

Inquiry into Public Governance, Performance and Accountability Bill 2013

Joint Committee of Public Accounts and Audit

**Further supplementary submission by the
Department of Finance and Deregulation**

May 2013

Introduction

1. This further supplementary submission to the JCPAA inquiry into the *Public Governance, Performance and Accountability Bill 2013* (the Bill) provides examples that address two issues raised in relation to the Bill in the public hearing and in submissions to the inquiry.

Timing for development of the rules

2. Advice received by Finance is that the general practice is for subordinate legislation to not be presented to the Parliament at the same time as the primary legislation. This is particularly the case where the primary legislation has a delayed commencement date. The delayed commencement date is to allow sufficient time for consultation to occur to support the development of subordinate legislation. **Attachment A** provides some examples of where this has occurred in relation to primary legislation.

Examples of rules

3. Attached for indicative purposes are examples of the likely scope and content of rules that would be issued as a basis for initiating consultations.
4. They do not represent a final position for Finance in terms of what these rules would contain, but provide a basic indication that could be used by stakeholders in forming their views on what the rules should contain, the general approach to be taken in terms of expressing requirements and the level of prescription appropriate to supporting reductions in regulatory burdens for Commonwealth entities and their partners.
5. The indicative rules at **Attachment B** relate to:
 - prescribing entities as Government Business Enterprises (under section 8 of the Bill);
 - corporate plans (sections 35 and 95 of the Bill);
 - audit committees (sections 45 and 92 of the Bill); and
 - Act of Grace payments by the Commonwealth (under section 65 of the Bill).
6. The final form of these and other rules will be subject to consultation with Commonwealth entities and with the JCPAA before they are included in a legislative instrument to be presented to Parliament.

Attachment A

<i>Legislation</i>	<i>Date of Assent</i>	<i>Subordinate Legislation commenced</i>	<i>Parliamentary Scrutiny/Comment</i>
<i>National Broadcasting Legislation Amendment Act 2012: Schedule 1, Schedule 2 – items 1 to 7</i>	24 July 2012	24 July and 24 November 2012	Delayed commencement allowed time for the making of key legislative instruments that are needed to give full operative effect to the merit-based appointment process for staff elected director to the ABC Board.
<i>Water Efficiency Labelling and Standards (Scheme Enhancements) Act 2012: Schedule 1</i>	22 July 2012	22 January 2013	Schedule 1 commenced on 22 January 2013 this delayed commencement was to allow time for the making of a new determination under the new registration provisions, including consultation with States and Territories. Staged commencement is also necessary to allow notice periods for registrants and to allow time for the making of new regulations and determinations.
<i>Territories Law Reform Bill 2010</i>	10 December 2010	1 March 2011	The <i>Territories Law Reform Act 2010</i> amended the <i>Norfolk Island Act 1979</i> to update Norfolk Islands financial management framework. On 1 March 2011, following consultation with the Norfolk Island Government, the Finance Minister made the Commonwealth Finance Ministers (Norfolk Island) Orders 2011.
<i>Financial Framework Legislation Amendment Act 2008</i>	20 September 2008		The commencement date for the provisions was 20 March and 1 July 2009. The Financial Management and Accountability Amendment Regulations 2009 (No.2) were registered on 19 March 2009 in time for the commencement of the Act but after the Act was passed.

Legislation	Date of Assent	Subordinate Legislation commenced	Parliamentary Scrutiny/Comment
<i>Health Insurance Amendment (Inappropriate and Prohibited Practices and other Measures) Bill 2007</i>	21 June 2007		<p>Regulations were developed following introduction of the Bill. The regulations will provide comprehensive details about specific elements of the reforms.</p> <p>As noted in the Second reading speech - "It is important that we get these right. We will work closely with our stakeholders during the development of the regulations to ensure that they are tailored to suit the different needs of the diagnostic imaging and pathology sectors respectively and do not produce any unintended consequences. We will also consult widely to ensure that the changes are well understood by those who may be affected."</p>
Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006	8 December 2005	16 April 2007	<p>Extensive parliamentary debate occurred on the Bill which was passed on 21 June 2006 and received the Royal Assent on 22 June 2006. The proof of identity provisions commenced on proclamation or 8 months after the Bill received the Royal Assent if not proclaimed before then.</p> <p>The Act was proclaimed to commence on 21 November 2006.</p> <p>The States, Territories and the Federal Privacy Commissioner were consulted on the operation of the Regulations.</p>
<i>A New Tax System (Goods and Services Tax) 1999</i>	8 July 1999	1 July 2000	<p>While the legislation was assented to on 8 July 1999 the subordinate legislation <i>A New Tax System (Goods and Services Tax) Regulations 1999</i> were not made until 20 October 1999. Both the legislation and regulations commenced on 1 July 2000.</p>

Examples of potential rules for use in consultation

1. Prescribing entities as Government Business Enterprises (GBEs)

Authority for prescribing a Commonwealth entity or Commonwealth company can be found in section 8 of the Bill. GBEs are prescribed under current arrangements, allowing for their treatment as a class of entity and differing expectations that are summarised in the GBE Guidelines as issued by Finance.

An indicative rule has been developed based on Regulation 4 from the *Commonwealth Authorities and Companies Regulations 1997* (the CAC Regulations). The indicative wording is as follows:

Government business enterprise

- (1) This section is made for the definition of **government business enterprise** in section 8 of the Act.
- (2) Each of the following Commonwealth entities is a government business enterprise:
 - (a) the Australian Government Solicitor;
 - (b) the Australian Postal Corporation;
 - (c) Defence Housing Australia.
- (3) Each of the following Commonwealth companies is a government business enterprise:
 - (a) ASC Pty Limited (ACN 008 605 034);
 - (b) Australian Rail Track Corporation Limited (ACN 081 455 754);
 - (c) Medibank Private Limited (ACN 080 890 259);
 - (d) NBN Co Limited (ACN 136 533 741).
- (4) If the name of a company mentioned in subsection (3) is changed, the company, under the new name, is taken to be prescribed.

2. Corporate plans

The requirement to prepare a corporate plan is included at clauses 35 and 95 of the Bill. Indicative wording for a rule has been developed taking into account similar wording within CAC Regulation 6AAA (in relation to GBEs) and similar provisions included in the enabling legislation for a number of entities.

Corporate plan for Commonwealth entities

- (1) This section is made for section 35 of the Act.
- (2) The corporate plan for a Commonwealth entity and its subsidiaries (if any) must:
 - (a) set out the objectives of the entity and its subsidiaries; and
 - (b) outline the general strategies and policies that the entity and its subsidiaries are to follow:
 - (i) to achieve the objectives mentioned in paragraph (a); and
 - (ii) to fulfil the entity's functions; and
 - (iii) to ensure that the accountable authority of the entity complies with the accountable authority's duties under the Act; and
 - (c) include a forecast of the revenue and expenditure of the entity and its subsidiaries, including a forecast of capital expenditure and borrowings; and
 - (d) include such performance indicators and targets (whether financial or operational) as the accountable authority considers appropriate.
- (3) The first corporate plan for the Commonwealth entity must:
 - (a) cover a period of between 3 and 5 years; and
 - (b) be given to the responsible Minister and the Finance Minister within 6 months after the entity [*is established?*].
- (4) A subsequent corporate plan for the Commonwealth entity must:
 - (a) cover a period of between 3 and 5 years, beginning immediately after the period covered by the previous corporate plan for the entity; and
 - (b) be given to the responsible Minister and the Finance Minister as soon as practicable after the plan is prepared.

3. Audit committees

Clauses 45 and 92 of the Bill permit the release of rules to prescribe how an audit committee is constituted and perform its functions according to the rules. Existing requirements are similar, involving Regulations 6A and 6B of the CAC Regulations and Regulation 22C from the *Financial Management and Accountability Regulations 1997* (FMA Regulations).

A draft provision has been developed based on FMA Regulation 22C as it is better aligned with the intent of the Bill and the increased emphasis on the governance of entities and the need to recognise and manage risks, and include a requirement for an external member. The CAC regulations are more technical and prescriptive.

Audit committee for Commonwealth entities

- (1) For subsection 45(2) of the Act, this section sets out requirements about how an audit committee for a Commonwealth entity must be constituted.
- (2) An accountable authority of a Commonwealth entity must:
 - (a) appoint one or more persons as members of the audit committee for the Commonwealth entity; and
 - (b) appoint a member of the committee as the Chair of the committee.
- (3) When appointing a person as a member of the audit committee, the accountable authority must have regard to:
 - (a) the Commonwealth entity's governance framework and assurance mechanisms; and
 - (b) the key risks to the Commonwealth entity, including risks relating to program delivery and implementation.
- (4) The accountable authority must also:
 - (a) be satisfied that each person to be appointed by the accountable authority has:
 - (i) appropriate skills and experience to carry out the audit committee's functions; and
 - (ii) the ability to advise the accountable authority about how the accountable authority can manage the key risks to the Commonwealth entity; and
 - (b) ensure, as far as practicable, that the audit committee includes at least one member who is not an official of the Commonwealth entity.

- (5) The accountable authority must give the audit committee terms of reference that include particulars of:
 - (a) the committee's functions; and
 - (b) the frequency of the committee's meetings; and
 - (c) the membership of the committee.
- (6) The accountable authority may add to, or vary, the functions of the audit committee, having regard to the matters mentioned in paragraphs (3)(a) and (b).
- (7) An audit committee may be the audit committee for more than one Commonwealth entity, and the accountable authorities of those Commonwealth entities may work out how the following things are determined:
 - (a) the Chair of the committee;
 - (b) the terms of reference mentioned in subsection (5);
 - (c) the functions mentioned in subsection (6).

Paragraph 7 of the indicative rule is based on one of the propositions contained within the consultation and position papers circulated for comment ahead of the development of the Bill. This proposition is that where circumstances warrant entities would be able to share the resources of a single audit committee rather than have to establish separate arrangements. Subject to such arrangements not being mandatory, there was wide acceptance of this proposition.

Options for amendments

FMA Regulation 22C currently includes a list of functions that need to be performed; the indicative provision does not. A fundamental aim of the reform effort is on streamlining and reducing regulation and placing greater reliance on internal controls and accountability of entities. Clause 16 of the Bill requires Accountable Authorities to establish and maintain systems relating to risk and control, and clause 15 imposes requirements in relation to governing the entity. Expectations in relation to the conduct and performance of audit committees are also well established and explained in a number of ways, including through the ANAO's Better Practice Guide¹.

Finance does, however, believe that consideration could be given to one of the suggestions contained with the submission by Kerry Jacobs to the Committee. The current form of the indicative rule reflects the FMA regulation position of including an external member where practicable. The question will be posed in the consultation process as to whether this should be strengthened to require at least one independent member on an audit committee without qualification.

¹ ANAO Better Practice Guide on *Public Sector Audit Committees*, published 31 August 2011 – <http://www.anao.gov.au/Publications/Better-Practice-Guides/2011-2012/Public-Sector-Audit-Committees>

4. Act of Grace payments by the Commonwealth

An indicative rule has been developed based on Regulation 29 from the FMA Regulations. The authority for the rule is found in clause 65 of the Bill, which largely reflects section 33 in the FMA Act.

Act of grace payments

- (1) For subsection 65(2) of the Act, this section sets out requirements about the authorisation of act of grace payments.
- (2) If:
 - (a) the Finance Minister is considering authorising a payment under subsection 65(1) of the Act; and
 - (b) the proposed payment would involve, or be likely to involve, a total amount of more than \$250,000;
the Finance Minister must ask the persons mentioned in subsection (4) to give the Finance Minister a report on the proposed authorisation.
- (3) The Finance Minister must not authorise the payment without considering the report.
- (4) For subsection (2), the persons are:
 - (a) either:
 - (i) the Accountable Authority of the Australian Customs and Border Protection Service (Customs); or
 - (ii) if the Commonwealth entity that is responsible for the matter to which the proposed authorisation relates is Customs—an Accountable Authority nominated by the Finance Minister; and
 - (b) either:
 - (i) the Finance Secretary; or
 - (ii) if the Commonwealth entity that is responsible for the matter to which the proposed authorisation relates is the Department—an Accountable Authority nominated by the Finance Minister; and
 - (c) either:
 - (i) the Accountable Authority of the Commonwealth entity that is responsible for the matter to which the proposed authorisation relates; or
 - (ii) if no Commonwealth entity is responsible for the matter—an Accountable Authority nominated by the Finance Minister.
- (5) The persons mentioned in subsection (4) are an advisory committee.
- (6) A member of the advisory committee may appoint a deputy to act in his or her place.
- (7) The advisory committee may prepare a report without having a meeting.