



# fact sheet

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## Public Governance, Performance and Accountability Act 2013 – what are the key changes for Commonwealth authorities?

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The *Public Governance, Performance and Accountability Act 2013* (the PGPA Act) creates a new framework covering governance, accountability, performance and the use of resources across Commonwealth bodies currently governed by the *Commonwealth Authorities and Act 1997* (the CAC Act) and the *Financial Management and Accountability Act 1997* (the FMA Act).

Sections 1 to 5 of the PGPA Act commenced operation on 1 July 2013. The remainder of the provisions of the Act (that is, those provisions that will impose substantive obligations on Commonwealth bodies) will not commence operation until 1 July 2014 or another date fixed by proclamation. When its substantive provisions commence operation, the PGPA Act will replace the CAC Act and the FMA Act.

Importantly, much of the detail of the legislative framework will be contained in rules made by the Finance Minister under the Act. Those rules, which are yet to be made, will be critical in determining the scope and operation of the legislation.

This fact sheet describes in very general terms:

- key concepts contained in the PGPA Act
- what key changes the PGPA Act will make for CAC Act authorities in various areas including:
  - the duties of ‘accountable authorities’
  - the duties of ‘officials’
  - planning, performance and accountability requirements
- what key issues the rules to be made under the PGPA Act may deal with that are particularly relevant to CAC Act authorities.

The fact sheet contains general information only and should not be relied upon as an exhaustive guide to the operation of the PGPA Act.<sup>1</sup>

### Key concepts

The substantive provisions of the PGPA Act will operate by reference to the following key concepts:

- *Commonwealth entity* – there will be 2 categories of Commonwealth entities:
  - corporate Commonwealth entities (CCEs) (most current CAC Act authorities will be CCEs)<sup>2</sup>

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<sup>1</sup> Further general information about the PGPA Act and its development can be found in the revised explanatory memorandum to the Public Governance, Performance and Accountability Bill 2013.

<sup>2</sup> Commonwealth companies currently governed by the CAC Act will not be Commonwealth entities. However, the PGPA Act contains special rules that will apply to Commonwealth companies (see Ch 3).

- non-corporate Commonwealth entities (most current FMA Act agencies will fall within this category)
- *accountable authority* (this will generally be the governing body – for example, the directors, board or council – of a CCE)
- *official* (all of the staff of a CCE, including a member of the accountable authority of the CCE, will be officials)
- *public resources* (generally all of the money and property of a CCE will be public resources).

## **Duties of accountable authorities**

### **Key changes**

Accountable authorities of CCEs will be required to comply with the following new duties under the PGPA Act:

- *duty to govern a Commonwealth entity (s 15)* – an accountable authority will be required to govern a CCE in a way that promotes the proper use and management of public resources that the authority is responsible for, promotes the achievement of the purposes of the CCE and promotes the financial sustainability of the CCE
- *duty to establish and maintain systems relating to risk and control (s 16)* – an accountable authority will be required to establish and maintain an appropriate system of risk oversight and management for the CCE and an appropriate system of internal control for the CCE
- *duty to encourage cooperation with others (s 17)* – an accountable authority will be required to encourage officials of the CCE to cooperate with others to achieve common objectives where practicable
- *duty in relation to requirements imposed on others (s 18)* – an accountable authority will be required to take particular matters into account when imposing obligations on others in relation to the use or management of public resources.

In addition, accountable authorities of CCEs will have the following duty:

- *duty to keep the responsible minister and Finance Minister informed (s 19)* – to some extent this provision reflects requirements currently contained in ss 15 and 16 of the CAC Act. However, s 15 of the CAC Act requires the directors of a CAC Act authority to notify the responsible minister if the authority or any of its subsidiaries decide to do particular listed things (including forming a company; participating in the formation of a company; or participating in a significant partnership, trust, unincorporated joint venture or similar arrangement). In contrast, s 19 of the PGPA Act will require the accountable authority to notify the responsible minister:
  - as soon as practicable after the accountable authority makes a ‘significant decision’ in relation to the CCE or any of its subsidiaries
  - if the accountable authority becomes aware of any ‘significant issue’ that may affect the CCE or any of its subsidiaries
  - as soon as practicable after the accountable authority becomes aware of any ‘significant issue’ that has affected the CCE or any of its subsidiaries.

The rules may prescribe matters relevant to the exercise of this duty – see the discussion of key issues that may be dealt with by the rules set out below.

### **What will not change much?**

Accountable authorities will need to comply with the following duty under the PGPA Act:

- *duty to comply with any government policy orders that apply to the CCE (s 22)* – the Finance Minister will be able to make a government policy order that specifies a policy of the Australian Government that is to apply in relation to one or more CCEs. CAC Act authorities are currently required to comply with any general policy orders that apply to them under s 28 of the CAC Act.

### **Duties of officials**

The PGPA Act will impose a number of duties on officials that are similar to duties currently contained in the CAC Act. However, as the table below explains, some of the duties that will apply to all officials under the PGPA Act currently only apply to directors or officers (that is, directors and senior managers) under the CAC Act.

<b>Duty</b>	<b>Who the duty applies to under the CAC Act</b>	<b>Who the duty will apply to under the PGPA Act</b>
<i>Duty of care and diligence (s 25)</i>	Officers (s 22)	All officials
<i>Duty to act in good faith and for a proper purpose (s 26)</i>	Officers (ss 23 and 26)	All officials
<i>Duty in relation to use of position (s 27)</i>	Officers and employees (ss 24 and 26)	All officials (no relevant change)
<i>Duty in relation to use of information (s 28)</i>	Officers and employees (ss 25 and 26)	All officials (no relevant change)
<i>Duty to disclose interests (s 29)</i>	Directors (s 27F)	All officials

Unlike existing provisions contained in the CAC Act, no civil or criminal penalties apply under the PGPA Act for a breach of any of these duties. Employment-related sanctions (for example, under the *Public Service Act 1999*) or criminal sanctions (for example, under the *Criminal Code Act 1995*) may result from a breach of these duties in particular circumstances. Further, under s 30 of the PGPA Act, the person responsible for appointing the accountable authority or members of the accountable authority of a CCE may terminate the appointment of the accountable authority or a member of the accountable authority if that person breaches one of these duties.

## **Planning, performance and accountability requirements**

### **Key changes**

Under the PGPA Act, all CCEs will be required to:

- *prepare a corporate plan (s 35)* – currently, government business enterprises (GBEs) are the only CAC Act authorities that are required by the CAC Act to prepare a corporate plan (see s 17 of the CAC Act). Further, if a statement of the Australian Government’s key priorities and objectives is published under s 34 of the Act and the purposes of a CCE relate to those priorities and objectives, the corporate plan for the CCE must set out how the activities of the CCE will contribute to achieving the Government’s priorities and objectives
- *prepare budget estimates (s 36)* – currently, GBEs are not required to prepare budget estimates (although most other CAC Act authorities are – see s 14 of the CAC Act)

- *keep records about performance in achieving its purposes (s 37)* – there is no current requirement along these lines contained in the CAC Act
- *measure and assess performance in achieving its purposes (s 38)* – there is no current requirement along these lines contained in the CAC Act
- *prepare annual performance statements (s 39)* – there is no current requirement along these lines contained in the CAC Act
- *keep accounts and records (s 41)* – this provision will impose similar requirements to s 20 of the CAC Act. However, one difference is that the Finance Minister and the responsible minister will generally be entitled to full and free access to the accounts and records kept under s 41 of the Act.

### **What will not change much?**

Under the PGPA Act:

- *annual financial statements must be prepared (s 42)* – this provision will impose similar requirements to cl 2 of Sch 1 to the CAC Act
- *annual financial statements must be audited (s 43)* – this provision will impose similar requirements to cl 3 of Sch 1 to the CAC Act
- *subsidiaries of CCEs must have their financial statements audited (s 44)* – this provision will impose similar requirements to s 12 of the CAC Act
- *CCEs must have an audit committee (s 45)* – this provision will impose similar requirements to s 32 of the CAC Act
- *an annual report must be provided to the responsible minister (s 46)* – this provision will impose similar requirements to s 9 of the CAC Act (however, the deadline for providing an annual report to the minister will generally be 31 October rather than 15 October).

### **Key issues that may be dealt with by the rules**

The rules to be made under the PGPA Act may, amongst other things, do the following:

- *prescribe matters relevant to the duty to keep the responsible minister informed (s 19)* – as discussed above, accountable authorities will need to notify the responsible minister about ‘significant issues’ and ‘significant decisions’. The rules may prescribe matters to be taken into account in deciding whether a decision or issue is ‘significant’.
- *prescribe matters relating to the commitment or expenditure of money by a CCE (s 52)* – the CAC Act does not contain specific requirements relating to the commitment or expenditure of money by a CAC Act authority. (The CAC Act does contain rules relating to investment (see ss 18 and 19), and similar investment rules are now contained in s 59 of the Act.)
- *deal with matters relating to banking by CCEs (s 54)* – banking requirements are currently contained in ss 18 and 19 of the CAC Act
- *authorise borrowing by CCEs (s 57)* – currently whether or not a CAC Act authority can borrow money will depend on their enabling legislation. The PGPA Act will expressly allow CCEs to borrow where this is authorised by an Act, the rules or by the Finance Minister. In other cases, borrowing by CCEs will be prohibited.
- *prescribe requirements relating to the granting of indemnities, guarantees or warranties by CCEs (s 61)* – other than s 27M of the CAC Act (which relates to a CAC Act authority indemnifying officers), the CAC Act does not contain any requirements about the granting of indemnities, guarantees or warranties

- *prescribe requirements relating to the obtaining of insurance by CCEs (s 62)* – other than s 27N of the CAC Act (which relates to a CAC Act authority insuring an officer against liabilities incurred as an officer), the CAC Act does not contain any requirements relating to the obtaining of insurance
- *establish new CCEs (s 87)* – currently CAC Act authorities can only be established by an Act of Parliament
- *make provision for grants and procurement (s 102)* – currently most CAC Act authorities are required to comply with the Commonwealth Procurement Rules when undertaking procurement activities over a particular threshold (see the *Finance Minister's (CAC Act Procurement) Directions 2012*), but they are not required to comply with the Commonwealth Grant Guidelines.

Section 102 of the PGPA Act lists a number of other matters that rules affecting CCEs can be made about.

The rules may prescribe matters in relation to a particular CCE or class of Commonwealth entities or make different provision in relation to different CCEs or classes of Commonwealth entities (s 101(2)).

The Department of Finance and Deregulation (Finance) has advised AGS that it will develop the rules during 2013–14 and release draft rules for public consultation. We understand that Finance strongly encourages CAC Act authorities to assist it to finalise the rules by providing it with any comments they may have about the draft rules.

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