



# Resource Management Guide No. <XX>

Preventing, detecting and dealing with fraud

WORKING DRAFT 13 MARCH

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# Resource Management Guide No. <XX> (Arial 21)

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## Preventing, detecting and dealing with fraud

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### Audience

This guide is intended for accountable authorities and commonwealth officials

### Key points

This Guide:

- is issued by the Minister for Justice to assist accountable authorities to meet their obligations under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and section 10 of the PGPA rule.
- provides better practice guidance for fraud control arrangements within entities
- commences on 1 July 2014, when the PGPA Act and PGPA Rules take effect
- is available on the Finance website at <add Finance website hyperlink>

### Abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
AFP	Australian Federal Police
AGD	Attorney-General's Department
AGIS	Australian Government Investigations Standards
AIC	Australian Institute of Criminology
ANAO	Australian National Audit Office
ASIC	Australian Securities and Investments Commission
CCPM	Case Categorisation and Prioritisation Model
CDPP	Commonwealth Director of Public Prosecutions
PGPA Act	Public Governance, Performance and Accountability Act 2013

### Glossary

corporate entity: an entity that is a body corporate. Corporate Commonwealth entities are legally separate from the Commonwealth.

Criminal Code: *Criminal Code Act 1995*.

entity: a department of state, a parliamentary department, a listed entity or a body corporate established by a law of the Commonwealth.

non-corporate entity : an entity that is not a body corporate. Non-corporate Commonwealth entities are part of the Commonwealth.

## Part 1 – Introduction

- 1.1 This guidance is issued by the Minister for Justice to assist accountable authorities to meet their obligations under the PGPA Act and section 10 of the PGPA rule. The purpose of the guidance is to promote high standards of governance, performance and accountability by establishing non-binding principles and processes for effective fraud control for all Commonwealth entities and their employees and contractors.
- 1.2 Section 10 of the PGPA rule ensures that there is a minimum standard for accountable authorities of Commonwealth entities for managing the risk and incident of fraud. It articulates the key principles for establishing and maintaining fraud control systems, including prevention, detection and responses to fraud. This guidance expands on these principles to articulate a flexible framework for fraud control that can be tailored to the circumstances and needs of different entities while providing coherent, consistent, transparent and accountable requirements.
- 1.3 The guidance should be read in conjunction with other relevant documents, including the Commonwealth Grant Guidelines, the Commonwealth Procurement Rules, the Covert Surveillance in Commonwealth Administration Guidelines, the *Commonwealth Protective Security Policy Framework* and the AGIS
- 1.4 The AGIS provides minimum case handling standards for investigations. Copies are available from the AFP, which administers the AGIS on behalf of the Heads of Commonwealth Operational Law Enforcement Agencies.

## Part 2 – The legislative framework

- 2.1 Section 10 of the PGPA rule provides a legislative basis for the Commonwealth's fraud control arrangements. It sets out clear, consistent and unambiguous minimum requirements for fraud risk management and controls, to assist accountable authorities to meet their obligations under the PGPA Act.
- 2.2 Failure to meet the requirements under the rule may constitute a breach of the general duties provisions of the PGPA Act. Sanctions include possible termination under section 30 of the PGPA Act or other administrative, civil or criminal sanctions.
- 2.3 Fraud against the Commonwealth is an extremely serious matter for all Commonwealth entities and for the community. Not only is it a criminal offence, but fraud reduces the funds available for delivering public goods and services, undermines the integrity of and public confidence in the government and can place public safety at risk. The Australian community rightly expects that entities and employees acknowledge and fulfil their responsibilities as stewards of public funds and make every effort to protect public money and property.

### Roles and responsibilities of key entities

- The AFP investigates serious or complex crime against Commonwealth laws, its revenue, expenditure and property, which can include both internal fraud and external fraud committed in relation to Commonwealth programs. The AFP conducts quality assurance reviews of entities' fraud investigations and can provide advice and other forms of assistance to entities conducting fraud investigations, including recovery action under the *Proceeds of Crime Act 2002*.
- The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing compliance with Australia's competition laws, which contain criminal and civil prohibitions on fraud in the form of cartel conduct. Cartel conduct occurs when competitors conspire to fix or control prices, rig bids, restrict supply or allocate markets. The ACCC is committed to providing procurement officers within entities with the knowledge and the tools needed to detect and report possible collusion by suppliers.
- The Australian Securities and Investments Commission (ASIC) regulates Australian companies, financial markets, and financial services organisations and professionals who deal with and advise on investments, superannuation, insurance, deposit taking and credit under a number of Commonwealth laws. ASIC uses enforcement powers to detect and deal with unlawful conduct and responds to breaches of law ranging from minor regulatory offences through to serious misconduct. ASIC uses compulsory information-gathering powers to collect documents and information for formal investigations.
- The Commonwealth Director of Public Prosecutions (CDPP) is responsible for prosecuting offences against Commonwealth law and for conducting related criminal assets recovery. All prosecutions and related decisions are made in accordance with the guidelines set out in the *Prosecution Policy of the Commonwealth*.
- The Attorney-General's Department (AGD) is responsible for providing high-level policy advice to the Government about fraud control arrangements within the Commonwealth. This includes developing and reviewing general policies of the Government with respect to fraud control, currently embodied in this guidance, advising entities about the content and application of those policies, and reporting to Government on compliance with section 10 of the PGPA Act rule.
- The Australian Institute of Criminology (AIC) is responsible for conducting an annual fraud survey of entities and producing a report on fraud against the Commonwealth, and fraud control arrangements within entities. The report is known as the *Annual report to government: fraud against the Commonwealth*, and is provided to the Minister for Justice.
- The Australian National Audit Office (ANAO) is responsible for assessing key aspects of entity's fraud control arrangements to effectively prevent, detect and respond to fraud, as outlined in this guidance. This assessment is published in the *Fraud control in Australian Government agencies* report.

## Part 3 – Objectives and scope

- 3.1 The Australian Government is committed to taking a systematic and stringent approach to the prevention and detection of fraud perpetrated against the Commonwealth. The management of fraud risk is a collective responsibility of all persons employed by the Commonwealth or in entities. Everyone in an entity is responsible for the proper management of public resources, whether working in policy design, program delivery, or other functions.
- 3.2 The objectives of section 10 of the PGPA rule and the guidance, consistent with good governance by the Commonwealth, are to:
- protect public money, information and property
  - protect the integrity and good reputation of entities.
- This includes reducing the risk of fraud occurring, discovering and investigating fraud when it occurs, and taking appropriate corrective actions to remedy the harm.
- 3.3 The rule and the guidance establish the fraud control policy framework within which entities determine their own specific practices, plans and procedures to manage the prevention and detection of fraudulent activities, the related investigation and, where appropriate, prosecutions of offenders. Fraud control strategies should become an integral part of an entity's culture, processes and practices. The most effective way to prevent or deter fraud is through the thorough and rigorous design of policy and programs, which should include detailed planning for implementation.
- 3.4 Fraud control in the Commonwealth is based on:
- thorough assessment of risks particular to the operating environments of entities and the programs they administer
  - development and implementation of processes and systems to effectively prevent, detect and investigate fraud
  - application of appropriate criminal, civil, administrative or disciplinary action to remedy the harms from fraud
  - recovery of proceeds of fraudulent activity
  - training of all employees and relevant contractors in fraud awareness and specialised training of employees involved in fraud control activities
  - external scrutiny of fraud control activities by the ANAO to provide accountability to Parliament.
- 3.5 Two documents set out and explain the fraud control policy framework:
- section 10 of the PGPA rule issued by the Minister for Finance
  - the guidance developed by the Minister for Justice to assist entities to implement their obligations under the rule.
- 3.6 The guidance is not intended to cover all types of entity risk. For instance, where corruption or other internal or external entity risks are concerned, the guidance should be considered a useful starting point to be used in conjunction with other appropriate guidance materials.

## Part 4 – Definition of fraud

- 4.1 For the purposes of this guidance, fraud against the Commonwealth is defined as 'dishonestly obtaining a benefit, or causing a loss, by deception or other means'.
- 4.2 There is a mental or fault element to fraud; it requires more than carelessness, accident or error.
- 4.3 Offences of fraud against the Commonwealth may be prosecuted under a number of different Commonwealth laws. The dishonesty offences under Part 7.3 in Chapter 7 of



the Criminal Code are often used and offer a good example of the fault elements necessary to establish fraudulent behaviour.

- 4.4 Fraud against the Commonwealth may include (but is not limited to):
- theft
  - accounting fraud (e.g. false invoices, misappropriation)
  - unlawful use of, or unlawful obtaining of, property, equipment, material or services
  - causing a loss, or avoiding and/or creating a liability
  - providing false or misleading information to the Commonwealth, or failing to provide information when there is an obligation to do so
  - misuse of Commonwealth assets, equipment or facilities
  - cartel conduct
  - making, or using, false, forged or falsified documents
  - wrongfully using Commonwealth information or intellectual property.
- 4.5 A benefit is not restricted to a monetary or material benefit, and may be tangible or intangible, including the unauthorised provision of access to or disclosure of information. A benefit may also be obtained by a third party rather than, or in addition to, the perpetrator of the fraud.
- 4.6 Fraud against the Commonwealth takes many forms, and may target one or more of the following:
- revenue (e.g. income tax, GST or customs duty)
  - benefits (e.g. social security, healthcare, childcare, education or training, visa or grant of citizenship)
  - property (e.g. cash, computers, other portable and attractive items, or stationery)
  - information and intelligence (e.g. personal information or classified material)
  - Commonwealth program funding and grants (e.g. education, childcare, employment)
  - entitlements (e.g. expenses, leave, travel allowances or attendance records)
  - government procurement through cartel conduct
  - facilities (e.g. unauthorised use of vehicles or information technology and telecommunication systems)
  - money or property held in trust or confiscated.
- 4.7 The risk of fraud can come from inside an entity, that is, from its employees or contractors. This is known as internal fraud. External fraud, on the other hand, is where the risk of fraud comes from outside the entity, that is, from external parties, such as clients, service providers or other members of the public.
- 4.8 Entities also need to be alert to the risk of complex fraud involving collusion between their employees and external parties. Complex fraud, which may also constitute corrupt conduct, can include instances when an employee or group of employees:
- are targeted and succumb to exploitation by external parties (bribery, extortion, grooming for favours or promises); or
  - initiate the misconduct (including through infiltration of an entity by an external party).
- 4.9 Note that some forms of corrupt conduct, such as soliciting for bribes or secret commissions, may not cause a direct loss to the Commonwealth, but may distort the market for fair provision of services or inflate prices.

## Dishonesty in the Criminal Code

Part 7.3 in Chapter 7 of the Criminal Code deals with fraudulent conduct against the Commonwealth, and contains a range of offences, including:

- dishonestly obtaining a financial advantage from a Commonwealth entity by deception (section 134.2)
- doing anything with the intention of dishonestly:
- obtaining a gain from a Commonwealth entity, or
- causing a loss to a Commonwealth entity (sections 135.1(1) and (3))
  - conspiring with another person with the intention of dishonestly:
- obtaining a gain from a Commonwealth entity, or
- causing a loss to a Commonwealth entity (sections 135.4(1) and (3))
- dishonestly influencing a Commonwealth public official in the exercise of their duties (section 135.1(7)), or
- obtaining a financial advantage which the recipient knows or believes they are not eligible to receive (section 135.2(1)).

The meaning of dishonesty is set out in section 130.3 as follows:

- (a) dishonest according to the standards of ordinary people; and
- (b) known by the defendant to be dishonest according to the standards of ordinary people.

## Part 5 – Obligations of accountable authorities

- 5.1 Effective fraud control requires the commitment of all employees, contractors and third-party providers. However, the primary responsibility for fraud control rests with accountable authorities of entities subject to the PGPA Act. Accountable authorities play a key role in ensuring their entities have appropriate fraud control arrangements, and in setting the ethical tone within their entities.
- 5.2 Section 15 of the PGPA Act provides that the accountable authority of an entity must govern the entity in a way that promotes the proper use and management of public resources for which the authority is responsible, the achievement of the purposes of the entity and the financial sustainability of the entity.
- 5.3 Section 16 of the PGPA Act provides that the accountable authority of an entity must establish and maintain an appropriate system of risk oversight and management for the entity and an appropriate system of internal controls for the entity, including implementing measures directed at ensuring officials of the entity comply with the finance law.
- 5.4 The general duties provisions in the PGPA Act (sections 25 to 29) impose a range of obligations on officials, including acting in good faith and for proper purpose and not improperly using their position or information.
- 5.5 Accountable authorities must be satisfied that their entities comply with the mandatory requirements in section 10 of the PGPA rule, regardless of whether all or part of an entity's fraud control activities are outsourced. The requirements are:
  - (a) conducting fraud risk assessments regularly and when there is a substantial change in the structure, functions or activities of the entity; and



- (b) developing and implementing a fraud control plan that deals with identified risks as soon as practicable after conducting a risk assessment; and
- (c) having an appropriate mechanism for preventing fraud, including by ensuring that:
  - (i) officials in the entity are made aware of what constitutes fraud; and
  - (ii) the risk of fraud is taken into account in planning and conducting the activities of the entity; and
- (d) having an appropriate mechanism for detecting incidents of fraud or suspected fraud, including a process for officials of the entity and other persons to report suspected fraud confidentially; and
- (e) having an appropriate mechanism for investigating or otherwise dealing with incidents of fraud or suspected fraud; and
- (f) having an appropriate mechanism for recording and reporting incidents of fraud or suspected fraud.

## Part 6 – Risk assessment

- 6.1 A fraud risk assessment must be conducted regularly and when there is a substantial change in the structure, functions or activities of the entity. For entities to have a regular fraud risk assessment, it should be conducted at least once every two years. Risk assessments consider internal and external fraud risks. Entities whose functions or operations are associated with a high fraud risk, or that operate in environments with a high fraud or corruption risk, should assess risk more frequently. Risk assessment strategies should be reviewed and refined on an ongoing basis in light of experience with continuing or emerging fraud vulnerabilities. The outcomes of fraud risk assessments should be provided to entities' internal audit units, for consideration in the annual audit work program.
- 6.2 Fraud risk should not be looked at in isolation from the general business of the entity but should be considered as an aspect of the entity's broader risk assessment processes, including the entity's security risk assessment.
- 6.3 Entities will generally face different fraud control issues depending on their size and the nature of their business, both of which influence an entity's potential exposure to fraud. Risk management is an integral part of good management practice and should be integrated into an entity's strategic and business planning processes. It is not cost-effective to institute measures to address every possible business risk, including potential fraud. Therefore, the likely occurrence of fraud and its impact on an entity's key organisational objectives and core business should be carefully assessed. A risk based approach enables an entity to target its resources, both in prevention and detection, at problem areas.
- 6.4 Entities are responsible for determining the risk assessment approach that is most appropriate for their circumstances. Risk assessment processes should take into account all significant factors likely to affect an entity's exposure to risk. The level and depth of the assessment will be determined by the level of vulnerability or exposure to fraud relevant to the entity.
- 6.5 Generally, management of fraud risks should be embedded in an entity's risk control and governance procedures rather than being seen or practiced as a separate program. However, some large entities or programs will have an inherent risk of fraud due to the nature of their business (e.g. revenue collection, payment of benefits or contract procurement activities). Those entities should consider developing a fraud risk assessment process that is specific to a particular policy or program area.

- 6.6 In developing their fraud risk assessment and fraud control plan, entities should adopt a methodology consistent with the relevant recognised standards: the *Australian/New Zealand Standard AS/NZ ISO 31000-2009 Risk Management—Principles and Guidelines* and *Australian Standard AS 8001-2008 Fraud and Corruption Control*.
- 6.7 Risk assessment is a continuous process. Where appropriate, entities should consider introducing a rolling program of updating their risk assessment procedures and risk mitigation measures. Entities should develop dynamic risk assessment procedures and integrate the fraud risk assessment process within an overall general business risk approach.
- 6.8 Under paragraph (a) of section 10 of the PGPA rule, when an entity undergoes a substantial change in structure, function or programmes, or when there is a significant transfer in function (for example, as a result of outsourcing), the entity must conduct a fraud risk assessment in relation to the changed structure, function or programmes. A substantial change can include changes to service delivery models, such as expansion of, or into, online provision of information and services. In such cases, the revised fraud risk assessment will need to consider new or varied fraud risks arising from a transfer to, or increased use of, the online environment.
- 6.9 Under paragraph (c)(ii), the risk of fraud is to be considered when planning and conducting the activities of entities. This includes when major new policies are being developed or when there is a significant change in a policy or in the way a policy will be implemented. Again, this should be considered in the context of other business risks. The assessment of fraud risks is an integral part of program design, and program design should include measures to prevent fraud from occurring in addition to fraud minimisation.
- 6.10 Risk assessment and fraud control planning require specific expertise, particularly in the increasingly complex context in which entities are operating. Risk assessments can be undertaken using in-house resources, but it is important to ensure that the risk assessment team has access to the range of skills, knowledge and experience necessary to provide coverage of the categories of risk to be considered.
- 6.11 If resources are not available in-house, entities may choose to outsource all or part of the risk assessment and fraud control planning process. However, even if the tasks are outsourced, the process should be overseen by a senior officer in the entity. Outsourcing does not remove the responsibility of accountable authorities or of senior management to deal with fraud risk. Entities should ensure that the organisation to whom they are outsourcing meets the terms and has the competencies set out in this guidance. Entities should ensure that relevant corporate knowledge is appropriately captured and taken into account during the risk assessment and fraud control planning process.

## Part 7 – Fraud control plans

- 7.1 Under paragraph (b) of section 10 of the PGPA rule, fraud risk assessments must be followed by the development (or updating) and implementation of a fraud control plan to manage the risks and address the entity's individual needs. Effective oversight mechanisms should be in place to oversee the process of developing and implementing the fraud control plan. The fraud control plan should, whenever appropriate, emphasise prevention measures, including effective policy and program design to minimise the opportunity for fraud.
- 7.2 Fraud control plans and processes do not have to be developed as standalone documents. The fraud control plan should, where appropriate, be integrated into the entity's strategic plan, business plan or risk management plan. When a fraud risk is

assessed to be high due to the nature of an entity's business, specific fraud control plans at the entity, enterprise or program level may be appropriate.

- 7.3 The fraud control plan should document the entity's approach to controlling fraud at a strategic, operational and tactical level, and should encompass prevention, detection, reporting and investigation measures. The plan should include:
- a summary of the identified internal and external fraud risks or vulnerabilities associated with the entity's activities or functions
  - the treatment strategies or controls (including policies, governance and other structures, and procedures) put in place to mitigate the identified risks or vulnerabilities
  - information about implementation, such as identifying positions responsible for implementation, timeframes, monitoring arrangements, and channels and processes for employees, contractors or members of the public to report fraud or suspected fraud
  - strategies to ensure the entity meets its training requirements
  - mechanisms for collecting, analysing and reporting the number and nature of incidents of fraud or alleged fraud within or against the entity
  - protocols setting out how the entity will handle allegations or suspicions of fraud, including assessment of allegations, establishment of investigations and options for resolution of incidents (such as referral to police and when and how to initiate a recovery action).
- 7.4 Controls and strategies outlined in fraud control plans should be commensurate with assessed fraud risks. Testing controls may indicate that not all controls and strategies are necessary or that different approaches may have more effective outcomes. Controls should be reviewed on a regular basis to make sure they remain useful.
- 7.5 Fraud control arrangements should reflect the fraud risk profile of an entity or particular program. The ANAO report *Fraud control in Australian Government agencies* (2010) found that small entities (those with fewer than 249 employees) comprised the largest percentage of entities that indicated they were not meeting the mandatory fraud external reporting requirements and generally were less likely to have fraud prevention oversight arrangements in place. While the nature and extent of internal and external fraud risks faced by smaller entities may differ from the fraud risks facing larger, service delivery entities, these risks will still require targeted mitigation strategies. Small entities should adopt fit-for-purpose mechanisms to address specific fraud risks.
- 7.6 Fraud control plans should include review mechanisms to enable an entity to evaluate the effectiveness of its fraud control strategies regularly, particularly following changes in business processes or systems or after instances of fraud have been discovered. This will help ensure that control systems remain appropriate, cost-effective and proportionate to the actual risks they are addressing.
- 7.7 Fraud control plans should be user-friendly and available to all relevant employees. Entities should provide a copy of their fraud control plans to AGD or the AFP on request to assist in the analysis of fraud trends and in development of guidance material.

## Part 8 – Fraud awareness and training

- 8.1 Fraud prevention involves not only putting into place effective accounting and operational controls, but also fostering an ethical culture that encourages employees and contractors at all levels to play their part in protecting public resources. Establishing an ethical culture is a key element of sound governance and is an important factor in preventing fraud and helping to detect it once it occurs.

- 8.2 As part of the accountable authority's responsibility for developing an overall fraud control strategy, the entity must ensure that officials in the entity are made aware of what constitutes fraud, consistent with paragraph (c)(i) of section 10 of the PGPA rule. Meeting this requirement includes preparing and widely distributing a fraud policy statement. This will assist employees and contractors to understand what fraud is and encourage employees at all levels to participate actively in protecting public resources.
- 8.3 Typically, a fraud policy statement will form part of other corporate documentation and include:
- the definition of fraud and an outline of the entity's position on fraud
  - a statement of the entity's commitment to investigating and prosecuting fraud or pursuing other effective remedies
  - a statement of employees' and contractors' responsibilities relating to preventing and reporting fraud, and the protocol for how fraud is to be reported
  - a summary of the consequences of acting fraudulently
  - an assurance that allegations and investigations will be handled confidentially
  - directions on how allegations and incidents of fraud are to be managed
  - advice on where further information can be found.
- 8.4 All employees and contractors must take into account the need to prevent and detect fraud as part of their normal responsibilities under paragraph (c) of section 10 of the PGPA rule. Appropriate fraud awareness and training measures include a rolling program of regular fraud awareness-raising and prevention training for all employees and, where deemed appropriate, for contractors. Fraud awareness training should be included in all induction training programs. An understanding of the roles and responsibilities of other entities, including the AFP and the CDPP, is also fundamental to sound fraud control.
- 8.5 Entities should consider providing complementary training on ethics, privacy and relevant codes applicable to the entity, such as the APS Values and Codes of Conduct.
- 8.6 Awareness-raising and training initiatives should be evaluated to determine whether they been successful and the target group is, in fact, more aware of fraud control and their responsibilities.
- 8.7 It is important that entities clearly document their procedures and instructions that assist employees to deal with fraud and ensure that all employees engaged in fraud control or investigations are aware of and have access to this guidance. Such documents are an important part of effective fraud control and should be kept up-to-date and made available to all employees.
- 8.8 The entity's approach to fraud should be clearly communicated to clients and third party service providers, and should be made available, where appropriate, to members of the public.
- 8.9 The entity should make its fraud control policy statement available to relevant consultants so that they are fully aware of the entity's approach to fraud control. When deemed appropriate, a copy of the fraud control plan, or any relevant sections, should be made available to consultants.
- 8.10 Awareness-raising programs for third-party providers need to take into account both the work they do directly for entities and the services they deliver on behalf of the entity to clients and customers.
- 8.11 Clients should have access to information about their rights, responsibilities and obligations, including information on their responsibilities for fraud control.

- 8.12 Appropriate training for fraud control includes ensuring that employees and contractors who are primarily engaged in detecting or investigating fraud meet the required fraud control competency requirements set out in the AGIS as a minimum. <sup>1</sup>
- 8.13 Entities should ensure that employees who are primarily engaged in detecting and investigating fraud attain the relevant qualifications within 12 months of starting employment. Until an employee has attained the relevant qualifications, entities should ensure that appropriate supervision is provided to maintain acceptable fraud investigation standards. Entities should also ensure these employees undertake appropriate professional development training to further develop their expertise and ensure their skills remain current. Timeframes for refreshing employee knowledge and skills should be determined by individual entities, but should occur at least every three years. Entities with a greater exposure to fraud should consider developing more specialised training programs for these employees to ensure the potential risks to their business are minimised.
- 8.14 Entities should ensure employees and contractors engaged in fraud control activities, including prevention and detection, possess or attain relevant qualifications or training to effectively carry out their duties. For example, employees primarily engaged in fraud risk assessment and planning activities should acquire or possess a Certificate IV in Government (Fraud Control) or equivalent qualifications as a minimum. Employees primarily engaged in the coordination and management of fraud control (including prevention and detection activities) should attain or possess a Diploma of Government (Fraud Control) or equivalent qualifications as a minimum.
- 8.15 Relevant training and qualifications will vary for corporate entities depending on their structure.
- 8.16 Non-corporate entity employees who perform some fraud control or investigation functions, but who are not primarily engaged in fraud control (including prevention and detection activities) or investigation, do not need to attain full qualifications but should obtain statements of attainment against appropriate units of competency in accordance with the Public Sector Training Package or undertake other appropriate training.

## Part 9 – Outsourcing arrangements

- 9.1 Third-party providers, including non-government organisations, the private sector or other levels of government, undertake significant work for entities.
- 9.2 Entities should make third-party providers aware of the Australian Government's position or the entity's position on fraud control, and put measures in place to ensure that third-party service providers meet the high standard of accountability required as part of the Australian Government's financial management framework. The purchasing entity retains responsibility for the services delivered by third parties to clients, including requirements in relation to fraud control.
- 9.3 When an entity provides third-party services for another entity, the entity delivering the service retains responsibility to meet the obligations under this guidance.
- 9.4 If allegations are made in relation to third-party providers, entities will need to determine whether, if proven, the fraud constitutes fraud against the Commonwealth. If a private sector contractor or non-government organisation experiences internal fraud, this does not necessarily constitute fraud against the Commonwealth. The victim of the fraud is more likely to be the contractor and action is most likely to be considered under

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<sup>1</sup> The AGIS sets out the minimum level of training or qualification recommended for investigations staff of non-corporate entities. The requirements for corporate entities may be different.



state or territory law. However, contractors and service providers may be subject to the abuse of public office offence under section 142.2 of the Criminal Code.

## **Part 10 – Detection, investigation and response**

- 10.1 Fraud detection, investigation and response are key elements of the overall fraud control framework. Paragraphs (d) and (e) of section 10 of the PGPA rule require entities to have appropriate mechanisms for detecting and investigating fraud. These mechanisms should be developed by entities in compliance with the requirements of the AGIS.

### **Detection**

- 10.2 Entities are required to have in place appropriate systems to ensure they are able to detect internal or external fraud, or attempted fraud. Early detection of fraud is an essential element of fraud control and, particularly in areas of identified high risk, entities should not rely on reporting of fraud. Entities should consider measures such as monitoring high-risk jobs or areas, conducting reviews or internal audits, installing intrusion detection systems, conducting reviews focused on clients at risk, or data mining and data matching.
- 10.3 Members of the public can play an important role in reporting suspected fraud. Paragraph (d) of section 10 of the PGPA rule requires entities to put in place mechanisms to enable members of the public to report suspected fraudulent activity by an entity's clients, employees, contractors or agents. Such initiatives are particularly important for entities that deliver services and payments to the community and should be appropriately publicised.
- 10.4 Employees, clients or members of the public must be provided with an appropriate channel for reporting fraud that ensures confidentiality. Entities should have in place a formal system for securely storing, recording, analysing and monitoring all instances or allegations of internal or external fraud or attempted fraud within the entity and any subsequent investigations and outcomes.
- 10.5 Entities should establish policies and procedures to encourage and support reporting of suspected fraud through proper channels. This should include consideration of appropriate management of risks of adverse consequences to those making such reports.

### **Fraud incident management protocols**

- 10.6 Entities are responsible for making decisions at a number of critical stages in the management of a suspected fraud. This includes the decision to initiate an investigation (including the transition from audit or compliance work to a fraud investigation) or to refer the matter to the AFP or other law enforcement agencies. It also includes subsequent decisions on the actions resulting from an investigation, such as referral of a brief of evidence to the CDPP, or application of administrative, disciplinary or civil sanction or other action (such as a decision to take no further action).
- 10.7 An appropriate mechanism for investigating or otherwise dealing with incidences of fraud includes appropriately documented procedures and criteria for making decisions. For non-corporate entities, an appropriate system would be one that complies with the requirements under the AGIS for identification of breaches and case selection, and investigation management.



- 10.8 The criteria will reflect an entity's particular circumstances, and should include consideration of:
- the cost or value of the alleged fraud
  - the security implications of the alleged fraud
  - the likely cost of investigation or prosecution
  - the possible benefit, including recovery of losses and deterrent value, and non-monetary considerations such as the public interest
  - the identity of the person or persons against whom the allegations are made
  - the nature of the alleged fraud
  - the prospect of compiling sufficient evidence for a brief to the CDPP
  - the possible ongoing risks caused by or evident in the fraud.
- 10.9 Investigation mechanisms should include procedures to appropriately document decisions to use civil, administrative or disciplinary procedures or to take no further action, so that matters are resolved in a consistent and defensible manner. Procedures should reflect the assumption that allegations of fraud will be investigated and appropriately acted upon.

### Referrals to law enforcement agencies

- 10.10 Entities are responsible for investigating routine or minor instances of fraud, including investigating disciplinary matters. 'Routine or minor' means instances of fraud that, on an initial assessment by the entity, would be unlikely to be accepted by the AFP under its CCPM. Entities are encouraged to seek guidance from the AFP about the CCPM, and to discuss possible referrals with the AFP if there is any doubt about whether it is appropriate to refer a particular matter. Entities may outsource these investigations if they do not involve conflicts of interest or politically sensitive matters.
- 10.11 The AFP has the primary law enforcement responsibility for investigating serious or complex fraud against the Commonwealth. For the purposes of paragraph (e) of section 10 of the PGPA rule, an appropriate mechanism for non-corporate entities would include provision for all instances of potential serious or complex fraud offences to be referred to the AFP in accordance with the AGIS and the referral process published on the AFP website available at <[www.afp.gov.au](http://www.afp.gov.au)>. This applies except when legislation sets out specific requirements for referrals of a particular nature or by a particular class of bodies or entities, or when entities have the capacity and the appropriate skills and resources needed to investigate criminal matters and meet the requirements of the CDPP in preparing briefs of evidence. This exception does not preclude an entity from referring a less serious or complex matter to the AFP when deemed appropriate. For non-corporate entities, appropriate procedures for gathering evidence would be procedures that comply with the AGIS.
- 10.12 Matters of a politically sensitive nature, not limited to fraud, deemed by the entity as appropriate for referral to the AFP should be brought to the attention of the Minister for Justice through the relevant Minister or department at the time of referral. This enables the government to be informed at the earliest juncture of potential politically contentious matters that may require AFP investigation. The procedure exists only to enable the Minister to be informed of significant matters affecting their responsibility for the AFP. The Minister does not have the power or function of deciding what particular allegations the AFP will investigate. The decision to seek an AFP investigation will, unless the matter affects other portfolios, remain that of the complainant entity.
- 10.13 The AFP will also consider investigating matters that could involve a real or perceived conflict of interest if they were to be investigated by the entity concerned (for instance,

an allegation that concerns potential criminal behaviour by a member of the executive with some responsibility for the entity's investigation function).

- 10.14 When a matter involves offences under state or territory law, the entity should consider referring it to the responsible state or territory police service for investigation. If a matter may involve cartel conduct, the entity should refer it to the ACCC, which is responsible for enforcing compliance with Australia's competition laws. When competitors engage in cartel conduct, including fixing prices, rigging bids, restricting supply or allocating markets, the Commonwealth pays higher prices and has less choice in its procurement. Further information is available on the ACCC web page available at <[www.accc.gov.au/cartels](http://www.accc.gov.au/cartels)>.
- 10.15 The AFP and the state or territory police services may not be able to accept all referrals. If a police service declines a referral, the entity is responsible for resolving the matter, in accordance with internal and external requirements such as the AGIS and entity specific criteria.
- 10.16 The AFP evaluates matters referred to it for investigation in accordance with its CCPM. The CCPM has been developed by the AFP to provide a transparent, objective and consistent basis for evaluating and comparing AFP operational activities from a range of perspectives, including across entities, regions (geographic locations) or teams (work groups). The CCPM provides entities with a basis for considering matters prior to referral. The AFP also uses the CCPM as a basis for identifying and agreeing with entities on the types of matters that may be most appropriate for referral.
- 10.17 If the AFP declines to investigate a matter, it will advise the entity of the reasons in writing at the earliest opportunity and, in any case, within 28 days (unless another period is agreed to). The AFP may also suggest alternative methods of handling the matter and may assist entities by executing search warrants and providing other forms of assistance. If, after the AFP has advised an entity that it cannot accept a referral, additional information becomes available that shows that the matter is more serious than first indicated, the entity may again refer the matter to the AFP for consideration.
- 10.18 An entity that needs specific arrangements with the AFP to meet its obligations and responsibilities may negotiate a service agreement with the AFP. In circumstances where there is a Commonwealth law enforcement interest, and where both parties support an outposting, the AFP may outpost employees to an entity. Such arrangements should clearly specify the role and responsibilities of each party.

## Investigation

- 10.19 The investigation of fraud is crucial to effective fraud control. Entities are encouraged to consult with the AFP to clarify whether a particular case requires criminal investigation.
- 10.20 For the purposes of paragraph (e) of section 10 of the PGPA rule, an appropriate mechanism would include a requirement that investigations be carried out by appropriately qualified and experienced personnel with the appropriate level of managerial oversight. If external investigators are engaged, they should also be appropriately qualified and supervised. Unqualified investigators may compromise a case by:
- failing to collect all the available evidence
  - collecting evidence in a manner that is inadmissible in court, and/or
  - alerting the suspect before all available or necessary evidence can be collected.
- 10.21 When an investigation concerns matters that are security classified, entities must ensure that investigators have obtained a security clearance commensurate with the classification of any materials discussed or reviewed during the investigation.

- 10.22 An entity may investigate allegations of fraud affecting the entity or its programs using its own or third-party investigators only if:
- the investigators possess the minimum competencies outlined in 8.12 (for non-corporate entities only) and 8.14
  - the accountable authority, or a delegate, has formally authorised the investigators to undertake fraud investigations
  - the investigations are conducted by entity investigators in accordance with these guidelines and other relevant laws, including privacy provisions and any secrecy provisions under Acts specific to the entity or its programs.
- 10.23 Australian Privacy Principle 6.2(e) allows the disclosure of information when it 'is reasonably necessary for one or more enforcement related activities conducted by or on behalf of an enforcement body'. Many investigations into fraud against the Commonwealth will involve, at the least, protection of the public revenue. Investigators should, however, be mindful of other legislative provisions regulating the disclosure or use of information.
- 10.24 Entities must comply with Part 1C of the *Crime Act 1914*, the *Freedom of Information Act 1982*, the *Privacy Act 1988*, the *Archives Act 1983* and other applicable law—including provisions in legislation administered by specific entities. Non corporate entities should have in place processes and procedures that are consistent with, or exceed, the model procedures outlined in the AGIS and must also comply with the *Prosecution Policy of the Commonwealth* and the *Commonwealth Protective Security Policy Framework*.
- 10.25 Entities should consider applying the AGIS in all investigations other than audit. Although compliance work generally involves investigations into matters that do not carry a criminal offence or for which the entity or investigating authority has pre-determined not to criminally prosecute, compliance investigations may in some circumstances progress into a criminal investigation and vice versa. Entities should use their judgement in applying the AGIS to investigations if there is a possibility of the investigations resulting in a judicial proceeding.
- 10.26 For fraud to occur, there must have been intent to defraud. Non-compliance is a particular issue for entities dealing with revenue or benefits. However, non-compliance may not constitute fraud. It may occur because of a lack of understanding or awareness of obligations or because compliance is difficult, or it may be deliberate. Entities should have graduated and proportionate responses to non-compliance. If the evidence cannot establish the degree of intention, recklessness or negligence required for a criminal offence, it may be appropriate to apply administrative sanctions for non-compliance.
- 10.27 Entities should consider prosecution in appropriate circumstances. The Australian Government's policy on prosecution of criminal offences is set out in the *Prosecution Policy of the Commonwealth*, which is available on the CDPP website. Prosecutions are important in deterring fraud and in educating the public generally about the seriousness of fraud.
- 10.28 If the AFP or another law enforcement agency declines to investigate a potential offence and returns the matter to the referring entity, the entity may, if it has investigated the matter and obtained sufficient evidence, subsequently refer the matter to the CDPP for consideration of prosecution action. Briefs should be prepared in accordance with the *Guidelines for dealings between Commonwealth investigators and the Commonwealth Director of Public Prosecutions*.
- 10.29 If any entity needs specific arrangements with the CDPP to meet its obligations and responsibilities, in addition to those outlined in this guidance, the entity and the CDPP may negotiate separate measures, such as a memorandum of understanding.

- 10.30 If an entity sends a brief of evidence to the CDPP to consider prosecution action, and the CDPP advises that a prosecution will not proceed, the entity remains responsible for resolving the matter and for considering other available remedies, in accordance with the criteria established under 10.8. Entities should also consider civil, administrative or disciplinary proceedings for which a lower standard of proof is required. Entities with a range of legislated remedies should develop an enforcement strategy to ensure appropriate use of the remedies.
- 10.31 Entities should be committed to recovering financial losses caused by illegal activity through proceeds of crime and civil recovery processes or administrative remedies. Entities should have a general policy that recovery action will be undertaken when the likely benefit will exceed the recovery costs. In this context, 'benefit' is not simply financial, but should include consideration of deterrent value and other non-financial benefits such as public interest and integrity of the government's or the entity's reputation.
- 10.33 If an investigation discloses criminal activity involving another entity's activities or programs, the investigating entity must report the matter to that entity, subject to any requirements or limitations under the Privacy Act 1988, the Australian Privacy Principles or entity legislation regulating the disclosure of information. This also applies to criminal activity identified by the AFP.

### **Serious and complex matters referred to the AFP for investigation**

To ensure that AFP resources are directed towards the matters of highest priority, the AFP evaluates all matters that are referred to it for investigation in accordance with the CCPM. The CCPM is used to assess:

- the incident type and the impact of the matter on Australian society
- the importance of the matter to both the entity and the AFP in terms of the roles assigned to them by government and ministerial direction
- the type of response required (that is, whether an immediate response is needed)
- the resources required by the AFP to undertake the matter.

It is not possible to provide a definitive list of the types of fraud matters that will be accepted by the AFP for investigation. However, the criteria set out below provide some guidance as to whether a particular matter is of sufficient seriousness and may warrant referral to the AFP:

- significant or potentially significant monetary or property loss to the Commonwealth
- damage to the security, standing or integrity of the Commonwealth or an entity
- harm to the economy, national security, resources, assets, environment or wellbeing of Australia
- a serious breach of trust by a Commonwealth employee or contractor of an entity
- the use of sophisticated techniques or technology to avoid detection, which requires specialised skills and technology for the matter to be successfully investigated
- the elements of a criminal conspiracy
- bribery, corruption or attempted bribery or corruption of a Commonwealth employee or contractor of an entity
- known or suspected criminal activity against more than one entity
- activities that could affect wider aspects of Commonwealth law enforcement (e.g. illegal immigration or money laundering)
- politically sensitive matters.

## Part 11 – Quality assurance and reviews

- 11.1 The Minister for Justice may direct AGD to review Commonwealth fraud control arrangements. Any reviews will be conducted in consultation with the ANAO, the AFP and other relevant entities with the aim of improving fraud control activities across the Commonwealth.
- 11.2 Entities should ensure appropriate monitoring and evaluation of fraud control plans by an appropriate committee or body.
- 11.3 Compliance with section 10 of the PGPA rule may be the subject of audit by the ANAO.
- 11.4 The AFP may conduct quality assurance reviews of entity fraud investigations, as described under the AGIS. The AFP will provide the results of any such reviews to AGD.
- 11.5 Entities conducting a number of investigations deemed to represent a significant risk must have a quality assurance review system in place that complements the AFP's quality assurance review process and that provides adequate information for effective monitoring and continuous improvement.

## Part 12 – Quality assurance and reviews

- 12.1 Reliable and up-to-date information is essential to sound decision-making. A reporting system that records all allegations of fraud, any subsequent investigation action and the outcomes can provide an overview of the nature, extent and location of fraud. It can also form the basis for developing an intelligence capability and risk profiles of potential fraud suspects, in addition to providing the data necessary for identifying trends and for appropriate performance monitoring and reporting.
- 12.2 Entities are required to have systems in place to manage information gathered about fraud against the entities. Mechanisms for recording and reporting incidences of fraud should be appropriate for the number of cases and complexity of investigations undertaken. To ensure the integrity of evidence, entities should comply with the relevant requirements of the AGIS covering the storage of information relating to investigations.
- 12.3 Data collection on fraud and fraud control activities is an important part of controlling fraud against the Commonwealth. The AIC, in consultation with AGD and the AFP, will provide an annual report on fraud against the Commonwealth and fraud control arrangements in entities to the Minister for Justice. This report will also be provided to Ministers, Presiding Officers and accountable authorities. The AIC may also publish selected findings of the report with the agreement of the Minister for Justice. AGD will provide an annual compliance report to the government, through the Minister for Justice, on whole of government compliance with the requirements of section 10 of the PGPA rule.
- 12.4 For the purposes of paragraph (f) of section 10 of the PGPA rule, an appropriate mechanism for recording and reporting incidences of fraud should include the collection and provision of information on fraud to the AIC by 30 September each year. This requirement facilitates the process of annual reporting to government, and compliance information will be made available to AGD for monitoring. Required information may include incidents of suspected fraud, incidents under investigation, completed incidents, whether the fraud was proved or not, and whether the incident was dealt with by a criminal, civil or administrative remedy. The precise data items will be agreed between AGD and the AIC in consultation with other entities and entities will be required to provide the information by responding to an online survey hosted by the AIC.

- 12.5 In addition to responding to the AIC's online fraud survey, the AFP will provide annual information to the AIC on all fraud incidents against the Commonwealth referred to, accepted by or declined by the AFP during the previous financial year.
- 12.6 In addition to responding to the AIC's online fraud survey, the CDPP will provide annual information to the AIC on all fraud matters handled by the CDPP during the previous financial year.

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# Resource Management Guidance No. XX

## Audit committees for Commonwealth entities and Commonwealth companies

### Audience

This guide is relevant to accountable authorities of Commonwealth entities, governing bodies of Commonwealth companies and audit committee members.

### Key points

This guide:

- details considerations for establishing and operating an audit committee to provide independent advice and assurance to accountable authorities and governing bodies
- provides guidance to accountable authorities and governing bodies on determining the audit committee's charter, including the review of the integrity of the entity's financial and performance reporting and compliance requirements
- takes effect immediately to support the implementation date of the rule of 1 July 2014.

### Relevant resources

#### Related guidance

- [ANAO better practice guide on audit committees](#), which has informed this guidance, in particular, sections on "skills and experience required of audit committee members" and "contractual arrangements and remuneration".
- [Australian Stock Exchange Corporate Governance Principles and Recommendations with 2010 Amendments](#)
- Auditing and Assurance Standards Board and Institute of Internal Auditors Australia. *Audit committees: a guide to good practice*. Sydney: Australian Institute of Company Directors, 2008.

#### Contact information

- [prma@finance.gov.au](mailto:prma@finance.gov.au)  
Department of Finance

### Section 45 Audit committee for Commonwealth entities

- (1) The accountable authority of a Commonwealth entity must ensure that the entity has an audit committee.
- (2) The committee must be constituted, and perform functions, in accordance with any requirements prescribed by the rules.

### Section 92 Audit committee (for Commonwealth companies)

- (1) The directors of a wholly-owned Commonwealth company must ensure that the company has an audit committee.
- (2) The committee must be constituted, and perform functions, in accordance with any requirements prescribed by the rules.

## Audit committee rule

### Section 17 - Audit committee for Commonwealth entities

#### Guide to this section

The purpose of this section is to set out minimum requirements relating to establishing an audit committee for a Commonwealth entity to help ensure that the committee provides independent advice and assurance to the entity's accountable authority. While an audit committee needs to be established for each Commonwealth entity, and the accountable authority must determine the functions the committee is to perform for the entity, this section does not prevent the same audit committee being established for multiple Commonwealth entities.

This section is made for subsection 45(2) of the Act.

#### *Functions of the audit committee*

- (1) The accountable authority of a Commonwealth entity must, by written charter, determine the functions of the audit committee that is established for the entity as required by subsection 45(1) of the Act.
- (2) The functions must include reviewing the appropriateness of the accountable authority's:
  - (a) financial reporting; and
  - (b) performance reporting; and
  - (c) system of risk oversight and management; and
  - (d) system of internal control;

for the entity.

*Membership of the audit committee*

- (3) The audit committee must consist of at least 3 persons who have appropriate qualifications, knowledge, skills or experience to assist the committee to perform its functions.
- (4) On and after 1 July 2015, the majority of the members of the audit committee must:
  - (a) for a non-corporate Commonwealth entity—be persons who are not officials of the entity; or
  - (b) for a corporate Commonwealth entity—be persons who are not employees of the entity.
- (5) Despite subsections (3) and (4), the following persons must not be a member of the audit committee:
  - (a) the accountable authority or, if the accountable authority has more than one member, the head (however described) of the accountable authority;
  - (b) the Chief Financial Officer (however described) of the entity;
  - (c) the Chief Executive Officer (however described) of the entity.

**Section 28 - Audit committee for wholly-owned Commonwealth companies**

**Guide to this section**

The purpose of this section is to provide that the requirements in section 17 of this rule about establishing audit committees of corporate Commonwealth entities also apply to audit committees of wholly-owned Commonwealth companies. This is to help ensure that audit committees of wholly-owned Commonwealth companies provide independent advice and assurance to the governing bodies of those companies.

This section is made for section 92 of the Act.

- (1) Section 17 of this rule (which is about audit committees for Commonwealth entities) applies to a wholly-owned Commonwealth company in the same way as it applies to a corporate Commonwealth entity.
- (2) For the purposes of subsection (1), a reference in section 17 to the accountable authority of the entity is taken to be a reference to the governing body of the company.

## Introduction

1. The audit committee rules set out minimum requirements relating to establishing an audit committee for a Commonwealth entity and a Commonwealth company (section 17 and 28 of the draft Public Governance, Performance and Accountability Rule (2014) respectively). These rules aim to help ensure that the committee provides independent advice and assurance to the entity's accountable authority (or governing body for a company – hereafter, accountable authority). While an audit committee needs to be established for each Commonwealth entity or company, and the accountable authority must determine the functions the committee is to perform for the entity, this section does not prevent an audit committee providing its services to multiple Commonwealth entities.

## Functions of audit committee

2. The accountable authority must, by written charter, determine the functions of the audit committee. That charter should also include particulars of the committee's:
  - (a) meeting frequency
  - (b) membership; and
  - (c) quorum arrangements.
3. The functions of the audit committee that are outlined in the charter must include, at a minimum, reviewing the appropriateness of the accountable authority's:
  - (a) *financial reporting*, which may cover
    - advising the accountable authority on the preparation and review of the entity's annual financial statements
    - providing any other advice to the accountable authority about the accountable authority's obligations under the PGPA Act and other relevant Acts
    - advising the accountable authority on the entity's internal budgeting and reporting

- (b) *performance reporting*, which may cover
- reviewing the framework for the selection of key performance indicators and other performance measures
  - advising the accountable authority on the preparation and review of the entity's annual performance statement
  - advising the accountable authority about action that could be taken on significant matters of concern or significant opportunities for improvement that are mentioned in reports of internal and external audits
- (c) *systems of risk oversight and management*, which may cover
- advising the accountable authority about the internal audit plans of the entity
  - advising the accountable authority about the professional standards to be used by internal auditors in the course of carrying out audits in the entity
  - as far as practicable, coordinating work programs relating to internal and external audits
  - reviewing the adequacy of the entity's response to reports of internal and, as far as practicable, external audits
  - reviewing the content of reports of internal and external audits to identify material that is relevant to the entity, and advising the accountable authority about good practices
  - reviewing the entity's risk management framework including:
    - the entity's risk management plan
    - the entity's business continuity plan
- (d) *systems of internal control*, which may cover
- reviewing the adequacy of the controls that are designed to ensure the entity's compliance with legislation
  - reviewing the adequacy of the entity's governance arrangements
  - reviewing the adequacy of the entity's internal control environment .
4. The functions of the audit committee do not need to be limited to those listed above. The accountable authority should consider if the audit committee could also be utilised for a broader range of functions, such as combining the audit and risk committee functions together. This has the benefit of enabling a broader view of the entity, while also decreasing the number of committees and members the entity will need to support.

## Independence of audit committee members

5. The distinguishing feature of an audit committee is its independence. The committee's independence from the day to day activities of management helps to ensure it acts in an objective, impartial manner, free from conflict of interest or inherent bias or undue external influence.

6. Appointing a majority of external members to the committee is the most visible and practical way to make sure the committee is as independent as possible from the management of the entity.
7. An independent member cannot be an official or employee of the entity. Board members of corporate Commonwealth entities or Commonwealth companies are not employees of the entity and are therefore considered to be independent. To avoid doubt, an Audit Committee for a corporate Commonwealth entity may include independent persons who are not board members.
8. The rule includes a transition period before the requirement to have a majority of independent committee members comes into effect on 1 July 2015. Entities that are in a position to move towards majority independent membership before this date should take steps to do so.
9. Other measures to strengthen the committee's actual or perceived independence include:
  - appointing an independent chair. As the most influential member of the audit committee an independent chair can perform their role unencumbered by any management responsibilities and can give the accountable authority advice and assurance from an independent perspective;
  - not appointing committee members who will favour a particular area within the entity;
  - having a rotation policy for committee members to enable new knowledge and experience to be introduced to the committee; and
  - having policies in place to facilitate timely identification of changing relationships or circumstances that may affect the independence of committee members.
10. There may also be benefits in appointing a member from another Commonwealth entity as an independent member, particularly when the entities have working relationships or when a person has particular expertise in relation to an areas of audit committee responsibility.

## **Persons excluded from being audit committee members**

11. To ensure ongoing independence, subsection 17(5) of the rule excludes the chief financial officer, the chief executive officer (however described), and accountable authority or if the accountable authority consists of two or more people the person who is the head (however described) of the accountable authority, from being members of the audit committee.
12. Also, it is advisable that the chief operating officer, the chief information officer, the head of the corporate services area, and the head of internal audit not be members of the audit committee. However, it may be appropriate for them to attend meetings as observers.



## Skills and experience required of audit committee members

13. The audit committee must include people who have appropriate qualifications, knowledge, skills or experience to assist the committee to perform its functions. Members should be financially literate (that is, able to read and understand financial statements). At least one member of the committee should have accounting or related financial management experience and/or qualifications, and a comprehensive understanding of accounting and auditing standards. Collectively, the audit committee should possess broad business, financial management and/or public sector experience, and general knowledge of most of the areas listed below should be appointed.
14. Audit committee members should collectively have knowledge or expertise in:
  - the business or industry in which the entity operates
  - risk identification, evaluation and management
  - project and program management
  - information management and security
  - the operations of government and the public sector, including information technology systems and controls
  - the roles of internal and external audit
  - the application of accounting, auditing and assurance standards
  - relevant legislative and other policy requirements of the entity
  - public sector reporting requirements, including financial and performance reporting
  - internal control, compliance activities and fraud control.
15. The audit committee must consist of at least three persons. The size will depend on the nature and extent of its responsibilities, but it commonly comprises three to six members.

## Contractual arrangements and remuneration

16. When procuring the services of external members of the audit committee, non-corporate entities (and corporate entities listed in section XX of the Commonwealth Procurement Rules) must comply with the Commonwealth Procurement Rules where applicable. When accepting an appointment to serve on an audit committee, external members and the entity should ensure that the contractual arrangements clearly outline the role and the terms and conditions of appointment. This should include any requirements relating to hours to be worked, indemnity insurance, signing of conflict of interest declarations, remuneration and any specific requirements, so members and entities fully understand their obligations.

17. External committee members should be remunerated at a level that reflects the time it takes to effectively meet their responsibilities. Allowance should be made for the particular skills and expertise a member will bring to the committee, and the time required for meeting preparation, attendance at meetings and interaction with management outside committee meetings. Recognition should also be made for the additional responsibilities of the chair.

### **Sharing audit committees between agencies**

18. The rule has been designed to encourage, where practicable, the sharing of audit committees or members of audit committees. This supports independence and sharing of better practice among entities. The sharing of members between the audit committees of entities can also help to reduce operating costs and improve the utilisation of high calibre committee members.
19. An effective way to reduce costs and improve independence is to create a single audit committee from senior executive service officers from several agencies. This group is then utilised as the audit committee for each agency that contributed an officer. This group could be supplemented by an external member or chair with expertise in audit committees.

### **Support to identify suitable audit committee members**

20. The Department of Finance can assist the accountable authority to identify suitable people that it can consider to include on its audit committee.
21. Additionally, entities that wish to contribute candidates to the potential audit committee member pool should also contact the Department of Finance.



# Resource Management Guide No. XX

## Banking of relevant money received by Ministers and officials

This guidance relies on proposed changes to the *Public Governance, Performance and Accountability Act 2013* being approved.

### Audience

This guide is relevant to corporate and non-corporate Commonwealth entities.

### Key points

This guide:

- assists in understanding and implementing the law associated with the banking of relevant money by Commonwealth entities
- explains and provides an extract of the related law, which is section 55 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and sections 19, 20 and 21 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) made to support section 55
- takes effect on 1 July 2014.

### Relevant resources

This guide is available on the Department of Finance website at [www.finance.gov.au/publications/finance-circulars/index.html](http://www.finance.gov.au/publications/finance-circulars/index.html)

Questions about the matters covered in this guide may be emailed to Finance at [Banking.Policy@finance.gov.au](mailto:Banking.Policy@finance.gov.au), directed to the Banking Policy Team in the Appropriations and Cash Management Branch.

## Legislative framework for banking relative money

1. The authority for the Commonwealth to enter into an agreement with a bank to conduct banking business is provided in section 53 of the PGPA Act. The power in section 53 is delegated by the Minister for Finance to the accountable authority of each non-corporate Commonwealth entity.
2. A corporate Commonwealth entity is, on its own account, able to hold relevant money and enter into an agreement with a bank.
3. Under section 55 of the PGPA Act, Ministers or officials of Commonwealth entities are obligated to bank relevant money promptly and in accordance with any rules made under the section. Sections 19, 20 and 21 of the PGPA Rule support the operation of section 55 of the PGPA Act by setting out when relevant money is required to be banked and when it is not required to be banked.
4. An extract of the current section 55 of the PGPA Act and the sections of the PGPA Rule for banking are below.
5. Section 55 of the PGPA Act is subject to the approval of proposed amendments which would provide greater clarity about the responsibilities of Ministers and officials and about the banking of money. The revised provisions will specify that:
  - a Minister who receives relevant money must give the money to an official of a non-corporate Commonwealth entity as soon as practicable;
  - an official who receives relevant money (including from a Minister) that can be banked, must deposit the money in a bank as soon as practicable and/or deal with the money in accordance with requirements in the rules; and
  - if the money is non-bankable money, the rules can specify how such money is to be handled.

### **PGPA Act – existing provision that will be updated once proposed amendments are approved**

#### **55 Banking of relevant money by Ministers and officials**

A Minister, or an official of a Commonwealth entity, who receives relevant money (including money that becomes relevant money upon receipt) must:

- (a) cause the money to be banked promptly and in accordance with any requirements prescribed by the rules; or
- (b) otherwise deal with it in accordance with the rules.

## PGPA Rule

### Division 2—Banking etc. of relevant money received by officials

#### 19 Banking of bankable money received by officials

*[This section relies on proposed changes to the Act being approved.]*

##### **Guide to this section**

The purpose of this section is to require officials who receive bankable money to deposit the money in a bank either by the next banking day or within the period prescribed in the accountable authority's instructions. It is made for subparagraph 55(2)(a)(i) of the Act.

- (1) An official of a Commonwealth entity who receives bankable money must deposit the money in a bank:
  - (a) before the end of the next banking day; or
  - (b) if the instructions of the accountable authority of a Commonwealth entity that is responsible for the money prescribe a period in which the money must be so deposited—before the end of that period.
- (2) A **banking day** is a day other than a Saturday, a Sunday or a day that is a public holiday in the place where the money was received.

#### 20 Otherwise dealing with bankable money received by officials

*[This section relies on proposed changes to the Act being approved.]*

##### **Guide to this section**

The purpose of this section is to require officials who receive bankable money to deal with the money in accordance with the accountable authority's instructions as an alternative to banking it. It is made for paragraph 55(2)(b) of the Act.

An official of a Commonwealth entity who receives bankable money that is to be held for the purposes of making payments in relation to a Commonwealth entity must deal with the money in accordance with any requirements prescribed by the instructions of the accountable authority of a Commonwealth entity that is responsible for the money.

## 21 Dealing with unbankable money received by officials

*[This section relies on proposed changes to the Act being approved.]*

### Guide to this section

The purpose of this section is to require officials who receive unbankable money (for example, foreign coins) to deal with the money in accordance with the accountable authority's instructions. It is made for subsection 55(3) of the Act.

An official of a Commonwealth entity who receives relevant money that is not bankable money must deal with the money in accordance with any requirements prescribed by the instructions of the accountable authority of a Commonwealth entity that is responsible for the money.

### When relevant money must be banked

6. Section 19 of the PGPA Rule provides that relevant money must be banked promptly by an official who receives it, unless it is of a kind prescribed by the PGPA Rule as not required to be banked. Money is not bankable in certain circumstances, for example, when:
  - (a) the money will not be accepted for banking by any bank in the place where the money is held; or
  - (b) the banking of the money, in the opinion of the relevant accountable authority, would be uneconomical.
7. Subsection 19(1) sets out the meaning of 'promptly', which is the next banking day or a banking day approved by the accountable authority. The discretion provided to the accountable authority allows them to take into account organisational or operational matters that may affect the prompt banking of money.
8. Subsection 19(2) sets out the meaning of 'banking day', which is a day that the bank is open for business and not on a weekend or public holiday in the place where the money is held. This reflects the fact that Commonwealth entities operate in regional and remote areas of Australia as well as in locations overseas. Similarly, banking holidays differ across Australia, depending on State or regional arrangements.
9. Section 20 provides an exception to the requirement, set out in section 19, to deposit relevant money in a bank in the case where an official receives the money in order to carry out an activity of the Commonwealth entity. For example, if the money was withdrawn from the entity's bank account to make payments in cash (such as paying salaries, purchasing goods and services, making grants, etc). Another example of this could be when money is stored at an entity's shopfront to use as a cash float.



## When relevant money is not required to be banked

10. Section 21 of the PGPA Rule provides that when relevant money is not bankable, it is not required to be banked by an official. The accountable authority may issue instructions regarding how an official may manage the money. This enables, for example, foreign coinage which is not able to be banked in Australia and which cannot be used to make payments in Australia, to be provided to an officer travelling to that foreign country to use in that country.
11. Money is not bankable when:
  - (a) the money will not be accepted by a bank. An example of this could be when money is in the form of foreign coinage or money is damaged or contaminated. Such forms of money are not usually accepted by banks and therefore cannot be banked.
  - (b) the accountable authority has considered it uneconomical to bank the money. An example of this could be when coins of small denomination are collected in a place far from any location in which they could be deposited in a bank. In such cases, the accountable authority may decide to store the coins until a sufficient number are collected to have a value greater than the costs of transporting the coins to an appropriate bank.
12. Should circumstances change so that the money no longer falls into either of the above two categories, then the money becomes bankable and is subject to section 19.



# Resource Management Guide No. XX

## Receipts collected by non-corporate Commonwealth entities

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### Audience

This guide is relevant to non-corporate Commonwealth entities.

### Key points

The guide:

- assists in understanding and implementing the law associated with increasing appropriations with certain receipts collected by non-corporate Commonwealth entities
- explains and provides an extract of the related law, which is section 74 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and section 27 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule)
- takes effect on 1 July 2014.

### Relevant resources

This guide is available on the Department of Finance website at [www.finance.gov.au/publications/finance-circulars/index.html](http://www.finance.gov.au/publications/finance-circulars/index.html)

Questions about matters covered in this guide may be emailed to Finance at [Receipts.Repayments@finance.gov.au](mailto:Receipts.Repayments@finance.gov.au), directed to the Receipts and Repayments Policy Team in the Appropriations and Cash Management Branch.

## Legislative framework for appropriations and receipts

1. The Constitution provides that all money received by the Commonwealth is part of the Consolidated Revenue Fund (CRF) (section 81). The Commonwealth can only expend money that is part of the CRF when it is authorised to do so by an appropriation in law (section 83).
2. Parliament passes legislation that appropriates amounts of money that can be legally expended from the CRF by non-corporate Commonwealth entities. These entities can only expend money to the extent that they have an available appropriation entitlement.
3. In some cases, these entities buy and sell goods and services in the performance of their functions, and can receive donations and other contributions. The money received in the course of these activities cannot be used by the entities, absent of a mechanism to appropriate it. Section 74 of the PGPA Act provides a way for entities to retain for their own use, in certain circumstances, some of the money they receive. The section allows an entity to increase the entitlement balance of one of its existing appropriations by an amount equivalent to the amount of money the entity is allowed to retain.
4. The PGPA Rule describes the specific circumstances and activities for which entities may use section 74 to increase an appropriation. As a general principle, the PGPA Rule allows an entity to retain sufficient amounts to cover activities for which it has not received other appropriations by Parliament.
5. An extract of section 74 of the PGPA Act and the section 27 of the PGPA Rule are below:

### **PGPA Act**

#### **74 Receipts of amounts by non-corporate Commonwealth entities**

- (1) If a non-corporate Commonwealth entity receives an amount of a kind prescribed by the rules, then the amount may be credited to:
  - (a) the most recent departmental item for the entity in an Appropriation Act; or
  - (b) if the rules prescribe another item in an Appropriation Act, another appropriation or a special account—that item, appropriation or special account.
- (2) The crediting of an amount in accordance with subsection (1) takes effect at the time an entry recording the receipt of the amount is made in the accounts and records of the entity.

### **PGPA Rule**

#### **27 Receipts of amounts by non-corporate Commonwealth entities**

##### **Guide to this section**

The purpose of this section is to specify which amounts that are received by a non-corporate Commonwealth entity may be credited to a departmental item for the entity in an Appropriation Act (or another appropriation if otherwise provided for by this section). It is made for subsection 74(1) of the Act.

*Application of section*

- (1) This section applies to an amount (the **received amount**) that is received by a non-corporate Commonwealth entity.

*When received amounts may be credited to an appropriation*

- (2) The received amount is an amount of a kind for subsection 74(1) of the Act if:
- (a) it is specified in the following table; and
  - (b) it was received by the entity in relation to the entity's departmental activities.

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**Kinds of amounts**

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**Item    Amount**

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1	An amount that offsets costs in relation to an activity of the entity.
2	An amount that is a sponsorship, subsidy, gift, bequest or similar contribution.
3	An amount that is a monetary incentive or rebate in relation to a procurement arrangement.
4	An amount that is an insurance recovery.
5	An amount that is in satisfaction of a claim for damages or other compensation.
6	An amount that relates to an employee's leave (including paid parental leave).
7	An amount that relates to a sale of departmental assets of the entity.
8	An amount received in relation to an application to the entity under the <i>Freedom of Information Act 1982</i> .

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- (3) The received amount is an amount of a kind for subsection 74(1) of the Act if it relates to a trust or similar arrangement.
- (4) The received amount is an amount of a kind for subsection 74(1) of the Act if:
- (a) it is a repayment of the whole or part of an amount paid by the entity; and
  - (b) any of the following was debited in relation to the amount paid by the entity:
    - (i) the most recent departmental item for the entity in an Appropriation Act;
    - (ii) another item in an Appropriation Act, another appropriation or a special account.
- (5) If, as referred to in subsection (4), another item in an Appropriation Act, another appropriation or a special account was debited in relation to the amount paid, then that item, appropriation or special account is prescribed for paragraph 74(1)(b) of the Act.

*When received amount may not be credited*

- (6) Despite subsections (2) and (3), the received amount is not an amount of a kind for subsection 74(1) of the Act if:
- (a) a departmental item or an administered item for the entity in an Appropriation Act has been appropriated in relation to the amount; or
  - (b) it is a tax, levy, fine, or penalty; or
  - (c) it relates to GST (within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*).

- (7) Despite subsection (2), if:
- (a) the total of the amounts received by the entity in a financial year in relation to a sale of departmental assets (as referred to in item 7 of the table in subsection (2)); less
  - (b) the costs incurred by the entity in relation to the sale;
- reaches 5% of the total departmental items for the entity in an Appropriation Act for the financial year, then any further amount of that kind received by the entity in that financial year is not an amount of a kind for subsection 74(1) of the Act.

### When an amount received may be credited to an appropriation

6. Section 74(1) of the PGPA Act allows a non-corporate entity to increase:
- (a) the appropriation which is its most recent departmental item (under section 74(1)(a) of the Act); or
  - (b) another appropriation of the entity, including a special account appropriation (under section 74(1)(b) of the Act).
7. An entity can only use sections 74(1)(a) or (b) to increase an appropriation if the money it receives is of a kind that is consistent with one of the categories described in the PGPA Rule. Examples of money that fall into these categories are set out below.

#### Items that may increase an entity's most recent departmental appropriation item under section 74(1)(a)

8. Subsection 27(2) sets out eight kinds of amounts (called 'items') that may be credited to the most recent *departmental item* for the entity that received the amount.
9. Item 1 relates to *an amount that offsets costs in relation to an activity of the entity* and covers receipts that offset the costs the entity incurred through undertaking related activities. If an amount is greater than the amount required to offset costs, the portion that exceeds costs must be remitted to the Official Public Account (OPA) as an *administered receipt*.
10. Examples of amounts that are covered by Item 1 may include:
- for services provided by an entity;
  - for selling or hiring out goods (including leasing out goods);
  - in advance of meeting an obligation to provide a good or service;
  - for providing entity staff to speak at another entity's seminar (to offset costs such as staff time, travel or accommodation);
  - from employees to offset salary sacrifice services provided by the entity;
  - from employees, consultants or contractors to offset the use of entity facilities such as car parking, telephone or a photocopier;
  - from Comcare to offset amounts passed on to employees;
  - from royalties and licence fees to offset entity costs to develop a product;
  - in relation to a staff member attending jury duty. (Depending on the state or territory, a juror may receive payment for jury duty and pay this amount to the entity to offset salary costs while away from work.);

- to offset costs for conducting litigation or dispute resolution; and
  - for sub-leasing excess building space to a café. (Please note that a building managed by an entity as an administered asset does not usually generate receipts in relation to departmental activities.)
11. Item 2 relates to *an amount that is a sponsorship, subsidy, gift, bequest or similar contribution*. Item 2 covers receipts that involve no reciprocity and no consideration on the part of the Commonwealth. The receipts must be explicitly for the purpose of supporting an entity's departmental activities. Sponsorships, gifts, bequests or similar contributions received without the express purpose of contributing to the entity's departmental activities are amounts received for the Commonwealth as a whole and these amounts should be remitted to the OPA as administered receipts.
12. Examples of amounts that are covered by Item 2 may include:
- money (as distinct from goods) received from sponsors, for an entity to run a seminar or for an entity to participate in a trade show;
  - employment subsidies, for example a monetary subsidy for an entity to participate in a program that encourages the engagement of particular groups of people, such as staff involved in national security activities or defence reserve activities; and
  - gifts of money or bequests (as distinct from trust or trust-like arrangements, which are dealt with in subsection 27(3)).
13. Item 3 relates to *an amount that is a monetary incentive or rebate in relation to a procurement arrangement*, which enables an entity to retain amounts received as incentives or rebates when procuring goods or services. Before accepting such amounts, an entity should consider any implications for receiving value for money in the particular procurement and for the proper use of relevant money. Examples of amounts that are covered by Item 2 may include:
- fuel tax rebates; and
  - cash bonuses that accompany the purchase of a good or service (such as cash vouchers from manufacturers of electrical goods).
14. Item 4 relates to *an amount that is an insurance recovery*, which enables an entity to retain an amount received as a payout from an insurer in relation to departmental activities. Examples of such payouts include:
- ComCover payouts for departmental activities; and
  - insurance arrangements for overseas departmental activities.
15. Item 5 relates to *an amount that is in satisfaction of a claim for damages or other compensation*, which enables an entity to retain an amount received, in relation to departmental activities, as a result of negotiated compensatory settlements, court awarded costs or contractual provisions. It does not include penalties or punitive amounts, which are not compensatory and should be remitted to the OPA as *administered receipts*. Examples of amounts that may be retained include:
- compensatory out-of-court settlements; and
  - compensatory court awarded costs.



16. Item 6 relates to *an amount that relates to an employee's leave (including paid parental leave)*, which enables an entity to retain an amount received relating to an employee's leave entitlements, for example amounts received:
- under the Commonwealth's Paid Parental Leave scheme;
  - in relation to an employee undertaking defence force reserve duties; and
  - accumulated leave entitlements from a former employer of an entity employee.
17. Item 7 relates to *an amount that relates to a sale of departmental assets of the entity*. Examples of minor departmental assets include vehicles, furniture, fittings and specialist research or military equipment. Subsection 27(7) applies a maximum annual cap to retaining such receipts: the proceeds of selling departmental assets may, in a financial year, contribute a maximum increase of 5 per cent to the total departmental appropriation received by the entity in that year. The percentage is calculated on total departmental items received across all Appropriation Acts in the same year.
18. Item 8 relates to *an amount received in relation to an application to the entity under the Freedom of Information Act 1982*, specifically relating to fees that entities charge for processing applications under the FOI Act. In charging such fees, entities are required to consult the appropriate provisions of the FOI Act, for example, the Act currently permits charges to process an application but does not permit the charging of an application fee.
19. Subsection 27(3) provides for amounts that relate to a trust or similar arrangement to be credited to the most recent *departmental item* for the entity that received the amount. This applies regardless of whether the amount is of an administered or a departmental nature.
20. Before entering into a trust-like arrangement, a non-corporate Commonwealth entity needs to be aware of the legal obligations relating to trusts, and the potential financial and other implications for the Commonwealth. Entities are not encouraged to establish a formal trust under a trust deed or a trust instrument or to accept trust-like responsibilities unless it is expressly in the Commonwealth's interest to do so, having regard to the resourcing and management implications. An entity that is considering becoming responsible for a trust should obtain suitable legal advice and liaise with Finance.

#### **Items that may increase another appropriation of an entity under section 74(1)(b)**

21. Subsections 27(4) and (5) deal with the management of repayments received by the Commonwealth. An entity may use section 74(1)(b):
- (a) if the entity paid an amount using its most recent departmental item, the repayment received may be credited to the entity's most recent departmental item.
  - (b) if the entity paid an amount using another item in an annual Appropriation Act, another appropriation in another Act or a special account appropriation, the repayment received may be credited to the respective appropriation that was used.
22. This means that the same item or appropriation which was used to make the payment may be re-credited with the repayment. An example would be, if the administered item for an entity in *Appropriation Act No.1* of 2012-13 was used to make a payment and a repayment of that amount was received in 2013-14, then that administered item in the Act of 2012-13 may be re-credited.

## When an amount received cannot be credited to an appropriation

23. If an entity receives an amount of money which is of a kind described below, subsection 27(6) prohibits the entity from using section 74 of the PGPA Act to increase the balance of an appropriation. Subsection 27(6) applies even if the amount does fall into one of the categories previously described in this guide.
24. An entity cannot use section 74 of the PGPA Act if the relevant amount:
- (a) is a tax, levy, fine, penalty or an amount in relation to GST. Examples of this may be a related refund received from the Australian Taxation Office, the GST component of a larger receipt collected by the entity, or customs levies collected on dutiable goods; or
  - (b) relates to an activity for which the entity has already received a departmental appropriation entitlement in an Appropriation Act; or
  - (c) relates to an activity for which the entity has already received an administered appropriation entitlement in an Appropriation Act.
25. Subsection 27(6) prevents entities from being appropriated more than once for the same activity, which would represent a windfall gain for the entity.

### Authority to collect fees and charges

26. Section 74 of the PGPA Act does not provide authority for any entity to charge a fee. The authority to charge a fee is usually provided in the Act or regulation that relates to the relevant activity of the Commonwealth. For example, an entity that is a regulator may have enabling legislation that authorises it to charge fees and levies on the industry it regulates. If an entity collects a receipt as an authorised fee, section 74(1)(a) and Item 1 of subsection 27(2) may provide authority to increase the entity's most recent departmental appropriation by the amount collected.



# Resource Management Guide No. XX

## Investment by Commonwealth entities

### Audience

This guide is relevant to accountable authorities of non-corporate Commonwealth entities that are delegated investment power from the Finance Minister or Treasurer under section 58 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and rule 22 of the PGPA Rule; and accountable authorities of corporate Commonwealth entities under section 59 of the PGPA Act and rule 22 of the PGPA Rule.

### Key points

This guide:

- describes investment management and reporting processes to assist Commonwealth entities<sup>1</sup> with the effective management and reporting of investment activities.
- details the scope of investment powers of Commonwealth entities, including the extent to which the Finance Minister and Treasurer may delegate these powers to non-corporate Commonwealth entities, and the power provided to corporate Commonwealth entities.

### Resources

This guide is available on the Department of Finance website at [www.finance.gov.au/publications/](http://www.finance.gov.au/publications/)

#### **Related guidance:**

For guidance on the investment reporting requirements of Commonwealth entities, refer to the Financial Reporting Rules 2014 at [www.finance.gov.au/xxxx](http://www.finance.gov.au/xxxx)

For guidance on Commonwealth banking, refer to the Agency Banking Framework Guidance Manual at [www.finance.gov.au/publications/agency-banking-framework-guidance-manual](http://www.finance.gov.au/publications/agency-banking-framework-guidance-manual).

For foreign exchange risk management guidelines, refer to [www.finance.gov.au/publications/xxx](http://www.finance.gov.au/publications/xxx)

**Contact information:** If you have any questions or comments about this guide, you can email Finance at [governancepolicy@finance.gov.au](mailto:governancepolicy@finance.gov.au).

<sup>1</sup> Commonwealth entities and the different types are defined by sections 10 and 11 of the PGPA Act

## Investment by non-corporate Commonwealth entities

1. This guide supports the investment provisions in section 58 of the PGPA Act by detailing the forms of investments that the Finance Minister and the Treasurer are authorised to invest in on behalf of the Commonwealth.
2. The power to invest relevant money in accordance with section 58 of the PGPA Act can only be obtained through a delegation from the Finance Minister or Treasurer.<sup>2</sup> Section 58 also places requirements on how investments are to be administered and sets limits on the types of investments that can be made.
3. Delegations by the Finance Minister can be provided to individual accountable authorities in relation to specific moneys (usually moneys standing to the credit of special accounts that have a clear business need for investment).
4. The Treasurer has delegated investment powers to the Australian Office of Financial Management for its role in managing the Commonwealth's public debt.
5. A small number of non-corporate Commonwealth entities have enabling legislation permitting investment activities. The provisions in section 58 of the PGPA Act do not limit the investment provisions in an entity's enabling legislation.

### Authorised investments

6. If an accountable authority is delegated investment powers by the Finance Minister or the Treasurer, that accountable authority can only invest in the following authorised investments:
  - securities of, or securities guaranteed by, the Commonwealth, a state or a territory
  - a deposit with a bank,<sup>3</sup> including a deposit evidenced by a certificate of deposit; or
  - any other form of investment prescribed by the rules.
7. In addition, the Treasurer may also delegate to particular accountable authorities the power to invest in debt instruments with an investment grade credit rating that:
  - are issued or guaranteed by the government of a foreign country
  - are issued or guaranteed by a financial institution whose members consist of foreign countries (which may also include Australia); or
  - are denominated in Australian currency.

### Investment rule for non-corporate Commonwealth entities

8. Rule 22 of the PGPA Rule prescribes additional kinds of investments that the Finance Minister, the Treasurer and their delegates are authorised to make.
9. The investments authorised by the rule for non-corporate Commonwealth entities are:
  - a bill of exchange accepted or endorsed only by a bank
  - a professionally managed money market trust (if the Finance Minister or Treasurer is satisfied of certain conditions)
  - a debt obligation registered on the Austraclear system (a dematerialised security).<sup>4</sup>

<sup>2</sup> Sections 107 and 108 of the PGPA Act allow for the Finance Minister and the Treasurer to delegate certain powers.

<sup>3</sup> The term 'bank' is defined in section 8 of the PGPA Act. The following investments are outside the scope of investments described as 'a deposit with a bank': medium-term notes and fixed or floating rate notes, money market trusts or cash management trusts, and bills of exchange that do not comply with the rules.

<sup>4</sup> Information about the Austraclear System can be found on the Australian Securities Exchange's website ([www.asx.com.au](http://www.asx.com.au)).

## Investment by corporate Commonwealth entities

10. This guide supports the investment provisions in section 59 of the PGPA Act by detailing the forms of investments that the accountable authorities of corporate Commonwealth entities have the power to invest in.
11. Accountable authorities can only invest money that is 'not immediately required for the purposes of the entity'.
12. The money can only be invested:
  - on deposit with a bank, including a deposit evidenced by a certificate of deposit
  - in securities of, or securities guaranteed by, the Commonwealth, a state or a territory
  - in any other manner approved by the Finance Minister in writing; or
  - for a government business enterprise—in any other manner that is consistent with sound commercial practice.
13. A small number of corporate Commonwealth entities have enabling legislation permitting investment activities. The provisions in section 59 of the PGPA Act do not limit the investment provisions in an entity's enabling legislation.
14. A spending limit provision in the corporate Commonwealth entity's enabling legislation does not apply to a contract for investment of money under section 59, unless the provision expressly states that it applies to such a contract.
15. A spending limit provision in a corporate Commonwealth entity's enabling legislation generally prevents the entity from entering into a contract involving the expenditure or payment above a specified amount without the approval of a specified person.
16. Commonwealth corporate entities that have a business need to broaden their investment powers under section 59 should consult the Department of Finance before formally seeking approval from the Finance Minister.<sup>5</sup>

### Investment rule for corporate Commonwealth entities

The PGPA investment rule for corporate Commonwealth (The drafting of this rule is yet to be completed).

## Investment management and reporting

17. An accountable authority that has been delegated the power to invest by the Finance Minister or the Treasurer should ensure their entity develops an investment management plan<sup>6</sup> that will enable the accountable authority (or their delegate<sup>7</sup>) to effectively monitor and manage the investments held by the entity. While the structure of the plan will be dependent on the amount invested and the complexity of the investment structure, a Commonwealth entity should consider the following as a foundation to its investment plan:
  - access to an adequately skilled internal treasury expert or investment adviser
  - risk analysis and management

<sup>5</sup> For a list of current investment approvals by the Finance Minister for corporate Commonwealth entities under section 59(1)(iii) please refer to the following: <http://www.comlaw.gov.au/Details/F2008L02067/Download>.

<sup>6</sup> A specific document called an investment management plan is not required, but accountable authorities should ensure the entity maintains sufficient documentation to adequately monitor and manage their investments.

<sup>7</sup> Section 110 of the PGPA Act allows the accountable authority to sub-delegate the investment powers provided to it by the Finance Minister or the Treasurer.

- return analysis
  - a documented investment strategy.
18. While there is no formal requirement for Commonwealth entities to provide detailed performance reporting information through external reporting processes (such as annual reports), monitoring of investment performance provides a useful management tool to support decision-making about the treatment of current investments and the focus of future investment. Performance information may include a combination of qualitative and quantitative data.
19. The Financial Reporting Rules 2014 include the reporting requirements and guidance for Commonwealth entities that have the power to invest under the PGPA Act.

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# Resource Management Guide No. <XX>

## Insurance

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### Audience

This guide is relevant to corporate Commonwealth entities that are not members of the Comcover self-managed fund.

### Key points

This Guide:

- Provides advice to corporate Commonwealth entities on the placement of insurance to cover their directors and officers against liability claims.
- Describes the restrictions on corporate Commonwealth entities from insuring officials of the entity against liabilities relating to breach of duty

### Relevant resources

[This guide is available on the Department of Finance website at www.finance.gov.au/publications/](http://www.finance.gov.au/publications/)

#### Related guidance:

Additional guidance related to Comcover and Comcover's Statement of Cover can be found at: <http://www.finance.gov.au/comcover/policy/insurance/>

[Guidance related to the \*General Duties of Officials\* is available from the finance website. \[link\]](#)

## Laws / Rules

1. This guidance is issued pursuant to section 62 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). This section states that Rules may be issued that prescribe requirements relating to the obtaining of insurance by corporate Commonwealth entities.
2. Section 23 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) specifies:

- (1) A corporate Commonwealth entity must not insure an official of the entity against a liability (other than one for legal costs) arising out of:
  - (a) conduct involving a wilful breach of duty, arising at common law, in equity or under the finance law (other than section 27 or 28 of the PGPA Act), in relation to the entity; or
  - (b) a contravention of section 27 or 28 of the PGPA Act (which deal with the duties of officials in relation to use of position and use of information).
- (2) Anything that purports to insure a person against, or exempt a person from, a liability is void to the extent that it contravenes this section.

## Policy

3. Corporate and non-corporate Commonwealth entities within the General Government Sector are required to be members of the Comcover self-managed fund, which includes cover for directors and officers against liability claims.
4. Corporate Commonwealth entities that are outside the General Government Sector should consider acquiring insurance cover for their directors or officers against liability claims.

## Guidance

5. Fundamentally, the purpose of section 23 of the PGPA Rule is to restrict corporate Commonwealth entities from insuring officials of the entity against liabilities relating to breach of duty. This restriction is consistent with s 27N of the CAC Act, and reflects the principle that public resources should not be used to protect officials for actions that are not legal under the finance law.
6. Sections 25 to 29 of the PGPA Act set out the general duties that apply to the officials of all Commonwealth entities particularly in their management and use of public resources. These general duties are:
  - A duty of care and diligence
  - A duty to act in good faith and for a proper purpose
  - A duty in relation to use of position
  - A duty in relation to use of information
  - A duty to disclose interests.
7. In respect of these duties, *Resource Management Guide No.XX: General Duties of Officials* has been prepared and this is available from the Finance website.
8. In terms of insurance cover for corporate and non-corporate Commonwealth entities there is a general expectation that the entity will comply with all applicable laws and policies.

9. Under Comcover's Statement of Cover (Section 8 (7) (b)), corporate and non-corporate Commonwealth entities are not covered for any claim that arises from a wilful breach of duty or the improper use of inside information.
10. In order to comply with the insurance rule with respect to Section 62 of the Act, corporate Commonwealth entities that are not members of the Comcover self-managed fund should seek commercial Directors' and Officers' insurance that reflects the Comcover Statement of Cover.
11. Accountable authorities of corporate Commonwealth entities that do not insure with Comcover, will need to ensure that insurance does not cover an official of the entity against a liability (other than one for legal costs) arising out of the conduct or contraventions noted in section 23 (1) (a) and (b) of the PGPA Rule.
12. Section 23 (2) of the PGPA Rule requires that anything that purports to insure a person against, or exempt a person from, a liability is void to the extent that it contravenes section 23 of the PGPA Rule.
13. Steps corporate Commonwealth entities could take to assist their compliance with the insurance rule include:
  - a. undertaking a risk assessment to determine the appropriate level of insurance cover for their liabilities;
  - b. engaging a licensed insurance broker for advice on the class and quantum of cover required; and
  - c. based on the advice received, exercising discretion on the level of insurance obtained.



# Resource Management Guide No. XX

## Payment of an amount owed to a person at time of death

### Audience

This guide is relevant to accountable authorities in all non-corporate Commonwealth entities and officials who have been sub-delegated that power.

### Key points

This guide:

- provides guidance on the power for making a payment of an amount owed by the Commonwealth to a person at the time of their death, under section 103 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and section 25 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule).
- takes effect on 1 July 2014.

### Relevant resources

This guide is available on the Department of Finance website at

[www.finance.gov.au/publications](http://www.finance.gov.au/publications)

Questions about this guide may be emailed to Finance at [pmra@finance.gov.au](mailto:pmra@finance.gov.au)

## Section 25 of the PGPA Rule—Payment of amount owed to person at time of death

### 25 Payment of amount owed to person at time of death

#### Guide to this section

The purpose of this section is to allow the Finance Minister to authorise a payment of an amount that is owed by the Commonwealth to a person who has died. It allows the Finance Minister to decide who to make the payment to, and to authorise the payment without needing probate or letters of administration. It is made for paragraph 103(f) of the Act.

- (1) If, at the time of a person's death (whether before or after this section commences), the Commonwealth owed an amount to the person, the Finance Minister may authorise

payment of that amount to a person who the Finance Minister considers should receive the payment.

- (2) The Finance Minister may authorise the payment without requiring:
  - (a) production of probate of the will of the deceased person; or
  - (b) letters of administration of the estate of the deceased person.
- (3) In deciding who should receive the payment, the Finance Minister must consider the people who are entitled to the property of the deceased person under:
  - (a) the deceased person's will; and
  - (b) the law relating to the disposition of the property of deceased persons.
- (4) After the payment is made, the Commonwealth has no further liability in relation to the amount that was owed.
- (5) This section does not relieve the recipient from a liability to deal with the money in accordance with law.

## Introduction

1. Section 103 of the PGPA Act allows a rule to be made that enables the Finance Minister to authorise the payment of an amount if, at the time of a person's death, the Commonwealth owed that amount to the person. This includes authorising a payment without requiring production of probate of the person's will or letters of administration of the person's estate.
2. Section 25 of the PGPA Rule provides this discretionary power to the Finance Minister. The Finance Minister has delegated this power to accountable authorities of non-corporate Commonwealth entities. The Finance Minister's delegation is available on the Finance website ([Link](#)).

## Making a payment of an amount owed to a person at time of death

3. The power provided in section 25 of the PGPA Rule addresses circumstances where a deceased person's spouse or family member requires the payment to satisfy a debt or other requirement before probate or letters of administration can be produced, which can be a lengthy and complex process.
4. The Finance Minister (or delegate) has discretion to decide who should receive an amount payable by the Commonwealth. The will or letters of administration do not have to be produced to the Minister (or delegate) before a payment is made.
5. Subsection 25(3) of the PGPA Rule states that, in exercising this power, the Finance Minister (or delegate) must take into consideration the people who are entitled to the payment under succession law. However, the Finance Minister (or delegate) is not bound to act in accordance with that law.
6. In practice, section 25 of the PGPA Rule is expected to be used in limited circumstances, since many statutory payment schemes (such as superannuation Acts) include arrangements for payments owed to a deceased person. Section 25 of the PGPA Rule is meant for circumstances when a payment is owed to a deceased person and there is no other provision to make this payment to an appropriate recipient, such as a spouse or family member.
7. Section 25 of the PGPA Rule is concerned with the discharge of a debt on the part of the Commonwealth. It is therefore likely to be used mainly in circumstances involving the death of an employee with accrued salary and entitlements potentially payable to a spouse.

8. Section 103 of the PGPA Act and section 25 of the PGPA Rule do not create an appropriation. Payments must be made from existing appropriations.

WORKING DRAFT 13 MARCH





# Resource Management Guide No. <XX>

## Other CRF money

WORKING DRAFT 13 MARCH

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WORKING DRAFT 13 MARCH

# Resource Management Guide No. <XX>

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## Other CRF money

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### Audience

This guide is relevant to accountable authorities of all non-corporate Commonwealth entities and any officials of non-corporate Commonwealth entities to whom an accountable authority has delegated the power to enter into, vary or administer arrangements in relation to other CRF (Consolidated Revenue Fund) money.

### Key points

- **Laws/rules:** section 105 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and section 29 of the PGPA Rule.
- Section 105 of the PGPA Act defines other CRF money, provides that the PGPA Rule may prescribe matters in relation to other CRF money and contains a special appropriation to provide, in specified circumstances, for payments of other CRF money. Section 29 of the PGPA Rule provides requirements that must be complied with in respect of arrangements related to other CRF money.
- **Purpose:** this guide is intended to assist accountable authorities and officials of non-corporate Commonwealth entities entering into and administering arrangements in relation to other CRF money.
- **Commencement date:** 1 July 2014.

### Relevant resources

<Add details and links to related resources; delete links below if not relevant>

[This guide is available on the Department of Finance website at <add Finance website hyperlink>](#).

[Related guidance](#)

[Factsheets](#)

[Q&As](#)

[Other tools, templates & checklists](#)

[Contact information](#) <add details>

## Part 1 - Introduction

### Guidance

1. This document provides guidance on the interpretation and operation of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) in relation to entering into arrangements for the receipt, expenditure or custody of other CRF<sup>1</sup> money with a person other than the Commonwealth.
2. Accountable authorities of non-corporate Commonwealth entities are responsible for ensuring that arrangements with persons outside the Commonwealth handling other CRF money promote the proper use and management of that money.
3. Money held by a private person for and on behalf of the Commonwealth forms part of the CRF for the purposes of section 81 of the Constitution. For the purposes of the *Financial Management and Accountability Act 1997* (FMA Act) the concept of 'public money' extended to money held or controlled by an outside person for or on behalf of the Commonwealth, but the concept of 'relevant money' for the purposes of the PGPA Act does not. 'Other CRF money' is a new concept introduced under the PGPA Act. Accordingly, there is a need to create and regulate this new category of other CRF money.
4. The management of other CRF money is principally addressed through the contractual arrangements that accountable authorities (or their delegates) make in relation to other CRF money.
5. The PGPA Act imposes duties on officials which include exercising care and diligence and acting in good faith and for a proper purpose. These duties apply in all elements of the resource management framework, including the making and management of arrangements related to other CRF money.

## Part 2 – other CRF money is not relevant money

6. The PGPA Act contains a number of provisions that are directed at the control of relevant money, and public resources more generally, by accountable authorities and officials under the PGPA Act.
7. Other CRF money falls outside the definition of relevant money and is therefore not subject to the controls under the PGPA Act. Other CRF money is defined in section 105(2) of the PGPA Act as money that forms part of the CRF other than:
  - (a) relevant money; or
  - (b) any other money of a kind prescribed by the rules.

As at 1 July 2014, no other kind of money (b) is prescribed by the rules.

### Guidance

8. Other CRF money arises in situations where a person other than the Commonwealth or a Commonwealth entity (the person is neither an 'official' nor a Minister) receives, has custody of or spends money for and on behalf of the Commonwealth—that is, as the legal agent of the Commonwealth. The relationship between the Commonwealth (through the non-corporate Commonwealth entity) and the person is contractually based.

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<sup>1</sup> CRF means Consolidated Revenue Fund, see section 8 PGPA Act.

9. The person outside the Commonwealth or Commonwealth entity is not subject to the PGPA Act.<sup>2</sup> The person acting as the agent of the Commonwealth could receive the money from the Commonwealth or from a third party. In determining whether money paid by the Commonwealth to a recipient is other CRF money in the hands of a recipient, entities could apply broadly the same test as they currently apply (under the FMA framework) in determining whether such money remains 'public money' in the hands of the recipient.
10. The person may receive the money while providing goods or services to the Commonwealth, including administrative or management services, such as in the typical examples below.

Examples of situations when a person other than the Commonwealth receives and has custody of other CRF money.

Example 1

- The circumstance in which an agent had sold Commonwealth property on behalf of the Commonwealth and had received the purchase price which it has yet to remit to the Commonwealth.

Example 2

- The circumstance in which legislation provides for the collection of levies or fees by an organisation outside of the Commonwealth and those levies or fees are payable to the Commonwealth.

11. Typically, situations that involve other CRF money, such as the above examples, involve a person outside the Commonwealth receiving and holding amounts of money on behalf of the Commonwealth generally for short periods of time before either remitting the money to the Commonwealth or paying the money, on behalf of the Commonwealth, to a third party. In these circumstances it is necessary to ensure that the contractual arrangement with the person outside of the Commonwealth puts in place the controls and requirements that ensure the conduct of the person in relation to the other CRF money is consistent with the proper use and management of the money, and has regard to the broader duties of the accountable authority in respect of the management of the entity's affairs.
12. As with all money forming part of the CRF, other CRF money cannot be spent by the Commonwealth (or a person acting for and on behalf of the Commonwealth) unless there is an appropriation supporting the expenditure.
13. In example 3 below, when the property manager remitted the full amount received on behalf of the Commonwealth to the Commonwealth, and no other payment was made by the property manager, no appropriation would be required.

Example when a person other than the Commonwealth receives and has custody of other CRF money.

Example 3

- The circumstance in which a property manager has received rents payable to the Commonwealth in relation to property owned by the Commonwealth and remits the full

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<sup>2</sup> It is not intended that accountable authorities of non-corporate Commonwealth entities will make arrangements related to other CRF money with corporate Commonwealth entities or wholly-owned Commonwealth companies. Money standing to the credit of any bank accounts of, or held by, a corporate Commonwealth entity would be relevant money, not other CRF money, for the purposes of the PGPA Act. In respect of wholly-owned Commonwealth companies, while arrangements related to other CRF money could be made with them (as they are not part of the Commonwealth or a Commonwealth entity), it is not anticipated that accountable authorities of non-corporate Commonwealth entities will be required to make other CRF money arrangements with them.

amount received to the Commonwealth.

14. In these circumstances, the amount received could be credited to the non-corporate Commonwealth entity's departmental appropriation (under section 74 of the PGPA Act [*For further information – see Resource Management Guide No. XX: Receipts of amounts by non-corporate Commonwealth entities*]). Any subsequent payment (such as a fee for service) made by the entity to the property manager would be made from the entity's departmental appropriation.
15. However, in certain circumstances the person receiving the money on behalf of the Commonwealth may have to make a payment *from* the amount held for the Commonwealth, such as in the following examples.

When a person other than the Commonwealth receives, has custody of and makes payment of other CRF money.

Example 4

- The circumstance in which an agent had sold Commonwealth property on behalf of the Commonwealth and had received the purchase price from which the agent deducted their own service fee and remitted the remaining balance of the amount received to the Commonwealth.

Example 5

- The circumstance where an organisation, on behalf of the Commonwealth, manages payments of Commonwealth funding to recipients (such as scholarship payments or administration of a grants program).

16. In most cases, a specific appropriation would support the payments. In example 4, the entity's departmental appropriation (increased by the receipt concerned in accordance with section 74 of the PGPA Act) would support the payment by the agent. In example 5, the organisation making scholarship or grant payments on behalf of the Commonwealth would be likely to have those payments supported by the entity's administered item appropriation which covered the scholarship or grant program.
17. This aspect of an arrangement related to other CRF money underlines the importance of the Commonwealth entity being able to accurately record transactions against relevant appropriations. (For further information, see *Resource Management Guide No. XX: Appropriations management by non-corporate Commonwealth entities*.)
18. In the rare case where no existing appropriation would support a payment, section 105(3) of the PGPA Act contains a special appropriation for the expenditure of other CRF money by a person other than the Commonwealth or a Commonwealth entity. This appropriation will support the expenditure of other CRF money provided that, expenditure is in accordance with any requirements prescribed by the rules, if any, in relation to the expenditure, and if the Finance Minister is satisfied that the expenditure is not authorised by another appropriation. As it is not expected that this special appropriation will be relied on in many, if any, situations the Finance Minister has not delegated their power under this section.

Summary

- Other CRF money is not relevant money as defined in the PGPA Act – but it is money that forms part of the CRF.
- When money is received by a person who is not part of the Commonwealth and is acting for and on behalf of the Commonwealth (as the legal agent of the Commonwealth), that money will be regarded as forming part of the CRF as long as it was received, in the custody of, or expended for and on behalf of the Commonwealth by that person.
- Any expenditure of other CRF money will need to be supported by an existing



appropriation.

- If the Finance Minister is satisfied that an existing appropriation would not support expenditure, and the expenditure is in accordance with the rules, a special appropriation is provided.

### Part 3 – Power to enter into arrangements

#### Guidance - Entering into arrangements and approval of expenditure

19. The power for the accountable authority of a non-corporate Commonwealth entity to enter into, vary or administer an arrangement generally comes from legislation. The power can come from section 23 of the PGPA Act; section 32B of the *Financial Management and Accountability Act 1997*; or other specific legislation.
20. The power for an arrangement in relation to other CRF money does not come from section 105 of the PGPA Act or from section 29 of the PGPA Rule. These provisions regulate matters in relation to other CRF money, including any arrangement the accountable authority enters in relation to other CRF money.
21. The power to enter into, vary or administer arrangements may be delegated by the accountable authority to officials in the entity to enable them to enter into, vary or administer arrangements. Officials should not enter into, vary or administer arrangements, including those related to other CRF money, unless they have the power to do so (For further information on entering into arrangements, see *Resource Management Guide No. XX: Commitment and expenditure of relevant money*).

#### Summary

- The power for the accountable authority of a non-corporate Commonwealth entity to enter into, vary and administer arrangements usually comes from legislation.
- The PGPA Act and rules regulate matters in relation to other CRF money including the making of arrangements in relation to other CRF money – they do not authorise the making of the arrangement.
- Officials of non-corporate Commonwealth entities should not enter into arrangements in relation to other CRF money unless they have been delegated the power to do so.

### Part 4 – Duties of accountable authorities and officials and application of policies of the Australian Government

#### Guidance – Duties and policies

22. In entering into, varying and administering an arrangement in relation to other CRF money, accountable authorities should act in accordance with the duties on accountable authorities (sections 15–19 of the PGPA Act) and the duties on officials (sections 25–29 of the PGPA Act). [For further information see *Resource Management Guide No. XX: Duties of accountable authorities* and *Resource Management Guide No. XX: Duties of officials*.]
23. Persons outside of the Commonwealth or a Commonwealth entity who are subject to an arrangement to receive, expend or have custody of other CRF money on behalf of the Commonwealth are not ‘officials’ of a Commonwealth entity and therefore are not required to act in accordance with the PGPA Act, or in a way that is not inconsistent with the policies of the Australian Government.



24. Therefore, in making an arrangement related to other CRF money an accountable authority should consider including relevant requirements from applicable Commonwealth policies in the terms and conditions of the arrangement.
25. For example, if the person outside the Commonwealth is performing duties in relation to grants administration or procurement on behalf of the Commonwealth, the arrangement should incorporate obligations on the person to perform tasks in accordance with relevant requirements in the Commonwealth Grant Rule or Commonwealth Procurement Rule to the greatest extent practicable in the circumstances – remembering also that the accountable authority still has to meet the reporting requirements in the Commonwealth Grants Rule and Commonwealth Procurement Rule.
26. The principle that should be adopted is an accountable authority should ensure that other CRF money is managed in a way that, to the greatest extent practicable, is not inconsistent with the policies of the Australian Government. (For further information see, as applicable, *Commonwealth Grant Rule and Commonwealth Procurement Rule*.)

#### Summary

- An accountable authority (or their delegate) entering into, varying or administering an arrangement in relation to other CRF money is subject to the duties in the PGPA Act.
- In making an arrangement related to other CRF money, an accountable authority should consider including relevant requirements from applicable Commonwealth policies in the terms and conditions of the arrangement to the greatest extent practicable.
- An arrangement related to other CRF money should not be seen as an outsourcing of the accountable authority's responsibilities in relation to the other CRF money.

### Part 5 – Arrangements in relation to other CRF money

27. Section 29 of the PGPA Rule has been made under section 105(1) of the PGPA Act to ensure that the Commonwealth can exercise control over and impose obligations in relation to the circumstances in which a person other than the Commonwealth might receive, have custody of or expend other CRF money.

#### Section 29 of the PGPA Rule - Other CRF money

##### Other CRF money

###### ***Guide to this section***

*The purpose of this section is to set out requirements which the accountable authority of a non-corporate Commonwealth entity needs to comply with when entering into arrangements relating to the receipt, custody or expenditure of other CRF money by a person who is outside of the Commonwealth or a Commonwealth entity.*

*An example of this situation is where the accountable authority engages an agent to sell relevant property. When the agent receives an amount for the sale, that money is other CRF money. The accountable authority must ensure that the arrangement it enters into with the agent complies with the requirements in this section about how the agent is to deal with the money.*

*This section is made for subsection 105(1) of the Act.*

- (1) The accountable authority of a non-corporate Commonwealth entity must ensure that any arrangement it enters into relating to the receipt, custody or expenditure of other CRF money complies with subsection (2).
- (2) The arrangement must:
  - (a) promote the proper use and management of the other CRF money; and
  - (b) be in writing; and
  - (c) require the other CRF money to be deposited in a bank as soon as is practicable; and
  - (d) require the other party to the arrangement:
    - (i) to cause records to be kept that properly record and explain the receipt, custody or expenditure of the other CRF money; and
    - (ii) to allow those records to be conveniently and properly audited; and
  - (e) require any interest earned on the other CRF money to be remitted in full to the Commonwealth (including a requirement about the timing and frequency of remitting such interest); and
  - (f) include a requirement about the timing and frequency of any remittance of the other CRF money to the Commonwealth required under the arrangement; and
  - (g) include a requirement about the timing and frequency of any payments of the other CRF money to another person required under the arrangement.
- (3) **Proper**, when used in relation to the use or management of other CRF money, means efficient, effective, economical and ethical.

### Guidance – the arrangement in relation to other CRF money

28. Section 29(1) of the PGPA Rule provides that the accountable authority of a non-corporate Commonwealth entity must ensure that any arrangement it enters related to other CRF money must comply with the requirements prescribed in section 29(2).
29. Section 29(2) of the PGPA Rule sets out the obligations and matters that must be included in an arrangement for the purposes of the receipt, expenditure or custody of other CRF money. These requirements are designed to ensure that any arrangement made in relation to other CRF money meet the essential minimum requirements for control, accountability and transparency in respect of the arrangement related to other CRF money.
30. Section 29(2)(a) of the PGPA Rule is designed to ensure that the accountable authority applies the principles on proper use and management to the making and administering of an arrangement in relation to other CRF money. 'Proper' is defined in section 29(3). (For further guidance on efficient, effective, economical and ethical see *Resource Management Guide No. XX: Commitment and expenditure of relevant money*.) Section 29(2)(a) makes clear that when an accountable authority enters into an arrangement for other CRF money, the accountable authority does not 'outsource' their obligations in terms of the promotion of proper use and management through an arrangement related to other CRF money. In light of this, an accountable authority making the arrangement should consider the terms and conditions beyond those specified in the Rule that will enable the accountable authority to fulfil the reporting requirements on use of resources. For example, when a person outside of the Commonwealth or a Commonwealth entity is making grant payments for or on behalf of

the Commonwealth, the arrangement will need to include requirements to enable the entity to fulfil its obligations for reporting on grants.

31. Section 29(2)(b) of the PGPA Rule requires the arrangement to be in writing. An arrangement in writing will be legally enforceable. This aims to provide accountability and transparency for the arrangement and to minimise risks to the Commonwealth related to the proper management of the money. For example, if a person outside the Commonwealth fails to comply with the terms and conditions of the written arrangement, the Commonwealth will be in a better position to pursue redress.
32. Section 29(2)(c) of the PGPA Rule requires the banking of other CRF money as soon as is practicable. This section aims to minimise the risk to the Commonwealth by requiring other CRF money to be deposited in a bank account as soon as is practicable after receipt by the person outside of the Commonwealth. 'As soon as is practicable' is not defined however it would generally have its ordinary meaning. For clarity it may be preferable for the arrangement to specify appropriate banking arrangements that meet the requirement. If the other CRF money is to be held by the person for any length of time, the accountable authority making the arrangement should consider specifying that interest should be earned on the money for the benefit of the Commonwealth (see further at section 29(2)(e)).
33. Section 29(2)(d) of the PGPA Rule recognises that an accountable authority making the arrangement will still need to report on, and account for, the other CRF money received, in the custody of or spent by the person outside of the Commonwealth. Therefore section 29(2)(d) provides that the arrangement must require the person outside of the Commonwealth that is acting for or on behalf of the Commonwealth to keep proper records in relation to the receipt, custody or expenditure of other CRF money. The arrangement will also need to require those records to be kept in such a form that will allow them to be conveniently and properly audited to ensure appropriate accountability. To satisfy the requirements of the Rule it is strongly advisable for the agreement to specify how other CRF money will be identified and accounted for separately to other money held by the person outside the Commonwealth or Commonwealth entity. It is also advisable for the agreement to also specify the Commonwealth's right of access to all of the person's records relating to other CRF money transactions, including access by the Commonwealth Auditor-General and for freedom of information purposes.
34. Section 29(2)(e) of the PGPA Rule requires that any interest earned on other CRF money must be remitted in full to the Commonwealth. The Rule also requires that the arrangement should specify requirements in relation to the timing and frequency of remittance. The arrangement is required to address interest as it would be inappropriate for a person outside of the Commonwealth to receive any financial gain through the accrual of interest on other CRF money held by them. The interest earned on the other CRF money will become relevant money once held by, or standing to the credit of, a bank account of the non-corporate Commonwealth entity receiving the money. (For further guidance on interest and non-corporate Commonwealth entities see *Resource Management Guide No. XX: Investment by Commonwealth entities*.)
35. Section 29(2)(f) of the PGPA Rule deals with the timing and frequency of any remittance of other CRF money to the Commonwealth under the arrangement and section 29(2)(g) deals with the timing and frequency of any payments of other CRF money to another person under the arrangement.
36. Generally, the length of time and frequency of remittance to the Commonwealth should be based on an assessment of the risk of holding other CRF money in a non-Commonwealth bank account and the best cash management outcome for the Commonwealth. This should be balanced against any savings or cost advantages for remittances of greater or lesser frequency. Ideally, other CRF money should remain in a non-Commonwealth bank account for the shortest period of time that is reasonable in all the circumstances. When money is

remitted to the Commonwealth entity the money becomes 'relevant money' and must be handled in accordance with PGPA legislative requirements.

37. When the person acting for or on behalf of the Commonwealth is making payments to a third party from the other CRF money in their custody (for example the recipient of a grant), the arrangement must identify requirements in relation to the timing and frequency of payments to the third party. These requirements would usually require the person to make specific payments at particular times to the third party. Generally, these requirements should also identify the third party and identify the purpose of the payments.

#### Summary

- Section 29 of the PGPA Rule regulates matters in relation to arrangements related to other CRF money.
- The Rule imposes obligations on an accountable authority when they make an arrangement in relation to other CRF money.
- The Rule prescribes requirements that an arrangement *must* contain.

#### Guidance –Developing an appropriate arrangement in relation to other CRF money

38. The PGPA Rule discussed above, places obligations on an accountable authority when making an arrangement in relation to other CRF money and specifies the minimum requirements to be included in the terms and conditions of an arrangement in relation to other CRF money. However, to fulfil its obligations, the accountable authority, before making an arrangement, should consider other matters that may have to be addressed in the terms and conditions of the arrangement.
39. The terms and conditions of the arrangement are the key to establishing an appropriate framework for the proper use of other CRF money. To minimise the risks to the Commonwealth, an arrangement relating to other CRF money should be carefully drafted to clearly set out how the person acting for or on behalf of the Commonwealth must manage the other CRF money.
40. It is therefore essential for an accountable authority to carefully consider, and appropriately manage, any arrangement that permits persons outside of the Commonwealth or a Commonwealth entity to receive, expend or have custody of other CRF money.
41. Before entering into any arrangement with a person in relation to other CRF money, it is important to establish whether the person who could be handling other CRF money is an appropriate person to be doing so. An accountable authority should consider whether the person (who may be an individual or an entity):
- is well-established with a strong reputation for probity
  - is capable of satisfying entity reporting requirements
  - has robust internal procedures and processes for the handling of money.
- An objective assessment of these issues is more likely to result in a satisfactory arrangement that promotes the achievement of Commonwealth objectives.
42. Other issues to consider before entering an arrangement related to other CRF money may include:
- the volume, value and nature of the money that the person would be handling under the arrangement

- Generally speaking, the greater the value of the money the person may be receiving under the arrangement, the greater the risk to the Commonwealth; therefore it may be prudent to prescribe in the terms and conditions of the arrangement more regular remittance of amounts received.
- whether subcontracting should be permitted
  - If the person is permitted to subcontract, controls could be specified to ensure that the subcontractor does not handle other CRF money, or handles it appropriately. If it is contemplated that subcontractors will be handling other CRF money, the terms and conditions of the arrangement should specifically address the management of the money by the subcontractor.
- the potential for misuse or mismanagement of the money
  - Requirements in respect of fraud safeguards and the entity's fraud control plan may be found in the section of the Rule on fraud control and guidance issued by the Minister for Justice.
  - It may be prudent in some circumstances for the arrangement to specify the individuals or positions in the person's organisation that will be responsible for handling other CRF money. Procedures for notifying the Commonwealth of changes to these individuals or positions could also be outlined.
- the financial viability of the person and the possible risk of insolvency
  - It is advisable that the arrangement contain requirements on how other CRF money that remains in the custody of the person will be dealt with if the person becomes insolvent.
- any specific policy issues or government decisions related to persons outside of the Commonwealth handling other CRF money
  - In arrangements that involve a person outside of the Commonwealth performing procurement for or on behalf of the Commonwealth the terms and conditions of the arrangement should *to the greatest extent practicable* apply requirements to other CRF money contained in the Commonwealth Procurement Rule (CPR) issued under section 101 of the PGPA Act (noting that some requirements of the CPR, such as reporting on AusTender, cannot be managed or fulfilled by a person outside the Commonwealth). In addition, the arrangement should ensure that the person provides the entity with sufficient information to meet applicable reporting requirements under the Commonwealth Procurement Rule. (Compliance with the CPRs does not apply in relation to arrangements providing for a person outside of the Commonwealth to engage in procurement of property or services for the purpose of providing a statutory or employment entitlement.)
  - In arrangements that involve a person outside of the Commonwealth providing grant payments for or on behalf of the Commonwealth the terms and conditions of the arrangement should, *to the greatest extent practicable*, apply requirements to other CRF money contained in the Commonwealth Grant Rule (CGR) issued under section 101 of the PGPA Act (noting that some requirements of the CGR, such as those relating to

the Ministerial requirements outlined in paragraphs XX to XX, cannot be managed or fulfilled by a person outside of the Commonwealth). In addition, the arrangement should ensure that the person provides the entity with sufficient information to meet applicable reporting requirements under the Commonwealth Grant Rule.

- the appropriation arrangements, such as which appropriation will be debited and credited in relation to payments and receipts
- whether the transactions are of a complicated nature and may be difficult to manage
  - if transactions are particularly complicated and represent significant risk to the Commonwealth (be that risk financial or reputational) it may not be suitable for an arrangement related to other CRF money and alternative approaches should be considered. For example whether it is possible to make direct payments for good and serves rather than through another CRF money arrangement with a person outside of the Commonwealth or a Commonwealth entity.
- the period, or periods, of time that the person will be handling other CRF money
- the duration of the arrangement
  - An assessment will need to be made of the appropriate duration. Generally, an arrangement should not be for longer than five years. The duration will depend on the need for certainty, balanced against the need for flexibility if circumstances change (such as price increases or decreases).
- termination of the arrangement
  - It is advisable that the Commonwealth should be able to give notice to terminate the arrangement at any time, and that the person should be required to return any other CRF money in their custody to the entity in a timely manner.
- the risk of a perceived or actual conflict of interest arising
- whether the transactions may be contentious (for example, act of grace payments)
- the application of other relevant legislation (for example, legislation that may enable the person to collect fees on behalf of the Commonwealth)
  - If other legislation is applicable to the arrangement, then it should also be specified in the arrangement. For example, a person outside the Commonwealth subject to the arrangement related to other CRF money should be alerted to any legislation that may govern the task that the person is to perform.

43. It is important to understand that a person with whom an arrangement to receive, spend and have custody of other CRF money is made is not subject to the requirements of the PGPA Act – but only to the terms and conditions set out in the contractual arrangement made with that person. Therefore it is essential to mitigate risk to the Commonwealth by developing an appropriate arrangement and managing it closely.

## Summary

When entering into an arrangement related to other CRF money, an accountable authority *must* ensure that the arrangement:

promotes the proper use and management of other CRF money

is in writing

requires the other CRF money to be banked as soon as practicable by the person outside of the Commonwealth

requires records to be kept by the person outside of the Commonwealth that properly account for the receipt, custody and expenditure of the other CRF money

requires those records to be conveniently and properly audited

requires that any interest earned on the other CRF money must be remitted in full to the Commonwealth (including requirements about the timing and frequency of the remittance of such interest)

specifies requirements about the timing and frequency of any remittance of other CRF money to the Commonwealth required under the arrangement

specifies requirements about the timing and frequency of any payments of other CRF money to another person required under the arrangement

In meeting these obligations, an accountable authority *should* also consider in relation to the arrangement:

- the volume, value and nature of the money that the person would be handling under the arrangement
- the level of control that the Commonwealth has or requires over the money
- whether subcontracting should be permitted
- the potential for misuse or mismanagement of the money
- the financial viability of the person and the possible risk of insolvency
- any specific policy issues or government decisions related to persons outside of the Commonwealth handling other CRF money
- the appropriation arrangements, such as which appropriation will be debited and credited in relation to payments and receipts
- whether the transactions are of a complicated nature and may be difficult to manage
- the period, or periods, of time that the person will be handling other CRF money
- the duration of the arrangement
- termination of the arrangement
- the risk of a perceived or actual conflict of interest arising
- whether the transactions may be contentious
- the application of other relevant legislation
- any other risks associated with having a person outside of the Commonwealth handle other CRF money.



## Example – grants

This example provides general guidance on entering into arrangement with a person outside of the Commonwealth in relation to providing grants to third parties. Officials should also refer to the Commonwealth Grant Rule for further and more detailed information on grants.

- The accountable authority (or their delegate) requires a legal authority to enter into the arrangement. The authority to enter the arrangement may come from section 23 of the PGPA Act, section 32B of the *Financial Management and Accountability Act 1997* (FMA Act) or other specific legislation.
- For an arrangement related to grants, the authority is most likely to come from section 32B, or through other specific legislation. Section 32B provides the Commonwealth with the power to enter into, vary or administer an arrangement for a grant of financial assistance only if it is specified in Schedule 1AA to the FMA Regulations. Schedule 1AA may list a specific arrangement or grant of financial assistance, a class of arrangements or grants, or a program under which an arrangement or grant is made.
- The terms and conditions of the arrangement *must* contain the requirements set out in section 29 of the PGPA Rule (other CRF money) under the PGPA Act.
- Accountable authorities and officials should also consider whether the person handling other CRF money is an appropriate person to be doing so and consider what additional terms and conditions the arrangement may need to contain – for example, the information that the person outside of the Commonwealth will have to provide to the entity to enable the entity to meet its requirements under the Commonwealth Grant Rule. This would include information that will enable the entity to publish information on individual grants no later than 14 working days after the grant takes effect.
- In developing and entering into an arrangement with a person outside the Commonwealth, officials should also have regard to the seven key principles for grants administration contained in the Commonwealth Grant Rule.
- Appropriation arrangements will need to be identified to support the making of payments. In relation to grants, the relevant appropriation is likely to be an administered appropriation managed by the entity.
- In addition, when entering into and administering the arrangement, officials should ensure that:
  - they act in accordance with the law, government policy, applicable grants agreements and internal guidelines on grants issued by their accountable authority
  - information that the Australian Government requires to be notified is disclosed
  - they act in accordance with the duties contained in the PGPA Act.
- If a Minister will be approving grants, the Minister must comply with the requirements in section 71 of the PGPA Act and the Commonwealth Grant Rule, and officials must meet their obligations to support the Minister as described in the Commonwealth Grant Rule.

### Example – venue hire

This example provides general guidance on entering into an arrangement with a person outside of the Commonwealth or a Commonwealth entity in relation to hiring a venue for a function related to the ordinary activities of the non-corporate Commonwealth entity. The function is designed for attendees to pay a fee to attend. The arrangement will allow the person outside of the Commonwealth, for and on behalf of the Commonwealth, to collect the fees paid by the attendees and to deduct their fee for this service from the amount collected from attendees. The person outside of the Commonwealth will then remit the balance of the amount collected to the non-corporate Commonwealth entity.

- The accountable authority requires a legal authority to enter into the arrangement. This arrangement relates to the ordinary services of government therefore section 23 of the PGPA Act should provide the authority to enter into the arrangement.
- The terms and conditions of the arrangement *must* contain the requirements set out in section 29 (other CRF money) of the PGPA Rule.
- Accountable authorities should also consider whether the person handling other CRF money is an appropriate person to be doing so and consider what additional terms and conditions the arrangement may need to contain – for example, the accountable authority will need to know the total amount collected by the person outside the Commonwealth from the attendees and will need to know the amount deducted by the person outside the Commonwealth to pay their own fee for the service. This information is necessary to enable the correct appropriation managed by the entity to be debited and credited as appropriate.
- As this type of arrangement relates to the ordinary services of government the relevant appropriation is likely to be the departmental appropriation administered by the non-corporate Commonwealth entity.
- As this type of arrangement would generally be a relatively low risk, uncomplicated arrangement, the additional terms and conditions included in the arrangement may not need to be much more than those required under section 29 of the PGPA Rule – this is ultimately for the accountable authority entering into the arrangement to decide.
- When the person outside the Commonwealth collects the total amount received from attendees the accountable authority of the non-corporate Commonwealth entity will need to know the total amount collected. This is necessary for the accountability and transparency of the arrangement and also necessary to enable the entity's departmental appropriation to be credited with the amount collected under section 74 of the PGPA Act.
- The accountable authority will also need to know the amount deducted by the person outside of the Commonwealth to pay their own service fee. This knowledge is required to allow the debiting of the entity's departmental appropriation to reflect this payment made by the person outside of the Commonwealth.



# Resource Management Guide No. XX

## Minister to inform Parliament of certain events

### Audience

This guide is relevant to all Ministers who are required to inform Parliament of certain events relating to Commonwealth entities (non-corporate or corporate) that have any involvement in a company, under section 72 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and section 26 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule).

### Key points

This guide:

- describes the types of events that require the responsible Minister to inform Parliament; and
- provides information on the particulars for tabling a notice in Parliament.

### Resources

This guide is available on the Department of Finance website at [www.finance.gov.au](http://www.finance.gov.au). The PGPA Act is available on the ComLaw website at [www.comlaw.gov.au/Details/C2013A00123](http://www.comlaw.gov.au/Details/C2013A00123).

**Related guidance:** For more information on the section of the PGPA Rule that supports section 72 of the PGPA Act, see [www.finance.gov.au/publications](http://www.finance.gov.au/publications).

**Contact information:** If you have any questions or comments about this guide, you can email Finance at [governancepolicy@finance.gov.au](mailto:governancepolicy@finance.gov.au).

## Section 72 of the PGPA Act

- (1) The Minister who has the responsibility for any of the following events must provide a notice to be tabled in each House of the Parliament as soon as practicable after the event occurs:
- (a) the Commonwealth or a corporate Commonwealth entity forms, or participates in forming, a company or a relevant body<sup>1</sup>;
  - (b) the Commonwealth or a corporate Commonwealth entity becomes, or ceases to be, a member of a company or a relevant body;
  - (c) a variation occurs in rights of the Commonwealth or a corporate Commonwealth entity as a member of a company or a relevant body;
  - (d) the Commonwealth or a corporate Commonwealth entity acquires shares (either by purchase or subscription) or disposes of shares in a company;
  - (e) a variation occurs in the rights attaching to shares held by the Commonwealth or a corporate Commonwealth entity in a company.

## Types of events not subject to section 72

1. Section 72 of the PGPA Act does not apply to:
  - an event listed in paragraphs (1)(a) to (e) of section 72 if that event occurs in relation to:
    - a) an authorised investment made under section 58;
    - b) an investment authorised under section 59;
    - c) an investment made under the *Future Fund Act 2006* or any other Act that is prescribed by the rules; or
  - anything that results from the transfer to a Minister of any property that is to be dealt with as unclaimed property under Part 9.7 of the *Corporations Act 2001*; or
  - a company or relevant body that is conducted for the purposes of an intelligence or security agency or a listed law enforcement agency.

## Particulars for tabling a notice in Parliament

2. This guidance supports section 72 of the PGPA Act and section 26 of the PGPA Rule by listing the events that would require a responsible Minister to table a notice in Parliament. It also provides a template for such a notice.
3. The rule prescribes the particulars that need to be included in a notice to Parliament.

Particulars for notice of event		
Item	Topic	The particulars to be included in the notice are:
1	Person giving the notice	The name and portfolio of the Minister who has the responsibility for the event.
2	The event	The nature of, and reasons for, the event.
3	Consequendces of the event	The following: <ol style="list-style-type: none"><li>(a) the dollar value of any consideration paid or received by the Commonwealth or a corporate Commonwealth entity in relation to the event ;</li><li>(b) whether, because of the event, the Commonwealth or a corporate Commonwealth entity:<ol style="list-style-type: none"><li>(i) has a liability, duty or obligation (whether actual, contingent or prospective); or</li><li>(ii) has control of a company; or</li></ol></li></ol>

<sup>1</sup> Relevant body means a body of a kind prescribed by the rules.

<b>Particulars for notice of event</b>		
<b>Item</b>	<b>Topic</b>	<b>The particulars to be included in the notice are:</b>
		(iii) no longer has control of a company; (c) whether, because of the event, there are other interests of the Commonwealth or a corporate Commonwealth entity that are affected by the event and, if so, details of the interests affected.
4	Event relating to a company	If the event relates to a company: (a) the name of the company; and (b) the company's ACN (within the meaning of section 9 of the <i>Corporations Act 2001</i> ) or ARBN (within the meaning of that section), if any; and (c) whether the company is a public company (within the meaning of that section).
5	Event relating to a foreign company	If the event relates to a foreign company (within the meaning of section 9 of the <i>Corporations Act 2001</i> ): (a) the jurisdiction in which the company is incorporated; and (b) if the company does not have an ARBN (within the meaning of that section)—an incorporation identifier for the company in that jurisdiction.

### **Notice of event under section 72 of the PGPA Act and section 26 of the PGPA Rule**

4. Commonwealth entities can use the following template when providing their Minister with the required form to be tabled in the Parliament. The notice to be tabled in Parliament does not require the disclosure of any information that would be considered confidential or commercial in confidence.
5. The template (on the next page) identifies specific information about the company, such as its ACN or ARBN, ownership structure and company type. Information of this type, about specific registered companies, can be found on the Australian Securities and Investments Commission website ([www.asic.gov.au](http://www.asic.gov.au)).

**NOTICE UNDER SECTION 72 OF THE PUBLIC GOVERNANCE, PERFORMANCE AND ACCOUNTABILITY ACT 2013**

I, [name of Minister or Ministers]:

- (a) give notice of an event as required under section 72 of the *Public Governance, Performance and Accountability Act 2013*; and
- (b) provide particulars of the event and a short statement about the event as required under section 26 of the *Public Governance, Performance and Accountability Rule 2014*.

<b>Minister or Ministers who have the responsibility for the event</b>	
<b>Nature of the event</b>	
<b>Particulars relating to the company</b>	
Name of company	
ACN or ARBN <sup>2</sup>	
Jurisdiction of incorporation, incorporation identifier and ARBN	
Address of principal place of business	
Whether listed on a stock exchange and, if so, name of the stock exchange	
Ownership structure	
Company type	
Legal structure of foreign company	
Details of any ultimate holding companies	
<b>Short statement about the event</b>	
Reasons for the event	
Obligations or liabilities placed on the Commonwealth	
Particulars about the Commonwealth's control of the company	
Dollar value of consideration paid or received	
Other areas where the Commonwealth's interests have been affected	
<b>Signature block for Minister</b>	
Date	
[Signature]	
[Name and title of Minister]	

<sup>2</sup> A foreign company may have an ARBN if it operates certain businesses in Australia.

## Providing Finance with a copy of the section 72 notice

6. To support the ongoing monitoring of entities being created, Commonwealth entities will need to provide Finance with a copy of the section 72 notice that has been tabled in Parliament.
7. The copy of the section 72 notice should be emailed to [governancepolicy@finance.gov.au](mailto:governancepolicy@finance.gov.au).

WORKING DRAFT 13 MARCH





# Resource Management Guide No. XX

Requests for discretionary financial assistance under the  
*Public Governance, Performance and Accountability Act 2013*

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# Resource Management Guide No. XX

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## Requests for discretionary financial assistance under the *Public Governance, Performance and Accountability Act 2013*

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### Audience

This guide is relevant to staff in non-corporate Commonwealth entities who deal with requests to the Finance Minister to approve discretionary financial assistance under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

### Key points

This Guide:

- Describes the types of discretionary financial assistance that can be agreed to by the Finance Minister under the PGPA Act, including act of grace payments, waivers of debt and set-off
- Takes effect on 1 July 2014
- Is available on the Finance website at [www.finance.gov.au/publications/finance-circulars/index.html](http://www.finance.gov.au/publications/finance-circulars/index.html)

Each request to the Finance Minister for discretionary financial assistance:

- is considered on its individual merits
- is decided at the discretion of the decision-maker
- once decided, does not establish a precedent for other requests.

In accordance with the *Acts Interpretation Act 1901*, the 'Finance Minister' is any Minister in the Finance portfolio who administers the PGPA Act. The power to consider requests for act of grace payments and waivers of debt has been delegated to senior officials in the Department of Finance.

### Relevant resources

#### Fact sheets

- Members of the public who are considering making an application for discretionary financial assistance can find fact sheets and application forms at [www.finance.gov.au/financial-framework/discretionary-compensation](http://www.finance.gov.au/financial-framework/discretionary-compensation).

#### Contact information

- Contact the Discretionary Payments Section in Finance by email at [sfc@finance.gov.au](mailto:sfc@finance.gov.au) or on 1800 227 572.

## Act of grace payments

### The act of grace power

Section 65 of the PGPA Act states:

(1) The Finance Minister may, on behalf of the Commonwealth, authorise, in writing, one or more payments to be made to a person if the Finance Minister considers it appropriate to do so because of special circumstances.

Note 1: A payment may be authorised even though the payment or payments would not otherwise be authorised by law or required to meet a legal liability.

Note 2: Act of grace payments under this section must be made from money appropriated by the Parliament. Generally, an act of grace payment can be debited against a non-corporate Commonwealth entity's annual appropriation, providing that it relates to some matter that has arisen in the course of the administration of the entity.

(2) The authorisation of the payment must be in accordance with any requirements prescribed by the rules.

### *Act of grace and other remedies*

1. The act of grace mechanism is generally a remedy of last resort when there is no other viable remedy available to provide redress in the circumstances giving rise to the application.
2. If other avenues exist for a person to receive financial assistance from the Australian Government (such as existing legislation or schemes), those avenues should be investigated before a request is made for an act of grace payment.
3. Most decisions about Australian Government benefits are subject to internal statutory review. A person is expected to undertake these reviews to ensure they are ineligible for financial assistance, before being assessed for an act of grace payment. Instruments to consider could include the *Legal Services Directions 2005*, the *Public Service Act 1999*, and the *Scheme for Compensation for Detriment caused by Defective Administration*.
4. If a person is claiming that a decision is incorrect at law, they should use existing legal review mechanisms.

### *Act of grace considerations*

5. The PGPA Act does not provide a time limit on making a claim under the act of grace mechanism.
6. The act of grace mechanism is permissive. It enables decision-makers to approve payments but does not obligate them to do so. There is no entitlement to an act of grace payment.
7. 'Special circumstances' and 'appropriate' are not defined in the PGPA Act and are for the decision-maker to assess.
8. Examples of special circumstances that may make it appropriate to approve an act of grace payment include instances when:
  - an act of a non-corporate entity of the Australian Government has caused an unintended and inequitable result to the individual seeking the payment

- Commonwealth legislation or policy has had an unintended, anomalous, inequitable or otherwise unacceptable impact on the claimant's circumstances, and those circumstances were:
    - specific to the claimant
    - outside the parameters of events for which the claimant was responsible or had the capacity to adequately control
    - consistent with what could be considered to be the broad intention of the relevant legislation
  - the matter is not covered by legislation or specific policy, but the Australian Government intends to introduce such legislation or policy, and it is considered desirable in a particular case to apply the benefits of the relevant policy prospectively.
9. Act of grace payments may not be approved, for example, when:
- the proposed payments would have the effect of supplementing capped payments set by other specific legislation, in circumstances where that legislation expresses the clear intention that particular payment levels cannot be exceeded in any circumstances
  - the proposed payments would have the effect of establishing a payment scheme to apply to a group of individuals, without considering the merits of their requests on an individual basis.
10. Payments under the act of grace mechanism must be made from money appropriated by the Parliament. Therefore, as a matter of practice, the act of grace mechanism is generally not available:
- when a request has arisen from private circumstances outside the sphere of Commonwealth administration, there has been no involvement of an agent or entity of the Australian Government and the matter is not related to the impact of any Commonwealth legislation
  - in respect of a matter that relates solely to the involvement of corporate Commonwealth entities which have a separate legal identity to the Commonwealth
  - to compensate a person or body for a debt owed to the Commonwealth
  - to compensate a person for a loss arising from a judicial decision not involving the executive arm of the government.
11. Act of grace requests are generally not approved in cases where a claimant's sole allegation is that it is unfair that they have been historically ineligible to receive a benefit for which a person in a similar contemporary situation would now be eligible. They are also generally not approved in cases where a person was historically eligible for a payment but is now ineligible due to a change in the criteria. In many of these cases, the legislative changes simply reflect the evolving nature of Australian Government policy interpretation and analysis, including incremental legislative amendment.
12. If a claimant is dissatisfied with the decision, it is open to them to:
- request reconsideration of the decision
  - lodge a complaint with the Commonwealth Ombudsman
  - seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*.

Attachment A provides further details.

## The role of the Department of Finance

13. The Discretionary Payments Section in Finance provides support to decision-makers under the act of grace mechanism.
14. Finance liaises with the claimant and the relevant entity, where appropriate, before a recommendation is made to the decision-maker. For claims that are received directly from a member of the public, a company or other organisation, Finance usually seeks further information from the entity responsible for the matter.
15. To assist potential claimants, application forms and fact sheets are available at [www.finance.gov.au/financial-framework/discretionary-compensation/act-of-grace.html](http://www.finance.gov.au/financial-framework/discretionary-compensation/act-of-grace.html).
16. Finance will advise the relevant entities once a decision is made.

## The role of entities

### Providing advice

17. Entity submissions on act of grace requests should address the following:
  - whether there is an alternative avenue of redress that could be pursued, and whether that avenue is viable in the claimant's circumstances (such as a statutory review mechanism)
  - the relevant sections of legislation and details of the claimant's circumstances in relation to that legislation
  - specific details of the actions of an entity, if any, that may have directly contributed to the claimant's situation
  - any history or background to the case, including any consideration of the case under the *Scheme for Compensation for Detriment caused by Defective Administration*, decisions of any tribunals or other review bodies, or other claims arising from the same circumstances
  - if there is a perceived anomaly in the law or policy, an estimate of the likely number of people affected and the likely number of applications
  - whether or not the entity supports the act of grace request and reasons
  - whether any other entity should be contacted to provide advice on the policy or legislation related to the matter
  - any other information that may be relevant to the decision-maker in determining whether special circumstances exist.
18. If an entity receives a request from a claimant directly, or decides to initiate a claim on an individual's behalf, the entity should prepare a submission and then forward it to Finance, along with any other relevant documents.
19. Before a decision is made, the claimant is given an opportunity to comment on the entity submission. Agencies should provide a complete copy of the submission to the claimant at the same time it is sent to Finance and ask the claimant to respond to Finance within two weeks. Finance can provide examples of covering letters.
20. If a payment over \$500,000 is proposed, section 24 of the PGPA Rule requires the Finance Minister to first consider the report of an advisory committee. The advisory committee is made up of the Finance Secretary, the Chief Executive Officer of the Australian Customs and Border Protection Service and the accountable authority of the Commonwealth entity responsible for the matter. Finance will liaise with the relevant entity on matters that require an advisory committee report.

***Funding and reporting***

21. While act of grace payments can only be authorised by the Finance Minister, or a delegate within Finance, the actual payments are funded under an appropriation of the relevant entity. Generally payments should be made out of departmental appropriations.
22. The total amount of act of grace payments made by the entity must be reported in the notes to the entity's financial statements each year.

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## Waivers of debts

### The waiver of debt power

Section 63(1) of the PGPA Act states:

(1) The Finance Minister may, on behalf of the Commonwealth, waive an amount owing to the Commonwealth, or otherwise modify the terms and conditions on which an amount owing to the Commonwealth is to be paid to the Commonwealth.

### *Waiver and other debt management options*

23. Section 11 of the PGPA Rule proposes that accountable authorities of non-corporate entities are required to recover debts, except in very specific circumstances.
24. When a debt is raised, the Commonwealth has a legal right and, under section 11 of the PGPA Rule, an obligation to pursue recovery of the amount. Recovery rights include circumstances where a person has been erroneously paid more than their legal entitlement.<sup>1</sup>
25. A waiver is a special concession that extinguishes a debt owed to the Commonwealth. The Commonwealth cannot pursue the debt at a later date if the financial circumstances of the person or organisation improve.
26. The waiver power should generally be seen as a remedy of last resort. It should only be used when there is no other viable remedy available to address the specific circumstances of a matter.
27. Individuals and organisations will often have review rights when a debt has been raised against them. It is expected that these review mechanisms would be used before a waiver of the debt is sought.
28. If an individual or organisation is claiming that there is no legal basis for a debt to exist, they should use legal review mechanisms.
29. If other avenues exist for a debt to be managed, those avenues should be investigated prior to considering a waiver. This includes debt management options in existing legislation. Entities' internal control documents will provide further advice on relevant debt management options and modification of terms and conditions.

### *Waiver of debt considerations*

30. The PGPA Act does not provide a time limit on making a claim under the waiver of debt mechanism.
31. The waiver of debt mechanism is permissive. It enables decision-makers to approve a request but does not obligate them to do so. There is no entitlement to a waiver of debt.
32. The decision-maker will consider whether a person or organisation should be allowed to retain money that the Commonwealth has a legal right to recover. The current and possible future circumstances of the person or organisation, including the financial situation, may be taken into account. Why the debt arose and what role the Commonwealth had in the debt arising may also be considered.
33. The existence of other debt management options (which would allow the Commonwealth to maintain the right to recover the debt at some later date) and whether they would be more appropriate in the circumstances may be considered.

<sup>1</sup> Certain legislation has specific waiver provisions for circumstances where a debt has arisen solely due to the error of an agency. Some debts may also be found to be irrecoverable at law.

34. There are some circumstances where the standard considerations listed above would not be relevant, and the debt would be unlikely to be waived. These include:
- debts that have been established by a judicial decision of a court, which are separate from the decisions of the executive arm of the Australian Government
  - debts owed to the Commonwealth that will be paid on to third parties
  - debts that have arisen through deliberate fraudulent or other illegal actions
  - requests submitted by companies on the grounds of financial hardship<sup>2</sup>
  - where an amount owing to the Commonwealth is not certain or ascertainable.
35. If a claimant is dissatisfied with the decision, it is open to them to:
- request reconsideration of the decision
  - lodge a complaint with the Commonwealth Ombudsman
  - seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*.

Attachment A provides further details.

### The role of the Department of Finance

36. The Discretionary Payments Section in Finance provides support to decision-makers under the waiver of debt mechanism.
37. Finance liaises with the claimant and the relevant entity, where appropriate, before a recommendation is made to the decision-maker. For a claim that is received directly from a member of the public, a company or other organisation, Finance usually seeks further information from the entity responsible for the matter.
38. To assist potential claimants, application forms and fact sheets are available at [www.finance.gov.au/financial-framework/discretionary-compensation/debt-waiver.html](http://www.finance.gov.au/financial-framework/discretionary-compensation/debt-waiver.html).
39. Finance will advise the relevant entities once a decision is made.

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<sup>2</sup> This is because the companies, rather than the individuals involved, are liable for the debts.

## The role of entities

### *Providing advice*

40. Entity submissions on waiver of debt requests should address the following:
  - the amount owing to the Commonwealth, including why it was incurred, how it is comprised, and when it is due for payment
  - any history or background to the case, including any information held by the entity on the assets, income, future earning capacity, other debts, health and family circumstances of the family unit or household to which the debtor belongs
  - whether the responsible entity has considered other debt management strategies
  - whether or not the responsible entity supports the request and reasons
  - any other information that may be relevant to the decision-maker's consideration of the particular circumstances.
41. If an entity receives a request from a claimant directly, or decides to initiate a claim on an individual or organisation's behalf, the entity should prepare a submission and then forward it to Finance, along with any other relevant documents.
42. Before a decision is made, the claimant is given an opportunity to comment on the entity submission. Entities should provide a complete copy of the submission to the claimant at the same time it is sent to Finance and ask the claimant to respond to Finance within two weeks. Finance can provide examples of covering letters.
43. If a waiver of a debt of more than \$500,000 is proposed, section 24 of the PGPA Rule requires the Finance Minister to first consider the report of an advisory committee. The advisory committee is made up of the Finance Secretary, the Chief Executive Officer of the Australian Customs and Border Protection Service and the accountable authority of the Commonwealth entity responsible for the matter. Finance will liaise with the relevant entity on matters that require an advisory committee report.

### *Funding and reporting*

44. While waivers can only be authorised by the Finance Minister, or a delegate within Finance, the entity that was owed the debt is required to report it in the entity's annual financial statements.

**Set off**

Section 64 of the PGPA Act states:

(1) If:

- (a) an amount (the **first amount**) is owing to the Commonwealth by a person; and
- (b) an amount (the **second amount**) is owing by the Commonwealth to the person;

the Finance Minister may, on behalf of the Commonwealth, set off the whole or a part of the first amount against the whole or a part of the second amount.

(2) Paragraph (1)(b) does not apply in relation to a payment if:

- (a) a law of the Commonwealth provides that the payment is inalienable or absolutely inalienable; or
- (b) a law of the Commonwealth provides that the payment, or the right to the payment, cannot be assigned.

(3) To avoid doubt, an amount may be owing to, or by, the Commonwealth even if it is not yet due for payment.

- 45. If set off of an amount over \$500,000 is proposed, section 24 of the PGPA Rule requires the Finance Minister to first consider the report of an advisory committee. The advisory committee is made up of the Finance Secretary, the Chief Executive Officer of the Australian Customs and Border Protection Service and the accountable authority of the Commonwealth entity responsible for the matter. Finance will liaise with the relevant entity on matters that require an advisory committee report.
- 46. If an entity receives a request for set off under section 64 of the PGPA Act, the entity should contact the Discretionary Payments Section in Finance to discuss handling of the matter.



# Resource Management Guide No. <XX>

## Approval and commitment of relevant money

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## Approval and commitment of relevant money

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### Audience

This guide is relevant to all corporate and non-corporate Commonwealth entities. It is particularly relevant to Chief Financial Officers (CFOs) and their staff, and officials of an entity who are responsible for the entity's internal controls and processes.

### Key points

This guide:

- deals with the 'commitment' of 'relevant money'.
  - 'Relevant money' is money standing to the credit of any bank account of, or that is held by, the Commonwealth or a corporate Commonwealth entity.
  - Relevant money generally becomes 'committed' when the Commonwealth or a corporate Commonwealth entity enters into an arrangement under which the relevant money is or may become payable.
- provides guidance on provisions of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) that deal with the commitment of relevant money (specifically, sections 23 and 71) as well as section 18 of the PGPA Rule.
  - section 23 of the PGPA Act confers on the accountable authorities of non-corporate Commonwealth entities the power to approve proposed commitments of relevant money. It also confers on accountable authorities the power to enter into arrangements that commit relevant money.
  - section 18 of the PGPA Rule sets out the requirements that an official must meet if he or she has been delegated, or authorised to exercise, the power to approve proposed commitments of relevant money.
  - section 71 of the PGPA Act imposes requirements on a Minister when approving a proposed expenditure of relevant money.
- commences on 1 July 2014, when the PGPA Act and PGPA Rule take effect.

### Relevant resources

#### [Guide](#)

- available on the Department of Finance website at <http://www.finance.gov.au>

#### [Related guidance](#)

#### [Q&As](#)

#### [Contact information](#)



## Part 1 – Introduction

1. This guide provides guidance about the operation of the PGPA Act and the PGPA Rule relating to the commitment of relevant money.
2. The commitment of relevant money is a key element of the resource management framework. 'Relevant money' is money that the Commonwealth or a corporate Commonwealth entity holds as cash or in bank accounts. Relevant money becomes 'committed' when the Commonwealth or a corporate Commonwealth entity enters into an arrangement under which that money will, or may, become payable.
3. It is important that financial resources are used for a proper purpose, by persons who are authorised to use those resources, and that losses due to waste, abuse, mismanagement, error, fraud, omissions and other irregularities are minimised. The financial resources of the Commonwealth are expected to be managed in a manner that will deliver the best results. Finding easier, cheaper and better ways of undertaking activities, will reduce costs to Commonwealth entities and, in turn, make relevant money available for other opportunities and uses. To facilitate this, it is essential that a robust framework be in place for the commitment of relevant money.
4. Part 2 of this guide explains the duties of accountable authorities that are relevant to the commitment of relevant money. To satisfy these duties, accountable authorities need to establish appropriate internal controls and processes in relation to the commitment of relevant money.
5. Part 3 of the guide explains the obligations of officials who are authorised to approve proposals for the commitment of relevant money. These obligations include specific rules about approving proposals for the commitment of money, as well as general duties that are imposed on officials under the PGPA Act.
6. Part 4 of the guide explains the obligations that Ministers have when they approve proposed expenditure.
7. Part 5 of the guide explains obligations of officials who enter into arrangements that commit relevant money.

## Part 2 – Duties of accountable authorities

8. Having appropriate controls over the commitment of relevant money is a crucial part of managing public resources. The PGPA Act, requires an accountable authority to ensure systems and processes are in place to properly manage the commitment of relevant money. Of particular relevance to the commitment of relevant money is the duty to govern a Commonwealth entity in particular ways (section 15) and the duty to establish and maintain systems relating to risk and control (section 16). For further information on the duties of accountable authorities, see *Resource Management Guide No. XX: Duties of accountable authorities*.

### Guidance – section 15 of the PGPA Act: Duty to govern the Commonwealth entity

9. Division 2 of the PGPA Act sets out the various duties of accountable authorities, which include a duty to govern a Commonwealth entity in a way that promotes the 'proper' use and management of the public resources for which the accountable authority is responsible (section 15 (a)).
10. Section 15(b) places a duty on the accountable authority to govern the entity in a way that promotes the achievement of the purposes of the Commonwealth entity.
11. Section 15 (c) places a duty on the accountable authority to govern the entity in a way that promotes the financial sustainability of the entity.
12. In order for an accountable authority to meet its obligations under section 15, it should establish an approval framework (including appropriate controls and processes) for the commitment of relevant money.

### Guidance – section 16 of the PGPA Act: Duty to maintain systems relating to risk and control

13. Section 16 requires an accountable authority to establish and maintain appropriate systems of risk oversight and management and an appropriate system of internal controls. The accountable authority is expected to create an operating environment that supports the proper use and management of public resources, without stifling innovation, in pursuit of both the public good and the purposes of the entity for which it is responsible. At a minimum, entities need to have controls and processes for identifying, measuring, managing and reporting material risks. This should include controls that manage risks associated with the commitment of relevant money.
14. In promoting the financial sustainability and managing risks of an entity, accountable authorities should take into account the fact that giving indemnities, guarantees and warranties can place significant obligations on the Commonwealth. These contingent liabilities may impact and constrain the ability to allocate future resources of the entity and the Commonwealth more broadly, and should be considered and managed prudently by accountable authorities. Section 60 of the PGPA Act gives the Finance Minister the power in primary legislation, to grant indemnities, guarantees and warranties on behalf of the Commonwealth. For further information, see *Resource Management Guide No. XX: [Indemnities]*.

## Part 3 – Approval for the proposed commitment of relevant money

### Section 23 of the PGPA Act: Power in relation to [arrangements and approvals]

- (1) The accountable authority of a non-corporate Commonwealth entity may, on behalf of the Commonwealth:
  - (a) enter into arrangements relating to the affairs of the entity; and
  - (b) vary and administer those arrangements.
- (2) An **arrangement** includes a contract, agreement, deed or understanding.

***Amendments to be included to provide power to approve commitments***

### Section 18 of the PGPA Rule: Approving commitments of relevant money

#### ***Guide to this section***

*The accountable authority responsible for relevant money has a duty to promote the proper use of the money (see section 15 of the Act). This duty applies when approving commitments of the money. If the accountable authority delegates its power to approve commitments of the money to an official, or otherwise authorises an official to exercise that power, the accountable authority will be able to ensure the proper use of the money through the delegation or authorisation. It can also ensure that through its accountable authority instructions.*

*The accountable authority will be able to achieve this whether the official is of the same entity as the accountable authority or a different Commonwealth entity.*

*The purpose of this section is to require an official who is approving the commitment of relevant money to record the approval. It is also to emphasise that the official must exercise the power to approve the commitment consistently with the accountable authority's instructions and with the terms of the delegation or authorisation. Of course, the official must also comply with his or her duties under sections 25 to 29 of the Act (which are about the general duties of officials).*

*This section is made for section 52 of the Act.*

- (1) If an official of a Commonwealth entity is approving the commitment of relevant money for which the accountable authority of a Commonwealth entity is responsible, the official must record the approval in writing as soon as practicable after giving it.
- (2) To avoid doubt, the official must also approve the commitment consistently with any written requirements, including spending limits, specified by the accountable authority in:
  - (a) instructions given by the accountable authority; or
  - (b) the instrument that delegates to the official, or otherwise authorises the official to exercise, the accountable authority's power to approve the commitment of relevant money; or
  - (c) a direction to the official in relation to the exercise of that power.

## Guidance – power to approve the proposed commitment of relevant money

15. Section 23 of the PGPA Act confers on accountable authorities of non-corporate Commonwealth entities the power to enter into, vary and administer arrangements relating to the affairs of the entity (see part 5 below). Entering into such arrangements can result in the commitment of relevant money. The term ‘commitment of relevant money’ is not defined in the PGPA Act or the PGPA Rule. Money will become committed when the Commonwealth or a corporate Commonwealth entity enters into an arrangement (such as, under section 23 of the PGPA Act) under which that money is, or may, become payable.
16. Section 23 also confers on accountable authorities of non-corporate Commonwealth entities the power to approve proposals for the commitment of relevant money [section 23 to be amended]. This power can be delegated to officials within the entity (see section 110 of the PGPA Act).
17. Corporate Commonwealth entities derive the power to enter into, vary and administer arrangements, and the power to approve proposals for the commitment of relevant money, from their separate legal personality and enabling legislation. Accordingly, the accountable authorities of these entities will not delegate powers under the PGPA Act relating to the proposed commitment of relevant money to officials. However, the accountable authorities of these entities may be able to authorise officials to approve the proposed commitment of relevant money on their behalf or delegate powers under their enabling legislation.
18. If the power to approve the proposed commitment of relevant money is exercised by officials within a Commonwealth entity, the accountable authority should establish appropriate approval processes as internal controls to ensure that the necessary considerations are taken into account when officials approve proposals to commit relevant money. These controls should include processes or instructions that support an accountable authority’s duties under the PGPA Act.
19. As noted above, officials obtain the authority to approve the proposed commitment of relevant money through a delegation or authorisation from their accountable authority. When delegating or authorising officials to exercise the power to approve the proposed commitment of relevant money, an accountable authority should consider placing appropriate conditions and limits on the exercise of the power, including dollar limits, which reflect the business needs of the entity and balance efficiency of operations with appropriate levels of accountability.
20. The conditions attached to any delegation or authorisation should be considered in the context of the entity’s size, structure, risk appetite and operations. There is no ‘one-size-fits-all’ approach to delegations and authorisations. For example, in a small agency with fewer than 20 officials, the accountable authority could determine that it will personally approve all proposed commitments, or determine that he or she would only delegate this power to the CFO. In contrast, for the day-to-day operations of large entities, delegations or authorisations may need to be provided to a range of officials at an appropriate level to facilitate an efficient system of decision-making and administration within the entity.
21. Delegation and authorisation instruments should be regularly reviewed to ensure that those officials who need to approve proposed commitments of relevant money hold appropriate delegations or authorisations. An entity should also review these instruments following any Machinery of Government changes or when its structure changes.
22. A delegation or authorisation should clearly identify the position (or person) to which it is issued. It should generally be issued to the official who will have responsibility for certain proposed commitments of relevant money and will exercise discretion about whether such commitments should be made. A copy of the delegation or authorisation instrument should be easily accessible and widely available to all officials in the entity.

23. An official who is delegated powers under the PGPA Act must comply with any directions from his or her accountable authority in exercising delegated powers (see section 110 of the PGPA Act). Accountable authorities can issue directions to delegates, or officials who were authorised to approve commitments of relevant money, to ensure that appropriate processes are in place for the approval of proposed commitments of relevant money. For example, accountable authorities should require that an official cannot approve a proposal for the commitment of relevant money unless he or she is satisfied that the proposal would be a proper use of that money within the meaning of the PGPA Act.
24. Officials approving proposals for the commitment of relevant money should ensure they are fully aware of the statutory obligations associated with their decisions and other relevant guidance and requirements (such as internal processes).
25. A proposal for the commitment of relevant money could be general in nature (such as, a proposal relating to a group or class of proposed arrangements), or relate to an individual arrangement. Where a proposed commitment of money is approved, that money will not necessarily be committed or spent immediately (although this may occur in some cases). It may be appropriate in some cases for the approver to specify a time limit for the approval to commit the money. This would be appropriate when the approver was approving a group or class of proposed arrangements, and may be a useful control in other circumstances to ensure that conditions that existed at the time the approval was granted are still in place when the relevant arrangement is entered into.
26. An accountable authority should establish decision-making and control processes for proposed commitments of relevant money. These processes should be set up to include information that helps an accountable authority meet its duties under the PGP Act, for example that the resources of the entity are being properly used. The processes could include matters such as, the separation of responsibility for approval and payments, the delegate needing to inform themselves that it would be a proper use of relevant money, appropriate oversight and review of approvals, appropriate spending limits, acquittal and internal audits of an approval, based on the size and risk of the commitment. Further, accountable authorities may determine whether approvals of some proposed commitments are required and therefore if internal systems and processes need to be in place. Such an approval needs to be based on a considered assessment of the risks and benefits to the entity, the official and the Commonwealth.
27. An accountable authority may determine the processes that officials are required to follow for different types of proposed commitments. For example, low value and low risk items such as hiring a taxi to get to an official meeting may not require a formal documented approval in addition to a record of the transaction. Commitments of money for routine items such as utilities may be approved for a certain period of time, and then reviewed as appropriate.

#### Guidance – proper use

28. Section 15 of the PGPA Act imposes a duty on accountable authorities to promote the proper use and management of public resources for which they are responsible, promote the achievement of the purposes of the entity, and promote the financial sustainability of the entity. Accountable authorities should put processes and controls in place, including processes and controls dealing with the commitment of relevant money, to ensure that these duties are met.
29. While officials other than accountable authorities do not have a specific duty to promote the proper use and management of public resources under the PGPA Act, the guide to section 18 of the PGPA Rule makes it clear that this duty flows from the accountable authority to officials. Instructions made by an accountable authority under section 23A of the PGPA Act [to be amended] may require delegates to exercise ‘proper’ use when considering approving

proposals to commit relevant money. As instruments under the PGPA Act, an accountable authority's instructions form part of the 'finance law' which officials are required to comply with.

30. The term 'proper', when used in relation to the use and management of public resources, is defined in section 8 of the PGPA Act to mean 'efficient, effective, economical and ethical'. Consistent with this, when assessing whether a proposed commitment of relevant money would constitute a proper use of that money, an official would need to consider whether the proposed commitment would be efficient, effective, economical and ethical.
31. The PGPA Act does not define the terms 'efficient', 'effective', 'economical' and 'ethical' for the purposes of the PGPA Act or the PGPA Rule. However, the following general principles may assist officials to assess whether a proposed commitment of relevant money would constitute a proper use of that money.
32. A use of public resources is efficient when it involves the most suitable resources being used to deliver the best result. For example, an official should inform himself or herself of the unit costs or other ways of achieving the particular purposes and objectives of the entity or the program and assess which proposed commitment would deliver the best overall result for the entity, or the Commonwealth.
33. Whether a use of public resources is effective depends on the extent to which it achieves its expected results. Officials should consider whether the proposed commitment is going to produce the desired result, taking into account the purpose and objectives of the entity or the program.
34. The economical aspect of proper use emphasises the requirement to avoid waste and sharpens the focus on the level of resources that the Commonwealth applies to deliver results. This generally relates to approving the best cost option to deliver the expected results.
35. Ethical behaviour should be consistent with the core beliefs and values of society. Where a person behaves in an ethical manner it could be expected that a person in a similar situation would undertake a similar course of action. For the approval of proposed commitments of relevant money, an ethical use of resources involves managing conflicts of interests, and approving the commitment based on the facts without being influenced by personal bias.

#### Case Study

An entity is going to conduct training for officials and needs to determine what type of training would be the best use of relevant money. The entity could either provide face-to-face training for \$10,000 or develop electronic training (e-learning) for \$30,000. The two options would need to be assessed to determine which approach would be the most efficient, effective, economic and ethical. In conducting this assessment, the delegate weighs up the fact that e-learning can be used by a wider audience on a number of occasions, but that face-to-face training creates a more interactive learning environment that may provide officials with a deeper understanding of the subject matter. The desired results of the training are also considered by the delegate (whether it is 'base level' or advanced training).

The delegate approves the development of e-learning, based on the desired result to deliver 'base level' training that can be used by everyone in the entity.

36. Sections 25 to 29 of the PGPA Act impose general duties on officials which are similar to the Code of Conduct under the *Public Service Act 1999*. These general duties include a duty of care and diligence and a duty to act in good faith and for a proper purpose. For further information, see *Resource Management Guide No. XX: Duties of officials*.



37. These general duties apply when an official is approving a proposed commitment of relevant money. For example, an official would be expected to take reasonable steps to inform himself or herself of the purposes of the proposed commitment to discharge his or her duty of care and diligence. The steps that would need to be taken would depend on the nature, significance, value and context of the proposed commitment. The accountable authority should ensure that officials are aware of the relevant considerations for approvals, such as risk and proportionality, appropriate to the circumstances of the entity. For example, this could be done through delegations or instructions by the accountable authority. Officials of a non-corporate Commonwealth entity would also be expected to be satisfied that the proposed commitment is not inconsistent with the policies of the Australian Government (see section 21 of the PGPA Act).

#### Guidance – recording approval

38. While the approval of the proposed commitment of relevant money would usually be documented before an arrangement is entered into, section 18 of the PGPA Rule recognises that an approval may be given orally, and requires that it be recorded in writing ‘as soon as practicable’ after it has been given.
39. An official should be satisfied that the record of approval provides appropriate evidence, so that the approval is transparent, the official is accountable for the approval, and there is an appropriate audit trail. In considering what form the approval should take, the official should consider who is going to rely on the record and ensure that the record is proportionate to the significance, value, level of risk and sensitivities associated with the proposed commitment. For example, when hiring a taxi to go to an official meeting, the cab charge voucher and a receipt from the taxi driver could record the approval.
40. The requirement to record the approval as soon as practicable is intended to provide officials with a degree of flexibility. An official should make a record appropriate to the circumstances and nature of the commitment in a timely manner. The accountable authority should establish internal controls to detail what is considered ‘as soon as practicable’ for the purposes of the entity’s operations.
41. An approval for the purposes of section 18 of the PGPA Rule does not need to be a record made on paper. An electronic approval, such as an email, or within an information system, (where a delegate ‘presses a button’), would satisfy the requirement if it creates a record which could be retrieved, (see section 12, *Electronic Transactions Act 1999*). The approval could also be a signed brief or minute, a signed purchase order or purchase order request, proportionate to the size and risk of the commitment.
42. Depending on the nature of the approvals, accountable authorities should establish processes that require officials to record the terms and/or basis of particular approvals. Accountable authorities should require a higher degree of documentation by delegates for higher risk activities, such as significant and/or high value procurements.
43. The terms of the approval could include factual information, such as the parties to an arrangement and the costs of the proposed commitment. For high-risk commitments the terms of the approval may also include, where appropriate:
- the key elements of the proposed commitment, such as the item, cost, parties, timeframes and any risks associated with the proposal;
  - any conditions on the approval, such as timing, or additional approvals; and
  - contingent liabilities, such as indemnities.
44. The basis of the approval should include the reasons for the official’s decision, including information about why the official was satisfied that the proposed commitment would be a proper use of relevant money.



## Summary

To meet the obligation under section 18 of the PGPA Rule, an official approving a proposed commitment *must*:

- do so consistent with the accountable authority's instructions
- record the approval in writing.

An accountable authority of a non-corporate entity, must be satisfied that the commitment will be a 'proper use' of relevant money (section 15) and 'is not inconsistent with the policies of the Australian Government' (section 21)

In meeting these obligations, an accountable authority *should* consider requiring officials to:

- approve the proposed commitment before an arrangement is entered into
- record the terms and the basis, if appropriate, of the approval in a timely manner.

WORKING DRAFT 13/1

## Part 4 – Approvals by Ministers

### Section 71 of the PGPA Act: Approval of proposed expenditure by a Minister

- (1) A Minister must not approve a proposed expenditure of relevant money unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money.
- (2) If a Minister approves a proposed expenditure of relevant money, the Minister must:
  - (a) record the terms of the approval in writing as soon as practicable after giving the approval; and
  - (b) comply with any other requirements prescribed by the rules in relation to the approval.
- (3) For a Parliamentary Department, the references in subsection (1) or (2) to a Minister are references to:
  - (a) a Presiding Officer, for expenditure for which he or she alone is responsible; and
  - (b) the Presiding Officers jointly, for expenditure for which they are jointly responsible.

### Guidance – approval by a Minister

45. Where a Minister is approving a proposed expenditure of relevant money, he or she must comply with section 71 of the PGPA Act.
46. Section 71 of the PGPA Act imposes a duty on Ministers not to approve a proposed expenditure of relevant money unless they are satisfied, after making reasonable inquiries, that it constitutes a proper use of the money. A Minister must also comply with any other requirements prescribed by the PGPA Rules in relation to the approval. There are additional requirements for Ministers when approving grants. For further information see the *Commonwealth Grant Rules*.
47. The terms of section 71 (specifically, the reference to ‘a’ proposed expenditure) make it clear that a Minister can only approve a particular item of proposed expenditure, rather than a class or group of proposed expenditure.
48. A Minister should not personally approve a proposed expenditure of relevant money if he or she has a material personal interest in the subject matter of the expenditure.
49. If a Minister chooses to personally approve a proposed expenditure of relevant money, he or she cannot delegate this responsibility. However, a Minister is not required to personally approve all the proposed expenditure within his or her portfolio. As discussed above, accountable authorities of Commonwealth entities (and their delegates and other authorised officials) may approve proposed commitments of relevant money (see part 3 above).
50. Section 71 requires a Minister to make ‘reasonable inquiries’ about whether proposed expenditure would be a proper use of relevant money. The nature of the inquiries that the Minister will need to make in a particular case will depend on the nature and context of the proposed expenditure of relevant money. A Minister should take into account the nature, significance and value of the proposed expenditure as well as any associated risks, and should marshal sufficient information to make a justifiable decision in the particular circumstances.

51. To satisfy himself or herself that particular proposed expenditure would constitute a proper use of relevant money, the Minister can take into account advice from the relevant Commonwealth entity. The entity should take appropriate steps to advise their Minister of the legal requirements and any other relevant information (such as, risks or impediments to achieving outcomes, or evidence to justify a recommendation) that may assist the Minister to form a view about whether the proposed expenditure would involve a proper use of relevant money.
52. A Minister would not generally need to make external inquiries where he or she is satisfied, based on advice from the relevant Commonwealth entity, that the proposed expenditure would involve a proper use of relevant money. For example, a Minister who receives a written or oral briefing on a particular proposed expenditure would ordinarily be able to rely on that briefing and need not make additional inquiries (assuming that the Minister was not aware of any other relevant considerations that should be taken into account). A Minister may, as a matter of judgement, request additional information from an entity where he or she considers this would be useful to form a view about whether a proposed expenditure would constitute a proper use of relevant money.
53. Section 71 of the PGPA Act requires a Minister to record the 'terms' of the approval in writing. This ensures that there is an appropriate paper trail for accountability purposes, such as an audit by the Auditor-General. Recording the terms of the approval should include recording relevant factual information such as the parties to an arrangement and the costs of a proposed expenditure.
54. Depending on the nature, size and significant of an approval, a Minister should also record the basis of the approval. The basis of the approval should include the reasons for the decision, including information about why the Minister was satisfied that the proposed commitment would be a proper use of relevant money. Ministers would also need to consider the additional requirements prescribed by the PGPA Rules, such as when approving grants.

#### Summary

To meet the obligation under section 71 of the PGPA Act, a Minister approving a proposed expenditure *must*:

- be satisfied, after making reasonable inquiries, that the proposed expenditure would be a proper (efficient, effective, economical and ethical) use of relevant money;
- record the terms of approval in writing
- comply with any other requirements prescribed by the PGPA Rules, such as the *Commonwealth Grant Rules*.

In meeting this obligation, a Minister *should*:

- approve the proposed expenditure before the commitment is made;
- record the terms in a timely manner
- record the basis of the approval.

## Part 5 – Entering into arrangements

### Section 23 of the PGPA Act - power in relation to arrangements

- (1) The accountable authority of a non-corporate Commonwealth entity may, on behalf of the Commonwealth:
  - (a) enter into arrangements relating to the affairs of the entity; and
  - (b) vary and administer those arrangements.
- (2) An **arrangement** includes a contract, agreement, deed or understanding.

***Amendments to be included to provide power to approve commitments***

### Guidance - entering into arrangements

55. Relevant money becomes 'committed' when the Commonwealth or a corporate Commonwealth entity enters into an arrangement under which money is, or may become, payable. The power for Commonwealth entities to enter into, vary or administer an arrangement is derived from the Constitution and/or Commonwealth legislation.
56. This power is usually delegated to officials within entities (or, alternatively, officials are authorised to exercise this power) to enable them to enter into, vary or administer arrangements of behalf of the entity. Officials need to be aware of the requirements in the *Commonwealth Procurement Rules* and the *Commonwealth Grant Rules* before entering into a procurement or grant arrangement.

### Entering into arrangements by Corporate Commonwealth entities

57. Corporate Commonwealth entities are legally separate from the Commonwealth and can act on their own behalf in exercising certain legal rights, such as entering into contracts. Corporate Commonwealth entities are normally given the authority to enter into contracts through their enabling legislation, or by virtue of their separate legal personality. Officials of a corporate Commonwealth entity should only enter into an arrangement on behalf of the entity where they have been properly authorised to do so (in some cases they may be delegated specific powers under the entity's enabling legislation that allow them to do so).

### Entering into arrangements by non-corporate Commonwealth entities

58. Non-corporate Commonwealth entities are part of the Commonwealth for legal purposes. They act on behalf of the Commonwealth and their actions are regarded as actions of the Commonwealth for legal purposes.
59. Section 61 of the Constitution supports the executive government entering into (and also varying and administering) arrangements for the ordinary and well-recognised functions of the government<sup>1</sup>. Under section 23 of the PGPA Act, the accountable authority of a non-corporate Commonwealth entity can enter into, vary and administer arrangements of this type on behalf of the Commonwealth, to the extent that the arrangements relate to the

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<sup>1</sup> This is the term used in *Williams v Commonwealth* [2012] HCA 23. The term 'ordinary services and functions of government' is also used in this guide.

affairs of the entity. An accountable authority of a non-corporate Commonwealth entity can delegate this power to officials (see section 110 of the PGPA Act).

60. 'Administering' an arrangement in this context includes making payments pursuant to that arrangement. Section 23 of the PGPA Act defines an 'arrangement' to include a contract, agreement, deed or understanding. This definition is broad and covers contracts as well as any other instruments between private parties that create rights and obligations. Examples of the range of agreements captured by section 23 include, memoranda of understanding (either between Commonwealth entities or between governments), standing offers and grant agreements.
61. The types of arrangements that an accountable authority of a non-corporate Commonwealth entity (or a delegate) would enter into relying on section 23 are arrangements for the ordinary services and functions of government. The types of arrangements include:
- public servant salaries and allowances
  - procure things for the purposes of running the entity (such as, stationery, furnishings, Information Technology (IT), electricity and other utilities, rent, travel, vehicles, subscriptions or attending conferences)
  - engage and pay contractors, provided they are engaged in the ordinary activities of the entity (such as, IT consultants and contractors engaged to perform research for the entity)
  - legal, accounting and other professional services required by the entity.
62. In some circumstances legislation (such as, section 32B of the *Financial Management and Accountability Act 1997*) may expressly authorise the Commonwealth to enter into particular arrangements and engage in related expenditure for other purposes (i.e. for purposes other than the ordinary services and functions of government). Where legislation other than the PGPA Act authorises the Commonwealth to enter into and administer arrangements, in some cases, delegations may need to be made under that other legislation to allow officials within an agency to perform these functions.
63. The phrase 'arrangements relating to the affairs of the entity' in section 23 is intended to be read in broad terms. The Government will generally expect entities to work cooperatively in a range of areas, including the implementation of whole-of-government policies. For example, this might include one entity entering into a contract on behalf of the Commonwealth, where the services can be accessed by other entities, such as occurs currently, through the Department of Finance in relation to the leasing of vehicles. There may also be occasions when entities decide cooperatively to share an arrangement that allows the inclusion of other entities.
64. Similarly, a Department of State may need to work closely with other entities in the same portfolio. This is particularly the case in relation to formation, dissolution or change processes for portfolio entities generally, when Departments may legitimately obtain goods or services on behalf, or in anticipation, of the requirements of a portfolio entity.
65. Moreover, some entities will be required, by their nature, to deal with contracts and payments on behalf of other entities. In these cases, arrangements might also be established to reimburse the agency bearing the initial costs of such contracts.

#### Summary

To meet the obligation under section 23 the PGPA Act, an official *must* have the appropriate delegation to enter into an arrangement.

In meeting this obligation the official *should* seek to confirm that approval for a proposed commitment of relevant money has been given before the arrangement is entered into.



# Resource Management Guide No. <XX>

## General duties of officials

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# Resource Management Guide No. <XX> (Arial 21)

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## General duties of officials

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### Audience

This guide is relevant to officials of Commonwealth entities, both corporate and non-corporate.

### Key points

- Sections 25 to 29 of the *Public Governance Performance and Accountability Act 2013* (PGPA Act) set out the general duties that apply to the officials of all Commonwealth entities particularly in their management and use of public resources.
- The duties imposed by section 13 of the *Public Service Act 1999* (PS Act), being the APS Code of Conduct, are broader in scope than the general duties that apply to officials and therefore adherence with the APS Code of Conduct will ordinarily meet the requirements of the duties under the PGPA Act.
- Sections 30 to 32 of the PGPA Act set out provisions on the termination of appointment of certain members of accountable authorities of Commonwealth entities who contravene the general duties and explain how the duties interact with other laws.

### Resources

[Related guidance](#)

[Factsheets](#)

[Contact information](#) <add details>

## Part 1 – Summary

1. Each Commonwealth entity has officials. They include employees, officers or members of an entity. These officials are employed under numerous employment frameworks, which include administrative personnel, uniformed service personnel, federal police, customs officers, park rangers, postal workers, camera operators or scientists. Some are chief executives, or members of boards; others are in administrative or support roles. All officials have a set of general duties that they must meet, as individuals, under the PGPA Act.
2. The PGPA Act includes requirements for the governance, reporting and accountability of Commonwealth entities, including corporate and non-corporate Commonwealth entities and Commonwealth companies, for their use and management of public resources. The PGPA Act supports the efficient, effective, economical and ethical use of public resources both at the entity level and throughout the Commonwealth generally.<sup>1</sup> Collectively, the PGPA Act, the rules and any instruments made under the PGPA Act, and any appropriation Acts are known as the finance law.<sup>2</sup>
3. The public resources used by a Commonwealth entity—most obviously the money and the property that it holds—are handled and managed by officials and subject to management by officials. The PGPA Act establishes some key principles about how public resources should be used, and requires that the chief executive or board of each Commonwealth entity (called the ‘accountable authority’ under section 12 of the PGPA Act) puts in place appropriate systems of internal control to ensure that public resources are managed and used properly (section 16).
4. Under section 16 of the PGPA Act, accountable authorities are required to implement measures directed at ensuring that the officials of the entity comply with the finance law. Officials who do not comply can be subject to sanctions, including termination of employment (for staff) or termination of appointment (for board members or office holders).<sup>3</sup>
5. This guidance covers the general duties of all officials under the PGPA Act. There are five general duties, which are set out in sections 25 to 29 of the PGPA Act. They are:
  - a duty of care and diligence
  - a duty to act in good faith and for a proper purpose
  - a duty in relation to use of position
  - a duty in relation to use of information
  - a duty to disclose interests.
6. This guide explains each of these five general duties and how they apply to officials. The information in this document may be supplemented with other guidance or requirements issued by an accountable authority in relation to its officials.

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<sup>1</sup> Four guiding principles underpin the design of the Act:

Government should operate as a coherent whole.

A uniform set of duties should apply to all resources handled by Commonwealth entities.

Performance of the public sector is more than financial.

Engaging with risk is a necessary step in improving performance.

<sup>2</sup> The finance law is defined by section 8 of the PGPA Act and includes measures to ensure that the Commonwealth Government is accountable for its use and management of public resources to the Parliament and people of Australia.

<sup>3</sup> Note 1 to section 16 and notes 1 and 2 to section 32 of the PGPA Act explain the sanctions that apply to officials in general and those employed under the *Public Service Act 1999* or the *Parliamentary Service Act 1999*. Section 30 deals with the termination of appointees of a corporate Commonwealth entity.

7. These general duties applying to officials in the PGPA Act provide a uniform set of expected behaviours that covers all officials in meeting high standards of governance, performance and accountability.
8. These duties are in addition to any other legal duties that an official may have under their employment framework or through an employment contract. For example, these duties are similar to elements of the APS and Parliamentary Service Codes of Conduct set out in section 13 of the PS Act and section 13 the *Parliamentary Service Act 1999*. The *Defence Force Discipline Act 1982* and the *Australian Federal Police Act 1979* also allow for duties, values or professional standards of employment to be set. These duties need to be upheld.
9. Around half of the officials subject to the PGPA Act are also subject to the PS Act. The table at [Attachment A](#) sets out the legislative requirements and the subtle differences between the duties in the PGPA Act and the Code of Conduct prescribed by section 13 of the PS Act.<sup>4</sup>
10. Accountable authorities may wish to refer to *Resource Management Guide No. XX: Duties of accountable authorities*, which provides guidance on the duties applicable to accountable authorities under sections 15 to 19 of the PGPA Act.

## Part 2 – Introduction

11. The Commonwealth Government is a diverse collection of departments of state, statutory agencies, business operations, companies, councils, research and broadcasting organisations, regulators, cultural institutions and other types of bodies. Some are corporate in nature, others are non-corporate in nature. Collectively, they are called ‘Commonwealth entities’.
12. Under section 13 of the PGPA Act, each Commonwealth entity has officials. An official is defined as ‘an individual who is in, or forms part of, the entity’. Such an individual can be an officer, employee or member of the entity, or a person or member of a class of persons prescribed by the rules made under the PGPA Act to be an official. An official is also an individual who is, or is a member of, the accountable authority of the entity. So the general duties in the PGPA Act apply to everyone in the entity. Some individuals, however, are not officials. These include Ministers, judges and, unless prescribed otherwise in the rules to the PGPA Act, consultants and independent contractors.
13. Sections 25 to 29 of the PGPA Act place general duties and obligations on officials of Commonwealth entities. These are legal duties that require all officials to exhibit a minimum standard of behaviour in exercising their powers or performing their functions. To meet the obligations imposed by the duties, officials need to comply with the PGPA Act and its subordinate legislation, such as rules and delegations. The rules set the general requirements to be applied in specific circumstances, like handling and spending relevant money.
14. Officials should also have regard to general guidance about the PGPA Act and rules issued by the Department of Finance and specific guidance issued by the entity in which they work.
15. The general duties that the PGPA Act places on officials are similar to the ones that apply to directors under the *Corporations Act 2001*, in that they promote high standards of governance, performance and accountability. The similarity of duties for the management of resources across the private and public sectors is aimed at helping *government to join up* with other sectors in delivering public programs and services.

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<sup>4</sup>. See APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads(see <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice>)

## Part 3 – Duty of care and diligence

Section 25 of the PGPA Act states:

- (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.

16. Section 25 of the PGPA Act requires all officials of Commonwealth entities to undertake their employment roles with the same degree of care and diligence that a reasonable person would exercise if they were an official of the entity. This requirement is similar to the requirement under the APS Code of Conduct that an APS employee 'act with care and diligence in connection with APS employment'<sup>5</sup>.
17. The Corporations Act applies a duty to directors of private sector corporations to 'exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise' (section 180(1)).
18. The reasonable person test in section 25 of the PGPA Act mirrors similar duties in common law and the Corporations Act. The applicable standard of care will depend on the particular circumstances and the role and responsibilities of the official involved. Accordingly, officials who behave reasonably in performing their roles, given the relevant circumstances, will comply with the PGPA Act.
19. For example, in the case of high-risk activities or decision-making processes such as engaging in significant business contracts with third parties, officials should exercise more caution to inform themselves of all the circumstances in order to make a reasonable decision.<sup>6</sup>
20. Section 25 of the PGPA Act requires an official to behave as a reasonable person would under the same or similar circumstances. Under the common-law reasonable person test, the key consideration is whether a person has taken reasonable steps, given the circumstances, to assess the consequences of their actions. Taking such steps requires the person to be appropriately informed, capable, aware of the law, and fair-minded.
21. In common law, a reasonable person will weigh all the following factors before acting:
  - the foreseeable risk of harm their actions create versus the utility of the actions
  - the extent of the risk so created
  - the likelihood that the risk will actually cause harm to others
  - any alternatives of lesser risk, and the costs of those alternatives.
22. For example, these factors would need to be taken into account in considering use of relevant money under the PGPA Act. The rule made under the PGPA Act for the commitment and expenditure of relevant money provides principles specific to the activity of committing or spending relevant money. To show that they have acted with care and diligence, officials

<sup>5</sup> There is also a similar provision in the Parliamentary Service Code of Conduct in the *Parliamentary Service Act 1999*.

<sup>6</sup> *ASIC v Lindberg* [2012] VSC 332.

spending relevant money will need to ensure that they have at least had due regard to guidance issued by the Department of Finance and their entity's internal procedures.

23. Likewise, the rule on banking of relevant money on receipt describes the general requirement for banking money promptly and when there might be exceptions to that requirement. Again, officials will need to ensure that they understand and have had due regard to guidance issued in relation to banking money to show that they have carried out their duties with care and diligence.

#### Case study

George is the lead manager of a high-value procurement process that involves his entity entering into a contract with a private sector company. While on the internet one night at home, George visits the blog of an environmental group that he often visits that details allegations of serious environmental breaches against the private sector company. The company has not been charged with any offence as yet, but the blog says that investigations are ongoing.

**Appropriate action:** Despite the nature and source of the information, George should investigate the allegations commensurate with the level of risk that this issue poses to his entity. George will also need to ensure that any particular course of action is not inconsistent with the Commonwealth Procurement Rules or pose unreasonable contractual risks to the entity. He should document his assessment, ensuring a clear audit trail, and communicate all relevant information to the accountable authority.

24. Examples of not exercising care and diligence could be:
- not taking reasonable steps to inform yourself about an issues significance before making a decision
  - knowingly performing actions that are inconsistent with statutory obligations
  - undertaking an unfamiliar task without checking legislative requirements, related guidance and the entity's operational guidelines.

## Part 4 – Duty to act in good faith and for a proper purpose

Section 26 of the PGPA Act states:

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.

25. To 'act in good faith and for a proper purpose' means that officials must act in a sincere or honest way for a purpose that they are employed to do and empowered to undertake. In doing so, an official is required to manage or use public resources in a proper manner. Section 8 of the PGPA Act defines 'proper' as 'efficient, effective, economical and ethical'.
26. Whether an action has been taken for a proper purpose is based on whether a reasonable person would have chosen the same course of action in the same circumstances. This is commonly known as the 'reasonable person' test.<sup>7</sup> In practice, an official could think of their duty to act in good faith and for a proper purpose, under section 26 of the PGPA Act, by considering whether an informed person would deem an action to be appropriate. This means that on balance the official is performing an action consistent with the aims and operations of the entity that would reasonably not be expected to result in a detriment.

<sup>7</sup> *Chew v R* (1992) 10 ACLC 816 at 647.

27. In contract law, the implied covenant of good faith is a general presumption that the parties will deal with each other honestly and fairly, so as not to destroy the right of the other party or parties to receive the benefit of the contract.
28. A similar provision to this duty is contained in PS Act which requires APS employees to 'behave honestly and with integrity in connection with APS employment'.

#### Case study

Sally is a newly appointed IT Asset manager in a Commonwealth entity, who has been approached by Lucy, one of her staff, to borrow a laptop projector to use for her daughter's slumber party over the weekend. Lucy advises Sally that the last IT Asset Manager regularly allowed staff to take the laptop projector home. She is also one of Sally's best employees and a very trustworthy person and has undertaken to cover costs in the event that the projector is damaged.

**Appropriate action:** Sally reviews the entity's guidelines on the use of entity assets, but it does not detail a policy on the personal use of assets by staff. However, the guidelines do require the proper use and management of all entity assets. On the balance Sally declines Lucy's request considering it to not be within the spirit of the proper use and management of the entity's asset, despite there being precedence. Sally also takes time to explain to Lucy reasons for refusing her request.

29. Examples of not acting in good faith and for a proper purpose could be:
- providing information to a person in a way that intentionally deceives or misleads them
  - undertaking an activity that is outside the powers and functions of the entity
  - purporting to have authority to approve something when you knowingly do not
  - withholding relevant information with the intent to influence the decision of a delegate.

## Part 5 – Duty in relation to position

Section 27 of the PGPA Act states:

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.

30. Officials must not improperly use the power conferred through their positions to gain an advantage for themselves or for another person, or cause detriment to the Commonwealth entity that employs them, to the Commonwealth more broadly or to any other person. An official contravenes this duty when engaging in conduct with the intention and purpose of obtaining an advantage or causing detriment, regardless of whether the benefit or detriment actually occurs.
31. Misusing a position can include using the entity's property or information or taking advantage of opportunities that arise by virtue of employment with the entity.<sup>8</sup> These are advantages that an outside person would not have access to.
32. The term 'position' includes a permanent or temporary work assignment, the powers or functions that have been delegated to an official, or the duties an official has been properly authorised to undertake on behalf of another official or the general status that is associated

<sup>8</sup> *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.



with being an official. While important to all officials, this duty becomes increasingly relevant to officials who hold senior management positions.

33. The term 'advantage' has a wide meaning and includes both financial and non-financial advantages, such as providing favourable treatment to a person during a procurement tender or recruitment process. Like the term advantage, 'detriment' is given a wide interpretation. The concept of causing detriment to an entity, the Commonwealth or another person recognises that an official might misuse their position either positively or negatively.
34. Misuse of a position may also involve a breach of the duty of care and diligence and the duty to act in good faith and for a proper purpose.
35. The Corporations Act, under section 182, places a duty on directors and employees of a company to deter them from improperly using their positions to gain an advantage for themselves or someone else. They must also not cause detriment to the company.
36. Courts applying the duty under the Corporations Act have held that it is sufficient to show that an action or omission was taken for the purpose of gaining an advantage or damaging the entity in order to demonstrate that an official was not acting in good faith.<sup>9</sup> In the PGPA Act, the concept of detriment extends more broadly to the Commonwealth. Accordingly, officials should behave in a manner that is consistent with the interests of the Commonwealth more broadly.
37. A similar provision to this duty is contained in the PS Act which requires an employee not to 'make improper use of inside information, or the employee's duties, status, power or authority in order to gain, to seek to gain, a benefit or advantage for the employee or for any other person'.

#### Case study

Anna is the finance manager of a government entity that is about to tender to engage an accounting firm to assist with an internal audit. While in Melbourne she had a coffee meeting with Greg, a potential tender applicant, Anna insisted on paying for the coffees. While walking back to their cars after coffee, it starts to rain. Greg's car is not far away and Anna's car is 3 blocks down the road. Greg offers Anna his umbrella, which has his accounting firm branded on it and says that she may as well keep it as he has about 20 of them back at the office.

**Appropriate action:** While Anna would love to accept the umbrella and stay dry, she is concerned that by receiving and using the umbrella it might be perceived within her entity and externally that she has been favourably influenced by the tender applicant. There are a number of possible actions available to Anna, possible actions include:  
1) Anna accepts the loan of the umbrella, but returns it promptly through the post; or  
2) Anna considers the risks associated with accepting the gift and instead suggests that they walk to Greg's car and he gives her a lift to her car.

38. Examples of misuse of position could be:
  - an official using their official title to seek a discount that benefits them personally
  - on behalf of the entity, entering into a contract for the provision of goods or services with a family member or friend, without disclosing the potential material personal interest
  - using Commonwealth resources for personal purposes without explicit approval.

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<sup>9</sup> *ASIC v Adler* (2002) 20 ALC 576.



## Part 6 – Duty in relation to information

Section 28 of the PGPA Act states:

A person who obtains information because they are an official of a Commonwealth entity must not improperly use the information to:

- (a) gain an advantage for himself or herself or any other person; or
- (b) cause detriment to the Commonwealth entity, the Commonwealth or any other person.

39. An official must not improperly use information accessed, gained or made available by virtue of their employment or position with a Commonwealth entity to gain an advantage for themselves or for another person, or cause detriment to the Commonwealth entity that employs, or previously employed, them, to the Commonwealth more broadly or any other person.
40. An official contravenes this duty when they engage in conduct involving information gained through their employment with the express intention of obtaining an advantage or causing detriment, regardless of whether the benefit or detriment actually occurs. An official would also breach this duty if they gave information to a third party who was not entitled to have the information and who gained an advantage or caused detriment because they had the information.
41. Misuse of information may also involve a breach of the duty of care and diligence, the duty to act in good faith and for a proper purpose, and the duty in relation to the use of position.
42. The Corporations Act, under section 183, places a duty on directors and employees of a company who obtain information due to their employment by the company not to use the information in a way that causes detriment to the company. The aim of the section is to deter them from improperly using that information to gain an advantage for themselves or someone else.
43. The APS Code of Conduct also requires an 'APS employee to not make improper use of ... inside information in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person'.<sup>10</sup>
44. There are secrecy provisions in other legislation applying to the work of particular agencies, For example, Sections 191,200A and 193S of the *Aboriginal and Torres Strait Islander Act 2005* places secrecy requirements on certain officials. Relevant officials need to be aware of these statutory requirements and the obligations imposed on them.

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<sup>10</sup> Regulation 2.1 of the Public Service Regulations places a duty on APS employees not to disclose information that could be prejudicial the government.

### Case study

Shaun works for a Commonwealth entity and meets John, at a friend's barbeque. John and Shaun start talking about what they do for a living. Shaun mentions that he is busy because he is working on the government's climate change policy. John tells Shaun that he runs a small renewable energy company that is keen to access the government's climate change funding. John asks Shaun if he knows if the government is going to have programs that will help companies like his.

**Appropriate Action:** Shaun advises John that he is unable give him any details because it is information that is confidential to Government and has not been publicly released. By doing this, Shaun recognises that revealing any information gained through his role working on the climate change policy may result in John gaining an advantage over others and therefore a benefit. However, consistent with the Minister's media release Shaun advises John that information on the government's program will be launched on the entity's website in the coming weeks.

45. Examples of misuse of information could be:

- leaking financial information to the media
- using protected financial data held by a government entity for personal financial gain
- providing information to a person or company that gives, or potentially gives, that person or company a competitive advantage in a procurement tender.

## Part 7 – Duty to disclose interests

Section 29 of the PGPA Act states:

- (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.
- (2) The rules may do the following:
  - (a) prescribe circumstances in which subsection (1) does not apply;
  - (b) prescribe how and when an interest must be disclosed;
  - (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).

46. Section 29 and the associated rule (which is at Attachment A) place an obligation on officials to report relevant material personal interests in relation to the affairs of the entity they work for. This could directly related their personal role, or, broader, in relation to the overall purpose of the entity.

47. The rule on the duty to disclose material personal interests requires the following:

### **For single-member accountable authorities**

- The official needs to report the interest in writing to the responsible Minister.

### **For officials that are members of multi-member accountable authorities**

- The official needs to report the interest to the other members of the accountable authority and ensure the interest is recorded in the minutes of the next meeting.
- If the matter in which the official has an interest is being considered as part of a meeting then the official must not be present unless the members (in the minutes to the meeting) or, where appropriate, the Minister (in writing) has approved for the relevant member to be present and any conditions regarding that approval.

### **For officials that are not part of the accountable authority**

- The official needs to report the interest in writing in accordance with the requirements established by the accountable authority.
48. The overriding principle for a declaration of interest should be: if in doubt, declare the interest in accordance with the appropriate process. Taking this step should stand up to scrutiny if a query arises.
49. There is extensive case law under the Corporations Act about material personal interests involving directors. The key question is whether a director can bring an independent mind to bear on a matter, or whether the conflicting interest or duty is so significant as to divide their loyalties.
50. The Corporations Act, under section 191, requires directors of a company who have a material personal interest in a matter that relates to the company's affairs to disclose that material personal interest to other directors. The interpretation of the phrase 'the company's affairs' is broad. As a result, if there is any uncertainty around an issue relating to the affairs of the company then disclosure of the potential material personal interest is the safest behaviour.<sup>11</sup>
51. A similar provision to this duty is contained in the PS Act which requires an employee to 'disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in

#### **Case study**

Juhan is on a panel that is assessing the procurement tenders for his entity's new cleaning contract. One of the tenders, John, is a parent of one of Juhan's son's classmates. Juhan does not socialise with John other than brief conversations at school events. Juhan is only one of several people on the panel and has limited ability to influence the panel's decision. Members of the panel do not know that an applicant is known to Juhan and there is little chance of them finding out.

**Appropriate action:** Consistent with the procedures issued by the entity's accountable authority, Juhan discloses the relationship in writing to the chief executive of his agency. Juhan offers to exclude himself from the discussion on the merits of John's tender application. This disclosure also mitigates the risk of perceived conflict of interest if Juhan develops a friendship with John in the future.

connection with APS employment.'

52. Material personal interests could arise, for example, when:
- a member of an accountable authority is also a director of an organisation that is seeking to provide services to the Commonwealth entity
  - an official is on an employment selection panel that is interviewing a friend or family member for a position with the Commonwealth entity
  - an official approving or recommending the approval of a grant is directly or indirectly involved with an organisation seeking the grant.

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<sup>11</sup> Cassidy, J, *Corporations Law Text and Essential Cases*, p 28.

## Part 8 – Termination of appointments for contravening general duties of officials

Section 30 of the PGPA Act section states:

- (1) A person (the appointer) may terminate the appointment of another person (the appointee) in relation to a corporate Commonwealth entity if:
  - (a) the appointer holds the position that is responsible for appointing the appointee; and
  - (b) the appointee is, or is a member of, the accountable authority of the entity; and
  - (c) the appointee contravenes Subdivision A in relation to the entity; and
  - (d) the termination is in accordance with any requirements prescribed by the rules.
- (2) The appointer terminates the appointment by giving the appointee a written notice signed by the appointer.
- (3) The notice must include a statement of reasons for the termination.
- (4) The appointer must cause a copy of the notice to be tabled before each House of the Parliament within 15 sitting days of that House after the day the appointer gives the notice to the appointee.
- (5) Without limiting paragraph (1)(d), the rules may prescribe positions in relation to which appointments must not be terminated under this section.
- (6) This section applies despite any provision in any enabling legislation for a corporate Commonwealth entity that provides for the termination of the appointment of a person in relation to the entity, but does not limit any such provision.

53. Section 30 of the PGPA Act provides for the termination of officials of Commonwealth entities who are members of an accountable authority if they breach the duties set out in sections 25 to 29. The person that has the power to appoint the official also has the power to terminate their employment for breaches of their general duties.

54. Secretaries of departments and APS employees who are part of an accountable authority may only have their appointment or employment terminated in accordance with sections 59 and 29 of the PS Act respectively.

## Part 9 – Interaction between the PGPA Act and other laws

Section 31 of the PGPA Act section states that sections 25 to 29 do not limit:

- (a) a law of the Commonwealth, or any principles or rules of the common law or equity relating to:
  - (i) the duty or liability of a person because of his or her position or employment in relation to a Commonwealth entity; or
  - (ii) conflicts of interest; and
- (b) any provision in any enabling legislation for a Commonwealth entity that restricts an official of the entity from:
  - (i) having a material personal interest in a matter; or
  - (ii) holding an office or possessing property;involving duties or interests that conflict with his or her duties or interests as an official.

55. Section 31 of the PGPA Act makes it clear that the general duties under sections 25 to 29 do not limit duties contained in other Commonwealth laws or any principles or rules of common law or equity. This provision ensures that duties contained in the PS Act, an entity's enabling legislation and employment contracts are not displaced by the PGPA Act duties.

## Part 14 – Officials under the Public Service Act or Parliamentary Entitlements Act

56. To avoid doubt finance law is an Australian law for the purposes of subsection 13(4) of *Public Service Act 1999* and subsection 13(4) of the *Parliamentary Service Act 1999*. This means that if the official contravenes the finance law, sanctions (such as termination of employment) may be imposed under section 15 of the relevant Act (i.e. the *Public Service Act 1999* or the *Parliamentary Service Act 1999*).

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### Complementary duties between the PGPA Act and the *Public Service Act 1999* (PS Act)

A significant portion of officials have obligations under the PS Act. The PS Act has a broader scope when it comes to the duties, but the PGPA Act is more specified in law regarding standards of governance, performance and accountability across all Commonwealth entities. Given the breadth of the relevant legislative provisions of the PS Act, if officials meet the requirements of the PS Act they will as a result ordinarily meet their duties under the PGPA Act. There are however some additional requirements which are outlined in the table below.

The Australian Public Service Commissioner has issued directions and associated guidance material about the responsibilities that apply to Australian public service employees and office holders under the PS Act, particularly the APS Values and Code of Conduct. For APS Employees, this guidance should be read in conjunction with the Australian Public Service Commissioner's guidance on the APS Code of Conduct.

Duty	PGPA Act	PS Act*	Complementary duties
Care and diligence	25	13(2)	<p>The PS Act requires an APS employee to act with care and diligence in connection with APS employment.</p> <p>The PGPA Act effectively extends this to all officials (who may or may not be APS employees) <b>and specifies the standard to be that which a reasonable person would exercise.</b></p>
Good faith and proper purpose	26	13(1) & 13(8)	<p>The PS Act requires an APS employee to behave honestly and with integrity and to use resources in a proper manner.</p> <p>The PGPA Act effectively extends this to all officials (who may or may not be APS employees).</p>
Use of position	27	13(10)(b)	<p>The PS Act prohibits an APS employee from making improper use of 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>The PGPA Act effectively extends the prohibition to all officials (who may or may not be APS employees) <b>and prohibits the official from using their position improperly to cause detriment to the entity, the Commonwealth or any other person.</b></p>

Use of information	28	13(10)(a)	<p>The PS Act prohibits an APS employee from making improper use of inside information in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.</p> <p>The PGPA Act effectively extends the prohibition to all officials (who may or may not be APS employees) <b>and prohibits the official from improper use of information to cause detriment to the entity, the Commonwealth or any other person.</b></p>
Disclosure of interests	29	13(7)	<p>The PS Act requires an APS employee to disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.</p> <p>The PGPA Act effectively extends this to all officials (who may or may not be APS employees) <b>and makes disclosure subject to a materiality test.</b></p>