

Australian Public Service Commissioner



Australian Government
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A handwritten signature in black ink, likely belonging to Stephen Sedgwick.

Dr Andrew Southcott MP
Chair
Joint Committee of Public Accounts and Audit
Parliament House
CANBERRA ACT 2600

Dear Dr Southcott

I enclose my submission to the Joint Committee of Public Accounts and Audit's *Inquiry into Public Governance, Performance and Accountability Act 2013 Rules Development*.

The submission and attachment outline my views on suggested enhancements to the draft rules, as provided to the JCPAA by the Department of Finance in its submission to your inquiry, and amendments to the *Public Governance, Performance and Accountability Act 2013*.

I do not consider the information in the submission to be confidential.

Yours sincerely

A large black rectangular redaction box covering the signature area.

Stephen Sedgwick AO, FIPAA
24 March 2014

Joint Committee of Public Accounts and Audit

**Inquiry into the *Public Governance,
Performance and Accountability Act*
2013 Rules development**

Submission by the Australian Public Service Commissioner

March 2014

When I gave evidence to the Joint Committee of Public Accounts and Audit in May 2013, I stated my support for the intent of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) as a principles-based governance framework for better resource management across the Commonwealth public sector.

1. Since last May, the Australian Public Service Commission (the Commission) and the Department of Finance have worked together with the aim of ensuring that arrangements under the PGPA Act support sound public administration in the Australian Public Service (APS). For example, the Commission is a member of the Project Board tasked with monitoring implementation of the new financial framework, and is represented on the Department of Finance's Governance and Risk Management Committee.
2. The Commission and the Department of Finance have examined carefully ways in which the PGPA Act works with the *Public Service Act 1999* (the PS Act), which sets out the role and powers of agency heads and a clear statement of the conduct expected of public servants. The Commission has been especially concerned that the legislation, taken together, should be clear, predictable and lack ambiguity for the employees who will be called on to implement it on a daily basis in the course of their duties. There has been good progress in this respect, particularly in relation to guidance on the general duties of officials.
3. In my appearance before the Committee last year I noted my concern that the PGPA Act had the potential to create confusion in the minds of APS employees about their responsibilities. We worked with the Department of Finance to minimise this potential, and I am grateful for the collaborative approach that the Department has taken during the development of the guidance material and rules on officials' duty to disclose interests.
4. In one sense, the fact that this guidance material has had to be carefully developed reinforces the view that I discussed with the Committee. The dual coverage of the two Acts, with each of them setting out alternate statements seeking to regulate the behaviour and professional standards of public servants in the APS, adds complexity and the potential for confusion for APS employees. (For the purposes of this inquiry, I have attached with this submission a reference table showing the differences in language between the two Acts.)
5. There is a straightforward solution. The PGPA Act already contains provisions in relation to Commonwealth companies that recognises the Corporations Act as the primary regulatory framework that should apply. As a consequence, they are exempted from many of the provisions of the PGPA Act.
6. I believe that it would be sensible to amend the PGPA Act to take a similar approach in relation to the duties of officials set out in sections 25 to 29, specifying that those provisions do not apply to people employed under the PS Act. An amendment of this character would recognise that, under the APS Code of Conduct, those employees already have a comprehensive framework for the regulation of their behaviour that has been developed over years of practice and through consultation across the APS, and has been shown to work well over a substantial period of time.
7. In this respect the fundamental duties in the Public Service Act which include honesty and integrity, care and diligence, the proper use of Commonwealth resources, disclosing and avoiding

conflicts of interests, not using inside information to gain an advantage, and appropriate disclosure of information have proved to be highly effective and are well understood in the APS.

8. There are two other issues that my staff are working with the Department of Finance to resolve.
9. The first of these relates to the termination of appointment of members of accountable authorities for contravening general duties under section 30 of the PGPA Act. Attachment G to the Department of Finance's submission notes that section 30 is to be amended to extend the provision to cover all Commonwealth entities rather than just corporate entities. It will be important to ensure that proposed amendments do not disturb the processes Parliament considered last year and established for the appointment and termination of appointment of Secretaries (and heads of Executive agencies and the office of the Australian Public Service Commissioner), as set out in the PS Act. Similar considerations may apply to other statutory office holders who have specific arrangements for terminating their appointment in their enabling legislation that reflect their autonomy in relation to Parliament or the Executive, such as the Auditor-General. I understand the Department of Finance is looking at this issue.
10. The second issue concerns the rules relating to *Officials' duty to disclose interests*. The Commission is working with the Department of Finance to ensure that it is clear in the rules that section 13(7) of the PS Act, which concerns disclosure of real or apparent conflicts of interest, applies to members of accountable authorities (section 14 of the draft Rule) where the member is also head of an APS agency. The Commission is exploring with the Department a minor revision to the draft rule to clarify this matter.
11. In conclusion, the PGPA Act brings together elements of existing financial laws that covers Commonwealth entities and sets out one simplified, principles-based legislative framework for regulating resource management. A simplified and clear framework is a welcome amendment to public sector governance.
12. Nevertheless, there are matters within the current PGPA Act that could be improved, particularly to avoid confusion in the minds of APS employees about their obligations. The Commission's experience of the development of the supporting rules and guidance reinforces the view I expressed last year that it would be preferable to amend the PGPA Act recognising that the behaviour of APS employees, as the single largest common group of officials under the PGPA Act, should be regulated and enforced by existing, well-established and well-understood mechanisms established by the PS Act.

Attachment A

PGPA Act	Related PS Act obligations	Comment
<p>s.25 Duty of care and diligence (1)An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if the person: (a) were an official of a Commonwealth entity in the Commonwealth entity's circumstances; and (b) occupied the position held by, and had the same responsibilities within the Commonwealth entity as, the official. (2)The rules may prescribe circumstances in which the requirements of subsection (1) are taken to be met.</p>	<p>ss.13(2) An APS employee must act with care and diligence in connection with APS employment</p> <p>(note all elements of the Code are expressed to apply to APS employees but apply to agency heads in the same way by virtue of s 14)</p>	<p>Although there is no explicit link in the PS Act to a standard that a reasonable person would exercise if they were in the shoes of the person, the entity's circumstances and the level and responsibilities of the person would be similarly relevant in assessing the matter.</p>
<p>s. 26 Duty to act in good faith and for proper purpose An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties in good faith and for a proper purpose.</p>	<p>ss.13(1) and (8) An APS employee must behave honestly and with integrity in connection with APS employment. An APS employee must use Commonwealth resources in a proper manner. Several other elements of the Code are also relevant, depending on the circumstances— ss 13((2)-(4), (7), (10), (11)).</p>	<p>There is no single element of the PS Act Code of Conduct that employs identical wording to either of the limbs of the PGPA duty to act in 'good faith and for proper purpose.' However, given the breadth of the relevant legislative provisions in the PS Act it is expected that a breach of either limb of s 26 of the PGPA Act could be dealt with under an element of the APS Code of Conduct such as, for example, s13(8) which requires APS employees to make proper use of Commonwealth resources.</p>
<p>s 27 Duty in relation to use of position An official of a Commonwealth entity must not improperly use his or her position to: (a) gain an advantage for himself or herself or any other person; or (b) cause detriment to the entity, the Commonwealth or any other person.</p>	<p>ss 13(10) and (8) An APS employee must not make improper use of: (a)... (b) the employee's duties status power or authority in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.</p> <p>An APS employee must use Commonwealth resources in a proper manner.</p>	<p>The PS Act obligation covers a broader range of activity than the PGPA Act. For example, the PGPA Act refers to an employee using his or her position whereas the PS Act refers to an employee's 'duties status, power or authority'.</p> <p>The Code does not explicitly address the provision in the PGPA Act of not causing detriment through improper use of position.</p> <p>This does not mean that an APS employee who improperly used his or her position etc to cause detriment would not, by virtue of that conduct, be in breach of various other duties under the PS Act.</p>
<p>s 28 Duty in relation to use of information A person who obtains information because they are an official of a Commonwealth entity must not</p>	<p>ss 13(10) and (13) An APS employee must not make improper use of: (a) inside information (b)...</p>	<p>Similar issues arise with s 28 of the PGPA Act which imposes a duty in respect of improper use of 'information obtained because they are an official' - and its</p>

<p>improperly use the information to:</p> <p>(a) gain an advantage for himself or herself or any other person; or</p> <p>(b) cause detriment to the Commonwealth entity, the Commonwealth or any other person.</p>	<p>in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person</p> <p>An APS employee must comply with any other conduct requirement that is prescribed by the regulations.</p> <p>Public Service Regulation 2.1 imposes a duty on an APS employee not to disclose certain information without authority (i.e. information communicated in confidence or where disclosure could be prejudicial to the effective working of government).</p>	<p>related element of the Code – ss 13(10) PS Act.</p> <p>The Code does not explicitly address the provision in the PGPA Act of causing detriment through improper use of information.</p> <p>This does not mean that an APS employee who improperly used his or her position etc to cause detriment would not, by virtue of that conduct, be in breach of various other duties under the PS Act.</p>
<p>s 29 Duty to disclose interests</p> <p>(1) An official of a Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose details of the interest.</p> <p>(2) The rules may do the following:</p> <p>(a) prescribe circumstances in which subsection (1) does not apply;</p> <p>(b) prescribe how and when an interest must be disclosed;</p> <p>(c) prescribe the consequences of disclosing an interest (for example, that the official must not participate at a meeting about a matter or vote on the matter).</p>	<p>ss 13(7)</p> <p>An APS employee must disclose and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment</p>	<p>There is a difference of scope between s29 of the PGPA Act and ss 13(7) of the PS Act.</p> <ul style="list-style-type: none"> The focus of s29 PGPA Act is disclosure of material personal interests that relate to the affairs of the entity only, whereas ss 13(7) of the PS Act imposes a broader obligation on APS employees in several respects. An APS employee must: <ul style="list-style-type: none"> disclose and take reasonable steps to avoid (broader) any conflict (real or apparent) (broader) in connection with APS employment (different in scope to 'the entity's interests')

