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28 June 2013

Bill introduces new governance, performance and accountability framework for Commonwealth bodies

Today the Senate passed the Public Governance, Performance and Accountability Bill 2013, which will set in place a new framework for the management of performance, financial accountability and the use of public resources across all Commonwealth bodies, regardless of their legal form.

The Bill will replace the *Financial Management and Accountability Act 1997* (the FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (the CAC Act). The substantive provisions of the Bill would commence on 1 July 2014 or on proclamation.

The Bill passed the House of Representatives earlier in June.

Key concepts

The Bill operates by reference to several key concepts. The most important of these are:

- Commonwealth entities
- accountable authorities
- officials
- public resources.

Commonwealth entities

Clause 10 of the Bill provides that all of the following are Commonwealth entities:

- departments of state and parliamentary departments
- 'listed entities' (that is, entities prescribed by the rules, similar to prescribed agencies under the FMA Act)
- bodies corporate established by a law of the Commonwealth.

All bodies that are presently agencies under the FMA Act or authorities under the CAC Act will be Commonwealth entities for the purposes of the Bill.

There will be 2 types of Commonwealth entity:

- corporate Commonwealth entities (that is, bodies that are established as corporations by their enabling legislation)
- non-corporate Commonwealth entities (that is, departments and listed entities).

Some provisions of the Bill apply only to corporate Commonwealth entities and some apply only to non-corporate Commonwealth entities.

If enacted, the Bill will empower the Finance Minister to create a corporate Commonwealth entity by rules (cl 87). It is intended that this power would be used where it is desirable to establish a corporate entity but where the circumstances are such that putting legislation before the Parliament would not be possible or appropriate (for example, where there is urgency).

Accountable authorities

The person or body responsible for governing the entity will be an 'accountable authority'. The accountable authority of:

- a department of state or a parliamentary department will be the secretary of the department
- a listed entity will be the person or group of persons prescribed by the rules
- a body corporate established by a law of the Commonwealth will be the governing body of the entity (that is, the board of directors).

Officials

Each Commonwealth entity will have 'officials'. An official of a Commonwealth entity will generally be an individual who is in, or forms part of, the entity (with some specific exceptions such as judges, consultants and independent contractors unless the rules prescribe that they are officials).

Importantly, all staff of current CAC Act authorities (such as AGS) will be officials and will be subject to the duties of officials (see below).

Public resources

Duties and obligations are imposed on accountable authorities and officials in relation to 'public resources', which is defined to include 'relevant money', 'relevant property' and appropriations.

'Relevant money' means money in any Commonwealth bank account or the bank account of a corporate Commonwealth entity, or money that is held by the Commonwealth or a corporate Commonwealth entity (such as petty cash). Importantly, it does not include money held by an agent of the Commonwealth or controlled by the Commonwealth (by contrast with the definition of 'public money' in the FMA Act).

'Relevant property' means property (other than relevant money) that is owned or held by the Commonwealth or a corporate Commonwealth entity, or any other thing prescribed by the rules.

Duties

The Bill imposes duties on both accountable authorities and officials.

Duties imposed on **accountable authorities** relate to how the accountable authority must govern the entity, as well as how it relates to others.

The most significant duty is that an accountable authority must govern its Commonwealth entity in a way that promotes the proper use and management of the public resources for which it is responsible, promotes the achievement of the purposes of the entity and promotes the financial sustainability of the entity (cl 15).

Accountable authorities also have a duty to establish and maintain systems relating to risk and control, encourage cooperation with others and keep their Minister and the Finance Minister informed about the activities of the entity and about significant issues, to the extent that this is not inconsistent with compliance with the enabling legislation of the entity.

Accountable authorities will need to take into account Commonwealth policy in governing their entities (see cl 20 and 21). Corporate Commonwealth entities will be required to comply with government policy orders made by the Finance Minister, while non-corporate Commonwealth entities will be subject to an obligation to govern their entities in a way that is not inconsistent with Commonwealth policy.

Officials will have duties:

- of care and diligence (cl 25)
- to act in good faith and for a proper purpose (cl 26)
- not to improperly use their position to gain a benefit or cause a detriment (cl 27)
- not to improperly use information they have obtained because they are an official (cl 28)
- to disclose any material personal interest that relates to the affairs of the Commonwealth entity (cl 29).

These duties are similar to duties currently imposed on officers of Commonwealth authorities under the CAC Act, while under that Act some of these duties are imposed on employees of Commonwealth authorities. While no duties along these lines are imposed on employees by the current FMA Act, officials of FMA Act agencies and some CAC Act authorities who are engaged under the *Public Service Act 1999* or the *Parliamentary Service Act 1999* are subject to similar duties set out in the Codes of Conduct in those Acts (other than the duty to act in good faith and for a proper purpose).

Under the Bill, no sanctions are attached to breach of these duties, but breach could give rise to sanctions under the Public Service Act or the Parliamentary Service Act (via a breach of the element of the Codes of Conduct that require APS employees or Parliamentary Service employees to comply with all applicable laws or via a breach of other elements of that Code that overlap with these duties) or under other employment arrangements.

Planning, performance and accountability

The Bill contains rules about planning by, and the performance and accountability of, all Commonwealth entities. Among other things, the accountable authority of a Commonwealth entity will be required to prepare a corporate plan and budget estimates for the entity. The accountable authority will also need to prepare annual performance statements about the entity's performance for inclusion in the entity's annual report, as well as annual financial statements for inclusion in the annual report.

The Bill contemplates that the Australian Government may, from time to time, publish a statement setting out its key priorities and objectives (cl 34). The corporate plan of entities will be required, where this is not inconsistent with any enabling legislation for the entity, to

indicate how the activities of the entity will contribute to achieving those priorities and objectives (cl 35).

These aspects of the Bill are intended ensure that ministers, the Parliament and the public have more, and more useful, information about the financial position of entities and also about their performance in achieving planned objectives.

Other provisions

The Bill replicates a number of existing provisions from the FMA Act and CAC Acts relating to matters including banking, borrowing, investment and the granting of indemnities, guarantees and warranties.

One important change is that the Finance Minister is conferred with the exclusive power to grant indemnities, guarantees and warranties on behalf of the Commonwealth.

There are a number of provisions that only apply to the Commonwealth (that is, not to corporate Commonwealth entities). These include provisions dealing with waiver, set-off and act of grace payments. There are also provisions that replicate current ss 28 and 31 of the FMA Act to deal with repayments by the Commonwealth, net appropriations and transfer of functions between entities, as well as clauses dealing with special accounts. All of these provisions generally reflect existing provisions in the FMA Act.

Importantly, the Bill does not contain any reference to drawing rights. However, there is a provision that confers on the Finance Minister the power to control the timing of release of appropriated funds to Commonwealth entities (cl 51).

Commonwealth companies

Even though Commonwealth companies currently governed by the CAC Act will not be 'Commonwealth entities' for the purposes of the Bill, the Bill does contain particular provisions relating to Commonwealth companies which generally replicate the provisions in the CAC Act dealing with Commonwealth companies.

The Bill will provide the Finance Minister with an express power (on behalf of the Commonwealth) to form, or participate in forming, particular companies and acquire shares in particular companies (cl 85). This power will be held exclusively by the Finance Minister.

Rules

As is presently the case, it is intended that much of the detail of the legislative framework will be contained in legislative instruments – namely, rules made by the Finance Minister – and the Bill provides that rules may be made in relation to a number of subject matters including:

- the commitment and expenditure of relevant money (cl 52)
- ensuring or promoting the proper use and management of resources (cl 102(a))
- grants and procurement (cl 102(c))
- performance (cl 102(g))
- recovery of debts (for non-corporate Commonwealth entities) (cl 103(c)).

The Bill will enable the Finance Minister to make different rules for different entities or classes of entities (cl 101). This mechanism may be used to allow particular entities to be given 'earned autonomy' – that is, by having less onerous requirements imposed on them than might apply to others – in appropriate circumstances.

Consequential amendments and rules

Significant consequential and transitional amendments will need to be made to other legislation before the substantive provisions of the Act commence. It is intended that a bill containing consequential and transitional provisions will be introduced and it will commence at the same time as this Bill.

Rules will be drafted which will commence at the same time as the Bill and we understand that the Department of Finance and Deregulation will be consulting widely with Commonwealth entities about the content of the rules.

Independent review

The Bill provides for an independent review of the Bill 3 years after its substantive commencement.

AGS involvement

AGS advised the Department of Finance and Deregulation throughout the drafting of the Bill.

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