Centre for Research in Public Sector Management
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28 February 2007

Richard Mulcahy MLA
Chair, Standing Committee on Public Accounts
Legislative Assembly for the Australian Capital Territory
GPO Box 1020, Canberra ACT 2601

Dear Mr Mulcahy

Thank you for the opportunity to make a submission to your Committee in its inquiry into Auditor-General's Report No. 5 of 2006: Rhodium Asset Solutions Ltd.

I have only a very general knowledge of the Rhodium enterprise and the problems that have arisen in its operations. I assume therefore that the invitation to me to make this submission is based on awareness that I have been studying government business enterprises and the non-departmental bodies often established to run them for a long period, and that my 2002 paper with John Laver extended this research interest to the ACT (Wettenhall & Laver 2002).

In this spirit, on 5 September 2006 I made a witness statement to the Standing Committee on Planning and Environment in its inquiry into Exposure Draft Planning and Development Bill 2006 (regarding the Planning and Land Authority and the Land Development Agency) (SCPE 2006). In similar spirit, there are several points I would like to make in relation to your present inquiry, mostly extending beyond the Rhodium case. Where I do discuss that case, it needs to be said that I mostly regard Rhodium as a continuation of a part of the earlier Territory-owned Corporation Totalcare.

I. The Territory-owned Corporation System

1. The ACT's TOC system was a creation of the Kaine Alliance government in 1990. It was based largely on the "corporatisation" model for public (government business) enterprise established by the Lange government in New Zealand in 1986 and followed by the Greiner government in NSW in 1989. NZ had converted a number of public enterprises that had previously been in the form of trading departments into state-owned companies. Though NZ had previously made good use of the statutory authority form as had the Australian states, it had not generally used that form for its GBEs, and the word "corporatisation" emerged to describe the from-department-to-corporation conversion process involved. In NSW and the ACT, however, most GBEs were already in the form of the statutory corporation (an incorporated version of the statutory authority), so it was always confusing to regard the process as one of corporatisation. In NSW the Carr Government tried to sort this out when it came to

office: it amended the Greiner legislation in 1995 to provide for both "company SOCs" and "statutory SOCs" (see Wettenhall 1997: 50-53).

2. In the ACT we have used the TOC system sparingly, with only three cases in existence for most of the post-1991 period: ACTTAB, ACTEW Corporation and Totalcare/Rhodium. Other GBEs have continued to operate either as statutory corporations or as parts of departments, with ACTION moving backwards and forwards between the two forms.

3. My own view, which has been argued elsewhere (Wettenhall 1993, 2001), is that the statutory corporation form is preferable because, while it allows an enterprise more freedom to operate commercially than a department, it retains a distinctly public flavour and has clearer accountability to the legislature. A different view was taken by Richard Humphry, who advised the then new Howard government on the management of the Commonwealth's GBEs in 1997 (Humphry 1997, and see Wettenhall 1998).

II. Rhodium/Totalcare as a special case

1. The Auditor-General's report has detailed numerous serious problems that have occurred in the management of Rhodium since its establishment in late 2004. Mostly the causes are attributed especially to inappropriate activities of the CEO, whose management style probably affected other senior executives as well. It is difficult to blame the board except to say that it may not have done enough to monitor the activities of its CEO; clearly it has been active in seeking remedies in the recent period.

2. The activities of Totalcare before Rhodium were often controversial, though I do not think it was the subject of on-going management failings in the same way. It provided a number of fairly standard utility services (notably road construction and maintenance and provision of cleaning services in the health and hospital area, in this servicing both public sector and private sector clients). The controversies stemmed rather from involvement in a quarrying venture with a private "partner", and in special Territory matters such as the implosion of the Canberra Hospital – but in fairness it needs to be said that, in the latter case, it was simply implementing a politically determined course of action that created significant difficulties for it.

3. I believe it is now fair to say that both cases were affected by the political environment in which they found themselves. For a large part of Australia's settled history, there was not too much debate about the propriety of government enterprise – it is often forgotten today that the non-Labor parties created many such enterprises and that, until the onset of the marketising philosophies of the later 20th century, many of them got almost as much support from non-Labor as from Labor politicians. Over the last generation, however, non-Labor has led the case for privatisation, and to some extent Labor governments have followed. This is, of course, a very bald summary of what has been happening, but the ideological shift away from the public sector has had two consequences for enterprises like Totalcare and Rhoduim that have remained in public ownership:

- While more exacting performance tests, both explicit and implicit, have been applied to their managements, they have had to operate in an atmosphere of considerable uncertainty in regard to their continuing life as public organisations – such uncertainty is not conducive to good, steady management.

- Even though still in public ownership, they have experienced considerable shifts in the make-up of their managerial personnel – many old-style managers experienced in public sector operation and imbued with the ethical standards demanded by such operation have been replaced by imports from the private sector with contrasting backgrounds and a commitment to profit over service and risk-taking over accountability to government and parliament.

The latter factor was especially evident in the collapse of the Victorian and South Australian state banks, and to some degree at least both factors have operated in the Totalcare and Rhodium cases. This does not excuse the bad management where it has occurred, but it does, I suggest, help to explain it.

III. General comment on the use of non-departmental public bodies in the ACT

1. While most of the familiar forms of governmental bodies – departments headed by ministers, statutory authorities (some of them incorporated as statutory corporations), and government-owned companies (some under the Territory-owned Corporations Act) – are present in the machinery of ACT government, the distinctions are not always clear. There are some overlapping cases that do not conform to conventional definitions or understandings of the purposes of the various types, and I contend that the resulting confusions about roles are not in the interests of good governance. This was argued in the second of two submissions from the University of Canberra Centre for Research in Public Sector Management to the (Costello) Strategic Review of early 2006. However, since the resulting report was never made public, I have no idea whether any note was taken of that argument. Some legislative outcomes of the 2006 budget suggest not, so I welcome the opportunity to repeat the argument here: a copy of the submission of 2 February 2006 is attached.

2. In preparing that submission, we queried a press comment that the ACT had 10 government agencies. The response from the Review Secretariat was: "Yes, there are 10 departments, or authorities classified as departments, however there are many other statutory authorities" (see attached copy of submission). Then, in preparing my evidence for the Standing Committee on Planning and Environment last September, I noted that there were conflicting lists issued from within the ACT government system itself. In one website list, some statutory bodies were grouped under departments (which I take to indicate the make-up of portfolios), while others were shown in a separate list of authorities, corporations and agencies away from such portfolios (ACT Government Home 2002). The Auditor-General's 2005 financial audit report had 20 items under the heading "Departments", including the Planning and Land Authority and a few others I regard as statutory authorities, followed by a separate lists of statutory authorities etc that included the Land Development Agency (ACT Auditor-General 2005: 9-10). There are probably other, differing lists. My check of the Financial Management Act, parts VIII and IX dealing with "territory authorities" (revised to early August 2006), revealed that there were two lists, one for authorities with boards, the other a more extensive list: the Land Development Agency appeared in both, the ACT Planning and Land Authority in neither! Checking that out, I found a 2003 declaration under the Financial Management Act that it is not a territory authority. Yet, in its own 2005 report, it describes itself as being "independent (for

some of its functions)", and lists one ministerial direction received (ACTPLA 2005: 4, 61). That is very much like a conventional statutory authority.

3. The current arguments about the status of the Emergency Services Authority/Agency provide another illustration of the problem. It is claimed that its statutory authority status has been removed, and my check of the post-2006 budget changes to the Emergencies Act 2004 shows that the declaration that it is a statutory authority has been eliminated, and that it is no longer "a corporation". However the legislation still establishes a position of Emergency Services Commissioner and vests significant powers in that office. Though the changes are significant (eg the commissioner is now to be a public servant, and is no longer required to submit an annual report), the structure retains many of the characteristics of a statutory authority as I understand them. They are virtually all under some degree of ministerial direction, but that does not remove their statutory authority status -- this makes a board or chief executive the first-instance statutory decision-maker, a position quite different from that of a departmental officer without statutory recognition and simply operating under delegation from a minister. This whole debate puzzles me. Yes, it is a weaker authority than before. However, had there been a clear intention to return the ESA to the relevant department, all power and authority should have been vested in the minister (as always with power to delegate). The internal units (here ambulance service, fire brigade, rural fire service, state emergency service, each of which still has its own statutory chief officer in the revised legislation) could be identified and their functions prescribed, but there would be no doubt that responsibility remained with the minister. Under the present legislation, there is in my view considerable doubt about that; it is as though the legislative draftsman was, whether under political direction or not, seeking to obscure rather than clarify.

4. It does not appear to me to be satisfactory to have a body which is an independent authority for some purposes but which is treated as a ministerial department for other purposes, which now seems to be the position of both ACTPLA and ESA. The processes of accountability are (or should be) different, and that should be clear in the legislation. My submission here is, obviously, that the processes of government in the ACT would be improved if such causes of confusion were removed. I suggest that this requires the development of a standard list of departments and agencies, and that that list be used consistently by all parts of the ACT governance system in such a way that a good understanding of the types of organisations involved and their particular requirements and responsibilities can emerge. This approved list should be produced at the centre, presumably in the Chief Minister's Department. Obviously it will change from time to time as portfolios and departments change and as non-departmental agencies are established and disestablished, but it should always be centrally determined and followed consistently by all parts of the system.

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ATTACHMENT - COPY

Centre for Research in Public Sector Management,
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2 February 2006

Executive Director
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Dear Executive Director

STRATEGIC REVIEW – SUPPLEMENT TO CRPSM SUBMISSION

Dr Chris Aulich, Director of the Centre for Research in Public Sector Management (CRPSM) in the University of Canberra, forwarded a submission to your Review on behalf of the Centre on 27 January.

I was involved in the preparation of that submission. Since it was sent, however, I have noted the suggestion in recent press reports relating to the pending retirement of Deputy Chief Minister and Treasurer Ted Quinlan that the restructuring of central agencies is an important part of your agenda. We did not refer specifically to that issue in our original submission, and I would now like to address it in a personal submission which may be seen as a supplement to the collective Centre submission.

At the outset I should tell you that I was puzzled by the reference to "ten currently-existing agencies" (Ben Doherty, "Stanhope's hand is forced by deputy", *Canberra Times,* 26 January, p.8), since there are obviously so many more. A check with the ACT Government Directory website was unhelpful in explaining this reference -- I did not find lists enumerating agencies and grouping them according to portfolios and/or organisational types as occurs in several state government directories. So I was grateful to Marsha Guthrie of your Secretariat for advising that the reference relates to "10 Departments (or Authorities classified as Departments)".

While we have not in this Centre worked specifically on the arrangement of ministerial departments in the ACT, I believe that more general work we have done on ministries and departments is relevant. This shows that there have been two broad traditional departmental patterns in Australia:

- that of the states, in which departmental arrangements (which began in colonial times before the advent of self-government) and ministerial arrangements are the products of different lines of development, and have rarely been fully integrated, and
- that of the Commonwealth, in which there has been a much greater degree of congruence between these two sets of arrangements, with ministerial and portfolio titles usually corresponding to departmental titles.

The state structures have for this reason usually been fairly inchoate, and more difficult to understand. These contrasts have been brought out, for example, in the early chapters of my *Organising Government: The Uses of Ministries and Departments,* Croom Helm, Sydney, 1986, a copy of which is enclosed for your use.

It may be that the differences are now less stark because of streamlining reformative action taken in some states over the last two decades, but it is suggested that they are still fairly significant. Although the separate territory administrations have been of much more recent vintage, perhaps because they have a good deal of functional affinity with the states they have tended to follow the state pattern.

Also a study of patterns of ministerial/departmental organisation inevitably brings us to the matter of relationships between the ministries/departments and non-departmental public bodies (NDPBs), including a consideration of differences in accountability and ministerial-responsibility requirements between the ministries/departments and the NDPBs.

I see a strong case for bringing the ACT pattern more closely into alignment with the Commonwealth pattern, with ministerial and portfolio titles exactly matching the titles of ministerial departments (even if on a one-to-two basis because of the small numbers), with all other structures clearly separated in normal NDPB style, and with every effort made to avoid hybrid-like "Authorities classified as Departments" (from Marsha Guthrie's message).

This would require also a clear recognition that, while ministers have ultimate responsibility for all parts of the system, that responsibility will be more immediate and comprehensive in the departments. An important part of the rationale for non-departmental bodies is that they should operate with a real degree of autonomy and at greater distance from ministers. If that is not acceptable, then they should unambiguously be parts of departments.

This proposition is based on a firm belief that clear lines of authority promote good administration whereas confusions confound it, and that the structures of government should be designed to avoid such confusions. I would also like to see the development of an ACT Government Directory website similar to those now prepared by some states, in the interests of transparency and better understanding both by those who work within the system and by those who have to deal with it.

As indicated in our main submission, this Centre would be very interested in working with your Review or with the ACT administration more generally to develop these ideas.

Yours sincerely

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PS: My more recent work on types of administrative agencies can be found in the journal *Public Organization Review,* Vol 3 no 3, September 2003. A copy of this issue of the journal is also enclosed.