



fact sheet

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Public Governance, Performance and Accountability Act 2013 – what are the key changes for FMA Act agencies?

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 *Financial Management and Accountability Act 1997* (the FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (the CAC Act).

Sections 1 to 5 of the PGPA Act commenced operation on 1 July 2013. The remainder of the provisions of the PGPA 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 FMA Act as well as the CAC Act.

Importantly, much of the detail of the legislative framework will be contained in rules made by the Finance Minister under the PGPA 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 the key concepts in and the key features of the PGPA Act in very general terms.

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

Key concepts

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

- *Commonwealth entity* – there will be 2 types of Commonwealth entities:
 - non-corporate Commonwealth entities (NCCEs) – departments of State, departments of Parliament and ‘listed entities’ will be NCCEs. ‘Listed entities’ will be listed in the rules and will include most bodies that are currently prescribed agencies under the FMA Act. Most current FMA Act agencies will be NCCEs.
 - corporate Commonwealth entities (CCEs) – Commonwealth entities that are body corporates established by a law of the Commonwealth will be CCEs. Any FMA Act agency that retains its status as a body corporate established by a law of the Commonwealth will be a CCE, as will bodies that are currently Commonwealth authorities under the CAC Act.²

¹ 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.

² 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).

- *accountable authority* (AA) – the AA of an entity is the person or body responsible for managing the entity. The AA of a department of State and a parliamentary department will be the secretary. The AA of NCCEs that are listed entities will be prescribed by the rules.
- *official* – any individual who is in or forms part of an entity will be an official of the entity. This will include any officer, employee or member of the entity and the AA of the entity. Contractors and independent contractors will not ordinarily be officials (unless the rules provide otherwise). Unlike the position under the FMA Act, people will not become officials merely because they perform ‘financial tasks’.
- *public resources* – ‘relevant money’ (meaning money in the bank account of or possession of the Commonwealth or a CCE), ‘relevant property’ (meaning property owned or held by the Commonwealth or a CCE) and appropriations will be public resources.

This fact sheet is intended to provide guidance for FMA Act agencies that will be NCCEs under the PGPA Act. FMA Act agencies that retain their body corporate status will be CCEs and can find further information about the obligations of CCEs and their staff in AGS Fact sheet 33, *Public Governance, Performance and Accountability Act 2013* – what are the key changes for Commonwealth authorities?

Duties of accountable authorities

The PGPA Act will impose a number of duties on accountable authorities, many of which will be new for the chief executives of existing FMA Act agencies. These include the following:

- *duty to govern a Commonwealth entity* (s 15) – the AA will be required to govern the entity in a way that promotes the ‘proper’ use and management of public resources for which the AA is responsible. ‘Proper’ use and management of public resources is defined to mean efficient, effective, economical and ethical use. The AA of an NCCE is required to govern the entity in a way that is not inconsistent with the policies of the Australian Government (s 21). This aspect of the duty is very similar to s 44 of the FMA Act.

However, s 15 also requires an AA to govern the entity in a way that promotes:

- the achievement of the purposes of the entity
- the financial sustainability of the entity.

Section 15 will also require an AA to take into account the effect of decisions on public resources generally, not only those for which the AA is responsible.

- *duty to establish and maintain systems relating to risk and control* (s 16) – an AA will be required to establish and maintain appropriate systems of risk oversight and management and of internal control for the NCCE, including by implementing measures directed at ensuring that officials of the entity comply with the PGPA Act and rules. This will include ensuring that consultants and independent contractors, who will not be officials, comply with the legislation.
- *duty to encourage cooperation with others* (s 17) – an AA will be required to encourage officials of the NCCE to cooperate with others to achieve common objectives where practicable
- *duty in relation to requirements imposed on others* (s 18) – when imposing obligations on others in relation to the use or management of public resources, an AA will be required to take into account the risks that might arise and the effects of imposing the requirements. This duty is intended to encourage entities to consider whether the requirements imposed on others (such as grant recipients) might be excessive in light of the potential risks that might arise.
- *duty to keep the responsible minister and Finance Minister informed* (s 19) – an AA will be required to keep the responsible minister informed of the activities of the entity; provide reports, documents and information to the responsible minister and the Finance Minister; notify the responsible

minister about significant decisions; and give the responsible minister notice of significant issues. Section 44A of the FMA Act presently requires that information be provided to the responsible minister and Finance Minister; s 19 expands this obligation. The rules may prescribe matters relevant to the exercise of this duty.

Duties of officials

The FMA Act does not currently impose specific duties on officials (although persons employed under the *Public Service Act 1999* (the Public Service Act) or the *Parliamentary Service Act 1999* (the Parliamentary Service Act) are, and will continue to be, subject to a range of duties under those Acts). The PGPA Act will impose the following specific duties on all officials (including AAs):

- *duty of care and diligence (s 25)* – officials will be required to exercise their powers, perform their functions and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were in the same position and had the same responsibilities as the official
- *duty to act in good faith and for a proper purpose (s 26)* – officials will be required to exercise their powers, perform their functions and discharge their duties in good faith and for a proper purpose
- *duty in relation to use of position (s 27)* – officials will be required not to use their position to gain an advantage (for themselves or any other person) or cause detriment
- *duty in relation to use of information (s 28)* – officials will be required not to improperly use information they obtained as an official to gain an advantage (for themselves or any other person) or cause detriment
- *duty to disclose interests (s 29)* – officials of a Commonwealth entity who have a material person interest that relates to the affairs of the entity must disclose details of the interest.

No civil or criminal penalties apply under the PGPA Act for a breach of any of these duties. However, employment-related sanctions (for example, under the Public Service Act or Parliamentary Service Act) may result from a breach of these duties in particular circumstances.

Planning, performance and accountability requirements

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

- *prepare a corporate plan (s 35)* – there is no requirement along these lines in the FMA Act. If a statement of the Australian Government's key priorities and objectives is published under s 34 of the PGPA Act and the purposes of a NCCCE relate to those priorities and objectives, the corporate plan for the NCCCE must set out how the activities of the NCCCE will contribute to achieving the Government's priorities and objectives.
- *prepare budget estimates (s 36)* – a chief executive of an FMA Act agency is currently required to prepare budget estimates by reg 22D of Financial Management and Accountability Regulations 1997 (the FMA Regs)
- *keep records about the entity's performance in achieving its purposes (s 37), measure and assess its performance in achieving its purposes (s 38) and prepare annual performance statements (s 39)* – the FMA Act does not require agencies to measure or report on their performance
- *provide an annual report to the responsible minister (s 46)* – ss 63 and 70 of the Public Service Act require the secretary of a department and the head of an executive agency to give a report to the agency minister about the agency's activities during the year, but there is no express requirement in the FMA Act along these lines

- *keep accounts and records (s 41)* – to some extent this provision reflects ss 19 and 48 of the FMA Act. However, the provision imposes more specific requirements than relevant provisions of the FMA Act. Under s 41 of the PGPA Act, an AA must cause records to be kept that properly record and explain the entity's transactions and financial position. Further, the AA must ensure that the accounts and records are kept in a way that complies with any requirements prescribed by the rules, enables the preparation of the annual financial statements and allows those financial statements to be properly and conveniently audited. 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 (currently, s 48 of the FMA Act requires that only the Finance Minister, and not the responsible minister, has full and free access to accounts and records).
- *prepare annual financial statements and have them audited (ss 42 and 43)* – these requirements are similar to those imposed by ss 49 and 53 of the FMA Act.

Committing and spending money

Spending proposals

Regulations 8 to 12 of the FMA Regs contain particular requirements in relation to the commitment and expenditure of money.

The PGPA Act does contain a provision similar to reg 9, but it will only apply to ministers. Section 71 will provide that a minister must not approve a spending proposal unless the minister is satisfied that the expenditure would be a proper use of relevant money. The PGPA Act does not contain any other specific requirements replicating regs 8 to 12. Rather, s 52 of the PGPA Act provides that the rules may prescribe matters relating to the commitment or expenditure of money by the Commonwealth or a Commonwealth entity.

Entering into arrangements

The PGPA Act will confer on the AA of a NCCE the power to *enter into, vary and administer arrangements relating to the affairs of the NCCE* – a similar power is contained in s 44 of the FMA Act. The PGPA Act does not contain a provision equivalent to s 32B of the FMA Act.

Banking, borrowing and investment

Powers relating to banking, borrowing and investment contained in the PGPA Act are similar to powers contained in the FMA Act. In particular:

- *the Finance Minister will be able to enter into banking agreements and open bank accounts (s 53)* – similar powers are currently contained in ss 8 and 9 of the FMA Act
- *the Finance Minister will be able to borrow money on behalf of the Commonwealth (s 56)* – a similar power is currently contained in s 38 of the FMA Act
- *the Finance Minister or the Treasurer will be able to invest money on behalf of the Commonwealth (s 58)* – a similar power is currently contained in s 39 of the FMA Act.

As is the position under the FMA Act, each of these powers can be delegated.

Under s 55 of the PGPA Act, the rules may also prescribe matters relating to banking by officials and ministers (banking requirements are contained in ss 10 and 11 of the FMA Act).

Indemnities, guarantees and warranties

Under s 60 the PGPA Act, the Finance Minister will have an exclusive power to grant an indemnity, guarantee or warranty on behalf of the Commonwealth. The Finance Minister will be able to delegate this power.

Waiver, set-off and act of grace payments

Under the PGPA Act the Finance Minister will have the power to:

- *waive amounts owing to the Commonwealth (s 63)* – a similar power is contained in s 34 of the FMA Act
- *set off amounts owed to and by the Commonwealth (s 64)* – a similar power is contained in s 35 of the FMA Act
- *authorise act of grace payments by the Commonwealth (s 65)* – a similar power is contained in s 33 of the FMA Act.

The Finance Minister will be able to delegate each of these powers

Appropriations and special accounts

Under the PGPA Act:

- *the Finance Minister will have power to control the timing of the payment of appropriated amounts of Commonwealth entities (s 51)* – under s 51, where an amount has been appropriated by the Parliament in relation to a Commonwealth entity, the Finance Minister may generally make the appropriated amount available to the entity in such instalments and at such times as the Finance Minister considers appropriate. However, any action by the Finance Minister cannot be inconsistent with any law that requires payment of an amount to an entity (and for which there is an appropriation).
- *there will not be any 'drawing rights'* – there is no equivalent provision to s 26 of the FMA Act contained in the PGPA Act
- *there will not be any adjustment to appropriations to take account of recoverable GST* – there is no equivalent provision to s 30A of the FMA Act contained in the PGPA Act
- *NCCEs will be able to retain particular receipts prescribed by the rules (s 74)* – this provision is similar to s 31 of the FMA Act
- *the Finance Minister may adjust relevant appropriations where there is a transfer of agency functions (s 75)* – this provision is similar to s 32 of the FMA Act
- *there will be an appropriation for particular repayments by the Commonwealth* – this provision is similar to s 28 of the FMA Act
- *the Finance Minister may establish special accounts and the Consolidated Revenue Fund will be appropriated for expenditure for the purposes of these special accounts (s 78)* – this provision is similar to s 20 of the FMA Act
- *the Consolidated Revenue Fund will be appropriated for expenditure for the purposes of a special account established by another Act (s 80)* – this provision is similar to s 21 of the FMA Act.

Key issues that may be dealt with by the rules

Under the PGPA Act a range of matters that may affect NCCEs can be dealt with by rules. Sections 102 and 103 of the PGPA Act list a number of matters that rules affecting NCCEs can be made about, including:

- grants and procurement
- managing appropriations
- performance
- the acquisition, use, management or disposal of property by a NCCE
- the recovery of debts by the AA of a NCCE.

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

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 FMA Act agencies to assist it to finalise the rules by providing it with any comments they may have about the draft rules.

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