



Express law *fast track information for clients*

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Significant changes to accountability and governance arrangements for Commonwealth authorities and companies

Amendments to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) that are primarily intended to improve accountability and governance arrangements for Commonwealth authorities and Commonwealth companies have recently been enacted. The main purpose of the amendments is to introduce more efficient and transparent administrative arrangements, align provisions and penalties with equivalent provisions and penalties in the *Corporations Act 2001*, and clarify clauses to avoid inappropriate or unintended governance practices.

The amendments are effected by the [Commonwealth Authorities and Companies Amendment Act 2008](#) (the Amendment Act), which was enacted on 26 May 2008. Most of the provisions of the Amendment Act will commence on 1 July 2008. The Amendment Act makes the most significant set of changes to the CAC Act since that Act commenced on 1 January 1998.

This *Express law* outlines the most significant of the changes.

Commonwealth authorities and wholly-owned Commonwealth companies to comply with General Policy Orders: sections 28, 43 and 48A

Currently, the CAC Act provides that Ministers can notify directors of Commonwealth authorities (s 28) and wholly-owned Commonwealth companies (s 43) of general policies of the Government that are to apply to the body.

The Amendment Act substitutes new ss 28 and 43 to require directors of a Commonwealth authority and a wholly-owned Commonwealth company to ensure that the authority or company complies with a 'General Policy Order' (GPO) to the extent that the GPO is applicable to it. The Amendment Act also inserts s 48A to enable the Finance Minister to issue these GPOs and to prescribe the regime under which they will become applicable to a Commonwealth authority or wholly-owned Commonwealth company.

The GPO regime is not intended to increase the power that the Government has under current ss 28 and 43 to require Commonwealth authorities and wholly-owned Commonwealth companies to comply with Government policy. Rather, the GPO regime is designed to be a more effective and transparent means of applying relevant Government policies to these entities and, in particular, of ensuring that the Commonwealth authorities and wholly-owned Commonwealth companies are aware of which Government policies apply

to them. In this respect, the GPOs will be legislative instruments and will therefore be listed on the [Federal Register of Legislative Instruments](#).

Changes to definition of 'Commonwealth company': section 34:

Currently, the definition of 'Commonwealth company' in s 34 focuses on whether the Commonwealth has a 'controlling interest' in the company and this in turn has been interpreted, in accordance with common law concepts, as depending on whether the Commonwealth is able to control a majority of votes at a general meeting of members.

The Amendment Act substitutes a new s 34 to provide that a 'Commonwealth company' means 'a Corporations Act company that the Commonwealth controls'. Under the new provision, the Commonwealth 'controls' a company if it:

- controls the composition of the company's board
- is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the company, or
- holds more than one-half of the issued share capital of the company (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital).

Use of credit cards and credit vouchers by Commonwealth authorities: sections 28A and 28B

Currently, the CAC Act does not provide Commonwealth authorities with a general borrowing power. Unless the enabling legislation of an authority contains a clear clause about borrowing, there is uncertainty about the power of some authorities to use credit cards or credit vouchers, such as taxi vouchers, to obtain cash, goods or services.

The Amendment Act inserts s 28A to provide that Commonwealth authorities may obtain cash, goods or services on credit from any person by the use of a credit card and goods or services on credit from any person by the use of a credit voucher. Section 28A will apply to the extent that the enabling legislation of an authority does not already provide the power to borrow or to use credit cards. It also enables the Finance Minister to make regulations to set exclusions or conditions on the use of the credit card facility by those authorities that do not have an explicit borrowing power.

Reliance on information or advice provided by others: section 27D:

Currently, s 27D provides that a director of a Commonwealth authority may prima facie rely on information or advice provided by others in specified circumstances provided that the reliance occurs 'after making proper inquiry if the circumstances indicated the need for inquiry'. The Amendment Act amends s 27D to align it with the Corporations Act to provide that the director's reliance must result from 'making an independent assessment of the information or advice, having regard to the director's knowledge of the authority and the complexity of the structure and operations of the authority'.

Compliance with statutory duties by officers of Commonwealth authorities: section 27A

Section 27A currently protects all officers of Commonwealth authorities, in specified situations, from a contravention of the civil penalty provisions in ss 23 to 25 (covering duties

on good faith, use of position and use of information) and from breaching the corresponding criminal offence in s 26. Specifically, s 27A(1) generally protects an officer who does something he or she is required to do under a section of the CAC Act (s 27A(1)), and s 27A(2) protects Australian Public Service (APS) employees where they are appointed to the board of a Commonwealth authority in cases where their duties as an officer of the authority and as a public servant may conflict.

The Amendment Act amends s 27A to:

- specify that the protection extends to both general law duties and statutory duties
- remove the exemption to the criminal penalty under s 26, and restrict it to protection against contravention of the civil penalty clauses
- clarify that s 27A(1) provides a defence for a contravention of ss 23 to 25, or their equivalent duties at common law or in equity
- make clear that s 27A(2) applies to Agency Heads and APS employees as defined in the *Public Service Act 1999* who are appointed from within Departments of State, Executive Agencies or Statutory Agencies other than the Commonwealth authority itself, to provide for protection where there is a conflict between a person's duty as an APS employee and an officer of the authority.

New definition of 'senior manager': section 5

The Amendment Act inserts a definition of 'senior manager'. The term is currently undefined but is referred to in ss 32 and 44, relating to the functions of audit committees. The new definition is consistent with how the same term is defined in the Corporations Act. The definition is intended to refer to senior managerial employees of a Commonwealth authority or company and specifically excludes directors and company secretaries, Ministers, and APS employees engaged by another agency.

The definition of 'senior officer' is significant primarily because the definition of 'officer' is also amended to provide that an officer is a director or a senior manager of a Commonwealth authority. Currently, the definition of 'officer' is 'a director of the authority or any other person who is concerned in, or takes part in, the management of the authority'.

Directors must prepare annual report: section 9

Section 9 is amended by the Amendment Act to align the process of annual reporting by Commonwealth authorities with the processes for submission of periodic reports to Parliament set out in s 34C of the *Acts Interpretation Act 1901*. Specifically, the deadline will now be the 15th day of the fourth month after the end of the financial year or the end of such further period granted by the responsible Minister under s 34C(5) of the Acts Interpretation Act.

All Commonwealth companies to submit annual reports: section 36

Section 36(1) is amended by the Amendment Act to clarify that all Commonwealth companies (including proprietary companies) are required to provide annual reports. The clause is designed to ensure that *all* Commonwealth companies have a consistent basic level of reporting and accountability, through the responsible Minister, to the Government and the Parliament.

Reporting obligations in relation to subsidiaries: sections 12(3) and 37(3)

Currently ss 12(3) and 37(3) require the Auditor-General to give copies to the responsible Minister of the financial statements and audit report of a subsidiary of a Commonwealth authority, or Commonwealth company, respectively. The Amendment Act amends these sections to transfer this responsibility to the directors of the Commonwealth authority or Commonwealth company.

Penalties: sections 11, 20, 26, 27F, 27J 27N, 30 and 36

The Amendment Act amends ss 11, 20, 26, 27F, 27J 27N, 30 and 36 to more closely align the offences and penalties that apply to Commonwealth authorities and their officers with equivalent provisions in the Corporations Act.

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