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Department of Finance and Deregulation

Response to Question on Notice

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Inquiry into Public Governance, Performance and Accountability Bill 2013

Question 1
Noting Finances' submission includes 'consequences of not progressing the Bill', could you please provide details of any **serious** consequences that may result from the Bill not progressing within this Parliament, and/or potentially delaying implementation until July 2015 (as outlined at the hearing)?

Response to question 1:

The Commonwealth Financial Accountability Review (CFAR) represents a fundamental consideration of the financial framework and how it can be redeveloped to support a more effective and productive public sector, including through improved working with its partners in other jurisdictions and sectors. CFAR is intended to initiate reforms that extend across legislation, business processes, governance structures and culture.

The Bill represents the first step in the reform process, and forms the legislative foundation on which reforms to other aspects of the framework can be developed and implemented over the next 3 to 4 years. As a result any benefits accruing from the reforms will be delayed if foundational elements are not finalised to allow other reforms to be progressed and finalised.

If the legislation is not passed before 1 July 2013 then the earliest passage date is unlikely to be before November 2013, leaving at most seven months to finalise arrangements for a start date of 1 July 2014 for the Bill provisions, including:

- finalising the set of supporting rules and consequential amendments to other related legislation, such as enabling legislation, to allow for their presentation to Parliament;
- developing and releasing guidance for Commonwealth entities;
- organising and presenting training for Commonwealth entities on reforms as well as resulting changes to business processes; and
- ensuring that Commonwealth entities make any necessary changes to business processes, internal guidelines and manuals, and issue revised delegations to officials.

While such a timetable is conceivable, the truncated timeframe will increase the risk of error or omission.

In consequence, this would most likely mean a start date of 1 July 2015 for the operational provisions in the Bill. The 1 July date is important as any significant change in the framework is best implemented from the start of a financial year to avoid the potential for confusion and error that may arise from meeting accountability obligations for part-years.

Passage of the Bill to allow a 1 July 2013 commencement date of the Bill (with the provisions coming into effect on 1 July 2014) ensures certainty in relation to the legislative and policy positions contained within the Bill, providing a stable basis on which to finalise consequential amendments to enabling legislation, supporting rules, guidance and any changes to business processes and systems.

The prompt implementation of these reforms would also support cultural changes being promoted by CFAR. This is advantageous to the implementation of the reform agenda as cultural changes take longer to implement than legislation. Moreover, cultural change needs legislation and other changes to be in place and operating to underpin and promote changes in behaviours and attitudes.

For the foreseeable future Commonwealth entities will be expected to operate in a resource constrained environment and continue to deliver on the policy priorities nominated by Government and Parliament. The ability of Commonwealth entities to meet these obligations can be enhanced if reforms are made to the legislative framework and supporting practices to emphasise a greater focus on the management of risk, and more flexible but accountable governance structures to support improved entity performance and working with other jurisdictions and sectors in delivering services to the people of Australia.

Our consultations indicate that currently the focus, especially the FMA Act, is increasingly on compliance rather than performance. FMA agencies are increasingly under stress to deliver quality services while being constrained by the existing regulatory burden.

Question 2
Further to the suggestion to strengthen 'independence' in the Bill (i.e. the independence of enabling legislation), please provide advice on the possible options (as outlined at the hearing) and whether there are any primacy provisions that can be articulated?

Response to question 2:

The Australian Government Solicitor (AGS) has advised that general principles apply in construing how two pieces of legislation interact, and that in the event that they cannot be read together, it can usually be inferred that specific legislation applying to an entity would prevail, even though (as in this case) the proposed PGPA Bill might have been enacted later in time.

The extent to which one or other piece of legislation is intended to have primacy would depend on the specific circumstances and the extent to which the later legislation is intended and drafted to apply.

Consideration of how best to reflect the independence of enabling legislation should start with what the different pieces of legislation seek to achieve. This Bill relates to how resources are used and managed in the course of delivering on the purposes for which an entity has been

established. Enabling legislation, by contrast, establishes the purposes or scope of the activity the entity is meant to pursue.

The extent of any independence in relation to the activities of an entity is the extent to which this has been permitted by the Parliament in approving the enabling legislation. As a result the Bill and enabling legislation are intended to be complementary; the enabling legislation describes what an entity is meant to achieve while the Bill describes how the entity is to use resources in pursuing its purposes and obligations.

A number of issues emerged during consultation on the Bill that have either been addressed in the Bill presented to Parliament or will be addressed through clarification in the revised Explanatory Memorandum (EM), including the commitment to incorporation in the rules and/or consequential amendment of enabling legislation.

As a result of discussions at the JCPAA Hearing on 24 May 2013 on whether there are other options that should be considered in providing assurance to entities on their continued level of operational independence as provided for by Parliament this matter has been discussed with AGS.

AGS has advised that the preferred approach for dealing with any issues relating to the interaction of the PGPA Bill with enabling legislation would be not to include anything in the Bill itself, but instead to amend the enabling legislation of the various entities which might be affected by the PGPA Bill to specify how the Bill is, or is not, to apply to those entities.

This would be done in a Bill containing consequential amendments. As no such Bill has yet been drafted it is appreciated that Parliament might be concerned that, if it passed the PGPA Bill could commence in the absence of satisfactory consequential amendments. AGS has advised on several possible ways to deal with this concern, which would involve:

- Amendments to clause 19 (keeping Ministers informed) to make it clear that it only operates to the extent that it is not inconsistent with the enabling legislation of a Commonwealth entity established by legislation;

- The Explanatory Memorandum to the PGPA Bill to be amended to make clear the Government's intention that, in the event that a bill containing consequential amendments would not commence on 1 July 2014, the Government would put a Bill before Parliament to delay the commencement of clauses 6 to 110 of the PGPA;

    - The EM could also indicate clearly the government's intention to ensure that the concerns of particular Commonwealth entities (including, for example, the broadcasters, the cultural institutions, the Reserve Bank and the Australian National Audit Office) will be addressed.

- Should these amendments not be considered sufficient, consideration being given to amending clause 2 of the PGPA Bill so as to provide that

    - Clauses 6 to 110 of the PGPA Bill would commence on the same day as a bill containing consequential amendments on the Bill, or
    - Clauses 6 to 110 of the PGPA Bill would not commence unless and until such a consequential amendment bill commenced.

Question 3
Could you please respond to concerns raised by the House of Representatives in their submission to the JCPAA inquiry (see submission on JCPAA website) and comment as to how this may or may not impact on other agencies such as the ANAO and Parliamentary Budget Office?

Response to question 3:

The focus of the Bill is on how entities use and manage resources in the operation of their entities. This does not extend to placing constraints on complying with statutory obligations or to the way in which decisions are made about these statutory obligations beyond other than that they are fulfilled within available resources and pursued based on proper use. Concerns have been raised in submissions and in the hearing on four areas of the Bill that need to be discussed:

a. Keeping Ministers informed (clause 19)
b. Corporate plans (clause 35)
c. Preparing Budget estimates (clause 36)
d. Recording and reporting on performance (clauses 37 to 40)

a. Keeping Ministers informed

This provision is based on CAC Act sections 15 and 16 rather than FMA Act section 44A as performance of an entity is more than financial; it is about how and how well those resources are applied towards the purposes for which the entity was established. CAC Act bodies have operated under the wording found in this clause since 1998.

b. Corporate plans

The focus of corporate plans is to explain what an entity is intending to achieve with the resources under its control. As explained under Question 2, to the extent the priorities and functions of an entity are consistent with government strategies this should be reflected in the plan to explain how the entity is contributing to broader objectives.

For an entity such as a Parliamentary Department or the Australian National Audit Office (ANAO) or the Courts this contribution to broader government contributions would not be expected to come within the scope of its consideration in developing its plan for publication.

c. Preparing budget estimates

The Finance Secretary, as now, will issue directions on the preparation of estimates and the form in which they are presented. This will cover a range of matters including timing, the content and supporting information such as explaining the reasons for seeking additional resources and the basis on which estimates are made.

While not specifically mentioned in the EM, the main change in this area is intended to be a simplification of requirements and a consolidation of the range of directions that are currently addressed in a large number of documents such as estimates memoranda on processes and information requirements relating to the annual Budget preparation arrangements.

d. Recording and reporting on performance

These provisions relate to information on how resources have been deployed in the delivery of services and functions and cover the range of information provided to Government and Parliament. Specific legislation covers the manner in which reporting obligations are met by entities such as the ANAO and Parliamentary Budget Office, but for the removal of all doubt it is proposed that this be made explicit in the EM, with any consequential amendments to enabling legislation.

The ANAO, as with the development of the Bill, and other affected parties will be involved in the development of rules in relation to performance reporting and the range of matters encompassed.

Question 4
In relation to clause 30 of the Bill, how many terminations under the existing legislation have taken place in the last five years?

Response to Question 4:

Any attempts to dismiss a director of a board of a Commonwealth authority would have been actioned under the engagement arrangements for that director. There are no explicit provisions for termination of a board member under the CAC Act for breaching their general duties.

Since 1999, it should also be noted that there has been only one prosecution of a Commonwealth authority official under the criminal provision of the CAC Act (under sub-section 26(2)) which resulted in a conviction on two counts and the application of a good behaviour bond.

We would not anticipate many terminations of employment given the standing and integrity of persons appointed as directors in government.

Question 5
Was the status of Royal Commissions considered when establishing the principles governing entity performance and accountability in the new financial regime? If so:

a) How does the Bill deal with allocation of responsibilities between the Royal Commission/Attorney-General?
b) In terms of the Bill's risk management emphasis, how can the Royal Commission carry the real responsibility and accountability if the Attorney-General has budgetary responsibility?

Response

<u>General Comments</u>
The Commonwealth includes a wide range of entity types and sub-types in terms of establishing and maintaining functions. Development of the Bill was based on being able to accommodate this variety, including Royal Commissions.

Under current arrangements the form in which a Royal Commission is established depends on the nature of the functions, including the term, size and scope of the commission. In principle this is no different to decisions made about the governance for any function of government. This ensures that the governance arrangements are fit for purpose.

The recent establishment of the *Royal Commission into Institutional Responses to Child Sexual Abuse* as a business operation within the Attorney-General's Department is an example of a decision on the governance structure.

These governance options for establishing a Royal Commission would continue to be available.

Question 5a

The Bill does not deal with such matters in the first instance. Once a decision has been made on the entity type or element of an entity that the Royal Commission will form then the Bill will apply in a way consistent with the form in which the Commission has been established. The allocation of responsibilities between the Royal Commission and the Attorney-General should be considered and addressed in the process of establishing the Royal Commission.

Question 5b

If the example of the current Royal Commission is considered, this has been established as a business operation within the Attorney-General's department in accordance with Financial Management Regulation 5A. The Secretary of the department will ensure that a budget approved for the business operation is allocated and then it will be the responsibility of the business operation to manage its activities and report on its use of resources as if it were a separate entity.