

## The Bill in-principle

### Overview

- 3.1 The purpose of the Joint Committee of Public Accounts and Audit's (JCPAA's) inquiry was to identify and address matters surrounding the Public Governance, Performance and Accountability Bill 2013. With the limited time remaining within the current parliament, the Committee remained focused on the higher end, and some of the principles involved, essentially testing whether 'there's enough meat on the bones for us, as a parliament, to have confidence to progress'.
- 3.2 While Chapter 4 focuses on some of the more specific areas of impact, this Chapter examines the overarching principles and broader issues that resonate across this Bill and Parliament more generally that were raised throughout the Committee's inquiry process. These include:
- The development of the Bill
    - ⇒ The motivation for change
    - ⇒ Jurisdictional comparisons
  - The concept of principles-based legislation
    - ⇒ Development of the underlying rules
    - ⇒ Consequences of not progressing the legislation.

## Developing the Bill

- 3.3 As described in Chapter 2, the Public Governance, Performance and Accountability Bill is the result of work undertaken through the Commonwealth Financial Accountability Review (CFAR).
- 3.4 Over the course of the last two years, Finance has provided the JCPAA with regular updates on the CFAR process, and since the referral of the Bill to the Committee has provided a detailed submission, appeared before the Committee and provided supplementary submissions to address outstanding concerns raised by witnesses during the hearing. The Minister for Finance and Deregulation has reinforced this consultation and provided documentary support including a submission to the Committee following the public hearing.
- 3.5 In addition to keeping the Committee updated, Finance has gone to some length to ensure broad stakeholder consultation throughout the CFAR process and more recently in the drafting the Bill and Explanatory Memorandum. Finance's submission detailed the most recent consultation rounds, including listing agencies that had been consulted, advising that the draft Bill and Explanatory Memorandum had been issued to all the portfolio departments and agencies throughout the drafting process, and that independent legal advice had been sought.<sup>1</sup>
- 3.6 Comments during the hearing supported Finance's view that they had undertaken extensive consultation and had been readily available to discuss issues of concern throughout the process. The CAC Act agencies that appeared before the Committee acknowledged Finance's open consultation process and willingness to take on board feedback and in a number of cases make amendments or provide additional assurances to mitigate concerns.<sup>2</sup>
- 3.7 The Auditor-General also noted his appreciation of Finance's efforts to engage with the Australian National Audit Office, though did express some concern that there were some entities that had not had the opportunity to examine the Bill.<sup>3</sup>

By consulting broadly and openly, you flush out the issues, you understand where the risks are and you can deal with them. My concern with the more limited consultation process with respect to the draft legislation – not the earlier work that Finance has done – is that there are conceivably issues there that have not been

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1 Department of Finance and Deregulation (Finance), *Supplementary Submissions 9.1 and 9.2*.

2 *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 16–21.

3 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 12.

highlighted and which desirably would be dealt with had we had more time.

... I would like the CEOs and the directors and others to have an opportunity to buy into that debate a bit more strongly to get confidence that it will work for them.<sup>4</sup>

- 3.8 In addition to Commonwealth entities, external stakeholders including UnitingCare and the Institute of Chartered Accountants commended Finance on their engagement over the last twelve months or more.<sup>5</sup>

## The motivation for change

- 3.9 According to the Explanatory Memorandum, 'the current framework is not broken but it creaks at times'.<sup>6</sup> Describing the proposed new framework as evolutionary, the Finance Secretary explained that the current system whereby bodies are categorised as either CAC or FMA Act entities no longer supports the 'operational diversity of the Commonwealth'. He further suggested the existing framework is impacting productivity, limits cooperation across agencies and does not give sufficient emphasis to risk management or measuring and monitoring performance.<sup>7</sup>
- 3.10 The Institute of Chartered Accountants commended Finance for the work that had been undertaken to date as part of the CFAR review, and put forward that that there is broad-based support for Finance's proposed single Act:
- The consensus has been in our view that whilst the delineation between the two classifications of entities has historically been appropriate, and that it certainly is not broken, such an approach should not be a feature of the evolution of the proposed new governance arrangements that are put forward as part of this bill.<sup>8</sup>
- 3.11 Both the Auditor-General and the Public Service Commissioner declared that they had been around at the establishment of the FMA and CAC Acts.<sup>9</sup> The Auditor-General explained that the creation of the two Acts had

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4 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 14–16.

5 *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 16–21.

6 Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (PGPA Bill 2013), p. 3.

7 Mr David Tune, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 1–2.

8 Mr Yasser El-Ansary, Institute of Chartered Accountants, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 28.

9 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 13; and Mr Stephen Sedgwick, Public Service Commissioner, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 33.

provided an opportunity to 'tighten the lens more on the nature of particular organisations'. However, he also acknowledged the downside is that there are some 'umbrella issues' common to all Commonwealth entities.<sup>10</sup>

- 3.12 The Public Service Commissioner indicated his strong support for the proposed consolidated legislative framework, and particularly the opportunity to move to an earned autonomy model and '[move] the FMA out of a transactional focus into one that is more a principle space'. Yet, the Commissioner suggested more could be done to reduce duplication, including with the *Public Service Act 1999*.<sup>11</sup>

### Jurisdictional comparisons

- 3.13 To understand the impetus to move from the existing financial framework to the new model outlined in the Bill, the Committee asked whether drafting was based on empirical evidence, and what jurisdictional comparison had taken place in the preparation of this Bill.

- 3.14 Finance drew attention to the Explanatory Memorandum and other relevant publications that reference their examination of legislation in other jurisdictions, including the US, the UK and other states and territories. Finance explained that:

...we have been able to talk through with the relevant jurisdictions what their experience has been. We have empirically looked at who does what elsewhere, how they do it and what their experience with that has been. One of the precise reasons we talked to all except one Auditor-General in Australia was to get a perspective which is not just the perspective of the people who, if you like, administer something but the perspective of the people who have to audit it.<sup>12</sup>

- 3.15 In addition to examining other jurisdictions, Finance advised that they had taken the opportunity to review requirements placed on the public sector, through for example the Australian Stock Exchange and the duty on risk – the principles around governance and the standards.<sup>13</sup>

- 3.16 Finance also pointed out that in one area the Bill will allow the Commonwealth to catch up with other jurisdictions, and that this 'is around the inclusion of the requirement to prepare financial statements in

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10 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 13.

11 Mr Stephen Sedgwick, Public Service Commissioner, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 33.

12 Dr Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 25-26.

13 Mr George Sotiropoulos, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 26.

accordance with accounting standards'. Finance indicated the benefit as increased independence of the standard setter, instead of relying on the Finance Minister's rules to determine standards.<sup>14</sup>

- 3.17 The CPA commended the move to include provisions in the Bill requiring compliance with independent accounting standards, which are defined in the Bill as those issued by the Australian Accounting Standards Board.

We believe that the operation of a transparent government reporting regime benefits the Australian economy.<sup>15</sup>

- 3.18 The Australian Information Commissioner advised that while the initial CFAR discussion paper included strong remarks on 'aligning financial accountability to transparency and open government principles', the Bill and supporting information have not included explicit reference.

The importance of drawing that link to broader open government initiatives is reinforced by the announcement this week by the Attorney-General that Australia will join the Open Government Partnership, which is a multilateral partnership of 57 nations that promotes transparency in government. One of the four eligibility criteria to join the international partnership relates to fiscal transparency, to be assessed according to criteria published by the International Budget Partnership.<sup>16</sup>

- 3.19 The Information Commissioner suggested amending the Explanatory Memorandum to include an explicit link between the framework and open government initiatives.<sup>17</sup> The Committee has provided support for this in a recommendation in Chapter 5 of this report.

## Principles-based legislation

- 3.20 In the Second Reading speech the Hon David Bradbury MP, Assistant Treasurer and Minister Assisting for Deregulation, advised the Parliament that this Bill 'would, as far as practicable, apply a consistent principles-based framework to all Commonwealth entities'. He went on to outline the principles as follows:

- Government should operate as a coherent whole

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14 Mr George Sotiropoulos, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 26.

15 CPA Australia, *Submission 5*, p. 1.

16 Professor John McMillan, Australian Information Commissioner, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 11.

17 Professor John McMillan, Australian Information Commissioner, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 11.

- Public resources are public resources, and a common 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>18</sup>
- 3.21 Minister Bradbury described the Bill as ‘the first step in modernising the public sector’, and explained that once this legislative framework is in place... ‘the government will progressively introduce the rules required to give effect to a number of provisions’.<sup>19</sup>
- 3.22 In his opening statement to the Committee, the Secretary of the Department of Finance and Deregulation acknowledged concerns raised by a range of stakeholders, including the Committee, about the ‘lack of visibility of the rules’. The Secretary suggested that the decision to produce a Bill based on principles aligns with the preferences of the ‘parliamentary drafters’, and was seen as an opportunity to get the Parliament’s endorsement prior to developing the rules.<sup>20</sup>
- 3.23 While the Auditor-General held the Bill as having ‘honourable objectives’ and ‘some significant improvements’, he advised the Committee that he could provide only measured support for the Bill due to having no visibility of the complementary rules.<sup>21</sup>
- 3.24 The Auditor-General referred the Committee to his submission, bringing attention to his view that there are some provisions that could be further improved. On this basis, he suggested that if the Bill was to progress in the current truncated timeframe, it is likely that amendments will be required before the Bill comes into effect. Overall, the Auditor-General suggested that:
- ...if circumstances were different, I would prefer to have more time and to allow the committee to have more time to consider this legislation in a little more detail before it put its weight behind it.<sup>22</sup>

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18 The Hon David Bradbury MP, Assistant Treasurer and Minister for Deregulation, Second Reading Speech, *House of Representatives Hansard*, 16 May 2013, pp. 9-10.

19 The Hon David Bradbury MP, Assistant Treasurer and Minister for Deregulation, Second Reading Speech, *House of Representatives Hansard*, 16 May 2013, p. 11.

20 Mr David Tune, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 2.

21 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 11.

22 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 11-12.

- 3.25 This same concern over the time allowed for consideration of the Bill and lack of clarity on the rules was echoed by a number of witnesses from Commonwealth entities that appeared before the Committee.<sup>23</sup>

...the time frame for the consideration of the draft legislation has been overly condensed... we have some concerns around not having any visibility to date of the rules... These rules will have significant operating implications for SBS. (Mr John Torpy, SBS)

The high-level legislation generally does not present any significant concerns; our point of interest is in the detailed arrangements (Ms Rhonda Adler, Australian War Memorial)

...the devil is in the detail; once the rules become apparent, that is where the rubber hits the road. (Mr David Perceval, National Gallery Australia)

...the reservation we have about the haste is around clarity on the rules (Mr David Pendleton, ABC)

Our primary concern is the rules are not yet finalised ...as they emerge, [the rules] could be better or worse for IBA. (Mr Fry, Indigenous Business Australia)

- 3.26 Likewise, a number of external commentators at the hearing expressed the importance of not rushing this legislation, and reaffirmed that the Committee, and the Parliament, should have sufficient time to examine the underlying rules and consider the broader implications.
- 3.27 Professor Jacobs expressed strong support for the overall objectives, but felt that there were areas such as 'earned autonomy' that needed more work, and that there were opportunities missed to take advantage of other work underway on standard business reporting.<sup>24</sup>
- 3.28 Mr Bartos noted the limited time the Committee had to consider the Bill and cautioned:

I do not think we can underestimate how important the legislation affecting the financial governance of all Commonwealth agencies is to the wellbeing of Australia. It is not something that I believe should be rushed.<sup>25</sup>

23 *Proof Committee Hansard*, Canberra, 24 May 2013, p. 16-21.

24 Professor Kerry Jacobs, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 27.

25 Mr Stephen Bartos, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 27.

- 3.29 Professorial Fellow Burmester queried whether there was substantial change and suggested:

If the bill does not lead to substantial change in financial administration, then there is no urgency to pass this bill. If there are substantial changes that are not obvious from the explanatory memorandum, and considering the importance of the legislation, the full package should be available for scrutiny by the committee.<sup>26</sup>

- 3.30 However, the Committee also heard from a range of stakeholders who strongly supported the early implementation of the Bill to ensure important gains are achieved as soon as possible.

- 3.31 The Institute of Chartered Accountants suggested that there is broad based support for the principles set out in this bill.

That broad based of support, in our view, reflects the fact that the direction being put forward will deliver the sorts of outcome that are so vitally important to ensuring that the Commonwealth public sector is able to continue to make a strong contribution to safeguarding the success and prosperity of this country over the coming years and decades.<sup>27</sup>

- 3.32 At the Senate Finance and Public Administration Committee Estimates hearing, the Minister for Finance and Deregulation suggested that of the options available, the preferential approach is to gain endorsement on a broader principles-based Bill and allow a consultation to take place over a period of time to finalise the operational aspects such as rules.<sup>28</sup>

- 3.33 Finance has since provided a supplementary submission outlining examples of where this has occurred in relation to primary legislation.<sup>29</sup>

## Development of the Rules

- 3.34 In referring the Bill, the House of Representatives Selection Committee asked the JCPAA to consider whether the Bill impacted on transparency or oversight. One aspect of particular concern is in relation to transparency of the rules underlying the legislation.

- 3.35 The Finance Secretary explained that while the rules would be used to provide 'breadth and depth' to the Bill, there are clear provisions identifying where it would be permissible to make rules. Further, he
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26 Professorial Fellow Bill Burmester, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 28.

27 Mr Yasser El-Ansary, Institute of Chartered Accountants, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 28.

28 Senate Finance and Public Administration Committee, *Senate Estimates Hansard*, 28 May 2013.

29 Finance, *Submission 18*, Attachment A.



explained that provisions had been made to ensure parliamentary oversight of the rules by including an explicit role for the JCPAA and though the rules being disallowable instruments.<sup>30</sup>

- 3.36 Following clarification that the ‘rules’ being referred to were in fact the same as what are currently referred to as ‘regulations’<sup>31</sup>, the Committee sought to confirm just how many different sets of rules might be forthcoming. The Committee also asked whether Finance could confidently state that in line with the Government’s ‘one-in, one-out’ policy that there would be no increase in regulation as a result of this process.
- 3.37 Describing the rules as one level of operationalisation of the Bill, Finance outlined the other supporting elements of the framework – the policies, procedures and guidelines – that ‘go to the things that people actually do in the public sector’, including ‘undertaking procurements, paying grants, using credit cards, having banking arrangements and providing financial reports’.<sup>32</sup>
- 3.38 As to why there are no rules in place as yet, Finance explained:
- When we are thinking about the absence of rules this time around, it is not in a context of having to reinvent a lot of things. It is in the context of finding the right way to connect things in place now, in terms of how people conduct their business, to the bill itself.<sup>33</sup>
- 3.39 In terms of the volume of rules, Finance noted that as it stands under the existing Acts, individually many would be around one page long, though the more complex areas may require substantially longer rules. Finance indicated that there are currently about 56 regulations under the FMA Act and 18 under the CAC Act.<sup>34</sup> From this Finance speculated that they may be able to achieve a reduction in the total number of rules similar to that of reducing the 161 sections in the FMA and CAC Acts, to 110 clauses in the Bill (including 30 which are new to this Bill), but cautioned:
- The Commonwealth is a big and complex entity and, try as we might to make the rule set clearer and to reduce it in volume, there is a limit to what you can do.<sup>35</sup>

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30 Mr David Tune, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 2.

31 Mr David Tune, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 3; for explanation of the decision to change from ‘regulations’ to ‘rules’ see the Explanatory Memorandum, p. 65.

32 Dr Stein Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 3.

33 Dr Stein Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 3.

34 Mr George Sotiropoulos, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 5.

35 Mr Lembit Suur, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 6.

- 3.40 While confirming that the rules would not come before this Parliament, Finance indicated that many of the rules will replicate those already in place under the existing FMA and CAC Acts. Despite this, Finance estimates it would take twelve months to complete work on the rules.<sup>36</sup>
- 3.41 The Finance Minister has since written to assure the Committee that the intent and form rules will be similar to the existing provisions, though with 'a modest number of new provisions to modernise the framework and its operation'. The Minister also emphasised that the intent was to continue a transparent and consultative process both in the initial development of the rules and in any material changes to the rules at a later date. The Minister gave the following assurances:
- That the Government will consult widely on the development of the rules. This would include extensive consultation within government, but also with other sectors and interested stakeholders (including the Not for Profit Sector, business and academia), including through working groups.
  - That once the rules are settled by government, they will be made publicly available for no less than 30 days for public comment and further consultation with government entities. The rules and explanatory memorandum will be made available on the Department of Finance and Deregulation's ('the Department') website. Furthermore, the Department will hold several workshops with a broad cross section of agencies to ensure they are rigorously tested.
  - Following the public consultation phase, the rules will also be made available to the Committee for scrutiny. The Government would await a report from the Committee prior to tabling in the Parliament. I would expect the Committee to have a strong and ongoing role in the formation of the rules, reflecting its position in the Parliament.
  - The rules are disallowable instruments and so following their tabling in the Parliament, there is a further opportunity for scrutiny.<sup>37</sup>

## Consequences of not progressing legislation

- 3.42 If the Bill does not pass prior to 30 June 2013, Finance indicated that the Bill's commencement date would have to be deferred from July 2014 to July 2015; and there is a likelihood that additional financial framework legislative amendment bills would need to be introduced as an interim measure.

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36 Dr Stein Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 7.

37 Senator the Hon Penny Wong, Minister for Finance and Deregulation, *Submission 16*, p. 2.

Essentially the longer it takes to settle this level, which is the level of principle and direction, the longer we live with and the government lives with the costs that are embedded in the current arrangements. It really is a question about how long parliament and government want to wait before some of the benefits can be realised.<sup>38</sup>

- 3.43 The Committee questioned whether on balance, this was sufficient reasoning to override the concerns raised, including the lack of time to reflect on the final Bill (as opposed to the consultation on the concept during the CFAR process) and limited information available on the rules. The Committee asked Finance to provide further detail on any serious consequences of not passing the bill before the end of the winter sitting (the last sitting period before the prorogation of parliament).
- 3.44 Finance's submission highlighted the importance of a '1 July' start date to 'avoid confusion and error that may arise from meeting accountability obligations for part-years'. In terms of the importance of the 1 July 2013 commencement date (with provisions coming into effect on 1 July 2014), Finance explained that this will provide a stable basis to continue the reform process and allow early realisation of the potential productivity improvements.<sup>39</sup>
- 3.45 Reinforcing the department's comments, the Minister for Finance proposed that delaying the reforms would delay the benefits:

The benefits will come, in large part, from the behavioural and cultural changes that are at the core of the Bill (i.e. engaging with risk). These gains would be expected to take up to one year or longer from when the framework is in place. Were the Bill to be delayed at this point, it is realistic to assume that the benefits at the core of this Bill will be delayed by over a year. This not only would see the current shortcomings continue, it would increase the risk of the current framework shortcomings becoming more acute, and significant issues arising.<sup>40</sup>

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38 Dr Stein Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 7.

39 Finance, *Supplementary Submission 9.2*, p. 2.

40 Senator the Hon Penny Wong, Minister for Finance and Deregulation, *Submission 16*, p. 2.

## Committee comment

- 3.46 In attempting to address concerns raised about lack of time to consider the Bill, Finance referred back to the process of development and passage of the FMA Act, the CAC Act and the Auditor-General Act, which occurred between 1990 and 1997, following the then Joint Committee of Public Accounts (JCPA) recommendation in 1989. Finance suggested that the timeframe for consideration by the JCPA equated to that of the CFAR process – a total of 30 months.<sup>41</sup>
- 3.47 As detailed in Chapter 2, in each previous case the JCPA undertook multi-month inquiries with multiple public hearings acknowledging the scope of the task of examining a framework that determines the financial operations of the Commonwealth. In the case of this most recent Bill, this framework goes beyond finances to the broader governance and performance of Commonwealth entities.
- 3.48 However, the JCPAA does acknowledge that as on previous occasions, the presentation of this Bill is not a stand-alone event but rather a significant outcome of a multi-year project by the Department of Finance and Deregulation to examine options to modernise the Commonwealth financial framework.
- 3.49 The Committee also acknowledges that the Bill is not the zenith, but nevertheless a critical junction in allowing the progression to the implementation phase, and appreciates the assurances of continued consultation throughout the remainder of the reform process.
- 3.50 In terms of the JCPAA's ongoing role in scrutiny of the rules, this is a welcome inclusion, but the Committee would like to flag that the parliamentary departments that support committees, like other small agencies, have limited resources.
- 3.51 The discussion of resourcing for implementation across all entities, while not a focus of this inquiry, needs to be given due consideration. This may mean that additional resources will need to be appropriated where agencies are able to demonstrate a material impact.

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41 Mr George Sotiropoulos, Finance, *Proof Committee Hansard*, 24 May 2013.