act* that apply only, for example, to the subset of corporations that also qualify as companies unless the particular GBE also meets the definition of

---

44 *Corporations Act* s 9 (dictionary), definition of ‘exempt public authority’.
45 2009 Act s 9.
46 See *Corporations Act* s 5F.
‘company’.\footnote{Section 9 of the Corporations Act defines ‘company’ as: ‘a company registered under this Act and:
(c) in Parts 5.7 B and 5.8 (except sections 595 and 596), includes a Part 5.7 body; and
(d) in Part 5B.1, includes an unincorporated registrable body.’ (NB: old subsections (a) and (b) related to the old charges regime that was abolished with the introduction of the Personal Property Securities Act 2009 (Cth)). It is beyond the scope of this paper to exhaustively parse the definition of ‘company’ except to say that GBEs that are not companies registered under the Corporations Act likely will not meet the definition of ‘Part 5.7 body’ (which would make the insolvency provisions including s 588G’s duty to prevent insolvent trading applicable to GBEs). Certain GBEs that are not corporations might be picked up by Part 5B.1 as unincorporated registrable bodies, but that fact is irrelevant for our purposes as it does not change this paper’s analysis.} It appears that in most instances, and certainly for most purposes, a GBE that has not specifically been registered as a company under the Corporations Act will not meet the company definition. Accordingly, the sections applicable only to companies will normally not apply to GBEs constituted as public authorities even if those GBEs do qualify as corporations under the Corporations Act. Such sections include, \textit{inter alia}:

- s 191 \textit{et seq} (disclosure of and voting on matters involving material personal interests);
- s 198A (the board’s management power);
- Part 2D.3 (appointment, remuneration and cessation of appointment of directors);
- Ch 2F (members’ rights and remedies, including s 232 \textit{et seq} (oppression) and s 236 \textit{et seq} (statutory derivative actions)); and
- the insolvent trading provisions (s 588G).

What does this discussion have to do with ensuring that GBEs adequately consider the public’s needs and concerns? If a GBE is found to be subject to the Corporations Act, then that will normally significantly broaden, as compared to the legislation under which the GBE was created, who can pursue the GBE’s board members or officers for breach of duty. For example, under the state legislation applicable to Allconnex, the only entities authorised to pursue remedies against Allconnex’s board members were Allconnex itself, the council-owners, or the State.\footnote{South-East Queensland Water (Distribution and Retail Restructuring) Regulations 2010 (2010) s 20.} Under the Corporations Act, standing would be extended to include not only ASIC but even, potentially, members of the general public to the extent that those persons meet the requirements of the Corporations Act’s statutory injunction provision, s 1324.

Furthermore, under the Corporations Act, a broader array of remedies will be available than is typically the case under the legislation governing GBEs. For example, in Allconnex’s case the relevant legislation limited board members’ liability to compensating for damage caused as a result of their breach of duty.\footnote{Ibid ss 20, 22.} In contrast, the general directors’ duties set forth at ss 180-183 of the Corporations Act are civil penalty provisions which ASIC is specifically authorised to enforce by applying for a declaration of contravention, pecuniary penalty order,
or compensation order. In appropriate cases ASIC could even seek to disqualify a GBE board member from managing corporations.

What is more, it is even possible, as mentioned above, that a member of the public might be able to seek a remedy under s 1324’s statutory injunction provision. Section 1324 allows any ‘person whose interests have been, are or would be affected’ by, *inter alia*, conduct that constitutes, constituted, or would constitute a contravention of the Act – ie, including breach of directors’ duties – to apply for an injunction to restrain the wrongdoer from engaging in the improper conduct. Section 1324(10) allows the court to order the wrongdoer to pay damages to ‘any other person’ in addition to or instead of granting the injunction. Section 1324’s broad standing provisions and flexible remedies clearly are a potentially powerful tool, although questions remain about the extent to which litigants may use this section to circumvent the restrictions limiting access to other remedies under the *Corporations Act*.52 Furthermore, s 1324’s utility is limited by the fact that it will only be available where there is a potential or actual breach of duty. Unless members of the public can devise a convincing theory as to why conduct such as, for example, a decision to excessively raise rates constitutes a breach of some directors’ duty, s 1324 will provide no relief even though ratepayers may suffer as a result. That is where this paper’s final suggestion – the creation of a duty to the public – comes in.

**B. Is a Duty to the Public the Answer?**

The Introduction to this paper posits that GBEs – at least in some instances – currently lack sufficient accountability mechanisms to ensure that GBE managers place adequate emphasis on the interests of the public. Some additional tool is necessary to restore the public focus that seems to have dissipated as a result of government businesses’ push to commercialise. The creation of a statutory duty to the public or the recognition of the existence of such a fiduciary duty may be the answer.

The creation of a duty to the public would effectively counter several of the problems that have been raised in this paper. As the public trust theory recognises, GBEs have a public status and purpose that should not be forgotten. Yet the law’s current emphasis on commercial viability and profitability would seem to virtually require GBE managers to ignore any notions of managing the GBE for the benefit of the public (including their customers) unless formally instructed to take a non-commercial consideration into account (eg, through the imposition of a CSO). The creation of a legal duty to the public would force GBEs to consider the public’s needs and concerns on a more holistic basis than the current piecemeal approach where such concerns are only relevant to the extent that they match with a particular consideration that the GBE’s managers were specifically ordered to take into account. In response to the double agency problem discussed above, which exacerbates the difficulty of aligning GBE managers’ interests with those of their principal(s), the creation of

50 *Corporations Act* s 1317J(1); see also *Corporations Act* ss 1317E, G and H. In addition, s 1317J authorises the corporation itself to apply for a compensation order.

51 See, eg, *Corporations Act* s 206C (court power of disqualification – contravention of civil penalty provision).

this duty would provide both an additional means of aligning GBEs’ interests with the public as well as another tool for holding GBE managers to account. And importantly, it will do so specifically with regard to something that goes to the very heart of why GBEs remain in the public sector at all. For these businesses are, after all, ultimately owned by the public. It is only proper therefore that the needs and concerns of the public be taken into account.

This is not to say that commercial considerations would or should become irrelevant – indeed, it would thwart the whole purpose of commercialising and corporatising public sector businesses if that were to occur – but such a duty would at least provide a counterweight to the current emphasis on commercial considerations. It would ensure that in the management of what are, again, government businesses, profit would not be the only real consideration. In other words, GBEs would be once again differentiated from for-profit private sector businesses. The GBE trend to focus on profitability as the expense of other considerations is, after all, a recent one. There is no reason why the role of commercialism in the public sector cannot be redefined before the current understanding becomes too entrenched.

The proposal must also be viewed in light of what is happening in the private sector. Corporate social responsibility (CSR) has dramatically increased in prominence in recent years, with the development of notions such as the ‘triple bottom line’. Companies are increasingly expected to be managed in ways consistent with the precepts of good CSR in order to differentiate themselves and gain or retain the goodwill of their customers and communities. Conversely, companies are expected to consider and, where possible, attempt to minimise the negative effects of their conduct on stakeholders including their employees, suppliers, customers, and communities in order to minimise legal risk. It would be the height of irony if businesses owned by the public were forbidden from considering the needs and concerns of the public (except where specifically ordered to do so) at the same time that private-sector businesses are increasingly expected to consider the CSR implications of their decisions.

It also bears noting that, to the extent that GBE managers do want to take the needs of the public into account, creating such a duty would give them legal cover to accommodate the public’s concerns without the risk of claims that the managers breached their duty to act in the entity’s best interests because, for example, they did not raise prices as high as they could have.

In short, GBEs should be managed for the benefit of the public (including their customers), and the law should reflect this. In the short term, the easiest way to do so would be by creating a statutory duty, although in the long term a recognition of a corresponding fiduciary duty would be useful since it would fill in the gaps to the extent that some GBEs escaped coverage under any of the statutory provisions imposing such a duty.

---

53 It is perhaps for another paper to consider whether the corporatist trend was on balance an improvement over the traditional system or not.

54 The triple bottom line refers to a consideration of social and environmental as well as economic factors. See, eg, Policy and Cabinet Division, Chief Minister and Cabinet Directorate (ACT), Triple Bottom Line Assessment for the ACT Government (2011).
The duty would have to be more specific than something simply requiring GBEs to act in accordance with the public’s concerns. Something that broad would be unworkable and unrealistic. Not only would a duty so phrased be too vague or ambiguous to be enforced, but by imposing an affirmative duty effectively to act in accordance with the public’s wishes, it would potentially create a conflict with other legal obligations, such as the requirement to break even or make a profit.

A more feasible solution would be to adopt a provision similar to s 172 of the UK Companies Act 2006, a relatively new provision imposing a duty to ‘promote the success of the company’. Under s 172, UK company directors must ‘have regard to’ various stakeholders and concerns when performing their duties. Section 172 was intended to force UK companies to consider corporate social responsibility (CSR) principles as part of their decisionmaking processes. It is not a panacea, as it merely requires decisionmakers to consider how the specified stakeholders will be affected by the relevant decision. It does not require a particular result, but the hope is that once the negative consequences to certain stakeholders are identified and discussed, that knowledge will influence directors’ decisionmaking.

The extent to which CSR principles should be mandatory as opposed to merely encouraged (or tolerated, depending upon one’s point of view) is still under debate in Australia. The adoption of a rule like s 172 would be controversial if applied to ordinary trading corporations because of concerns such as that s 172 unacceptably diffuses accountability to a corporation’s shareholders and muddies corporate objectives from the previously clear goal of profit maximisation. Those negatives in a way are the point of imposing such a rule on GBEs. It should therefore be much less controversial to apply CSR principles to public authorities and other GBEs, which by definition should be concerned with the public weal and where such a provision might, if anything, help clarify to whom the entity’s managers are accountable. Here, a s 172-like provision could require GBEs’ board members to have regard to, inter alia, the concerns of: the GBE’s government owner(s), the owner’s constituents (ie, the GBE’s conceptual ultimate owners -- the public), possibly its customers (monopoly or otherwise), and other stakeholders as appropriate, including potentially suppliers, competitors, and the environment. Indeed, if appropriate, such a provision could even require the GBE to have regard to specific considerations such as the need to keep fees affordable for vital necessities such as water, power, and transportation.

In response to concerns that imposing a s 172-like provision would open the floodgates to a tsunami of harassing litigation, relatively restrictive standing rules such as apply in other types of public interest litigation could limit standing on behalf of ‘the public’ to, for

---

55 Section 172 creates a new duty upon directors to act in ways ‘most likely to promote the success of the company for the benefit of its members as a whole.’ Directors are specifically instructed to have regard to: the likely long-term consequences of decisions; the interests of employees; the need to foster business relationships with suppliers, customers, and others; the impact of the company’s operations on the community and environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly as between members of the company.

56 Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151, 196; Whincop, above n 3, 7-8.
example, legitimate public interest groups. Alternatively, leave of court could be required to commence proceedings, similar to the process required before a statutory derivative action can be commenced by a shareholder on behalf of a company.\(^{57}\)

The other option would be to, in an appropriate test case, ask the courts to find a fiduciary duty to the public. For example, in *Bromley London Borough Council v Greater London Council*, \(^{58}\) ratepayers (via their local government) successfully argued that a governmental body did not adequately consider the interests of the public in making the decision at issue. In that case, the Greater London Council (‘GLC’) required subsidiary borough councils to raise rates to fund a public transport fare cut. The GLC refused to reconsider its decision even after learning that the costs to ratepayers would be double the amount of the fare cut because of a loss of block funding from the UK government if the fare cut went ahead. One of the borough councils sued, partially on the ground that the GLC had a fiduciary duty to have regard to ratepayers’ interests. The duty required the GLC to engage in a balancing test between the competing constituencies (ratepayers versus farepayers) instead of disregarding all costs to the ratepayers. The House of Lords upheld the appellate court’s finding of breach of fiduciary duty. As Lord Diplock stated:

> It is well established . . . that a local authority owes a fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory functions, and that this includes a duty not to expend those moneys thriftlessly but to deploy the full financial resources available to it to the best advantage . . . . [T]he GLC had a discretion as to the proportions in which that total financial burden should be allocated between passengers and ratepayers. What are the limits of that discretion and whether those limits would have been exceeded if the only effect of the GLC’s decision to instruct the LTE to lower its fares by 25 per cent had been to transfer to the ratepayers the cost . . . is a difficult question on which the arguments for and against are by no means all one way. Fortunately I do not find it necessary to decide that question in the present appeals . . . because the GLC’s decision was not simply about allocating a total financial burden between passengers and the ratepayers, it was also a decision to increase that total burden so as nearly to double it and to place the whole of the increase on the ratepayers. . . . That would, in my view, clearly be a thriftless use of moneys obtained by the GLC from ratepayers and a deliberate failure to deploy to the best advantage the full financial resources available to it by avoiding any action that would involve forfeiting grants from central government funds. It was thus a breach of the fiduciary duty owed by the GLC to the ratepayers.\(^{59}\)

There are several problems, however, with applying this theory in Australia, at least until a corresponding statutory duty has become well entrenched. First, it clearly requires an extreme level of disregard for the ratepayers before a public entity will be found to be in

\(^{57}\) See *Corporations Act* ss 236-37.

\(^{58}\) [1983] 1 AC 768.

breach. Furthermore, no Australian court has yet held that such a duty exists in Australia. Perhaps the closest we have seen is Finn J’s decision in *Hughes Aircraft Systems International v Airservices Australia*, in which he noted that

> There is, I consider much to be said for the view that, having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least insofar as this is consistent with its obligation to serve the public interest (or interests) for which it has been created.

But agreeing that such an obligation exists in the abstract and finding that there is a legally enforceable fiduciary duty to ratepayers are two different propositions, and even Professor Finn acknowledges that it will be very difficult to find such a duty under existing Australian trust and fiduciary law. This is why any enhanced fiduciary duty to the public must be written into statute rather than left to the courts to be discovered.

### VI. Conclusion

Drawing from public trust theory, this paper suggests ways that GBEs can be made more responsive to public concerns and, ultimately, accountable to the public for their conduct. An expanded understanding of how the *Corporations Act* can be used to hold some GBEs accountable is one possibility, but the most useful step would be the creation of a duty on GBE officers to consider the needs of the public in their decisions. From a practical perspective, the most feasible way of doing this might be via the imposition of a duty similar to the ‘duty to promote the success of the company’ found in s 172 of the *Companies Act 2006* (UK). Eventually it is to be hoped that the courts will recognise such a duty in equity, allowing for this concept to be applied to the maximum number of GBEs.

---

61 (1997) 76 FCR 151, 196.