

# **Inquiry into Public Governance, Performance and Accountability Bill 2013**

Joint Committee of Public Accounts and Audit

**Supplementary submission by the Department of  
Finance and Deregulation**

May 2013

## Introduction

1. This supplementary submission to the JCPAA inquiry into the *Public Governance, Performance and Accountability Bill 2013* (the Bill) seeks to address a number of issues that were raised during the public hearing on 24 May 2013.
2. The public hearing confirmed that there is a case for change in the Commonwealth's financial framework. It is something that the Department of Finance and Deregulation (Finance) has heard from stakeholders, participants and interested observers since the Commonwealth Financial Accountability Review (CFAR) process began at the end of 2010.
3. As a result of our own benchmarking and the advice of others, this Bill includes new better practice elements in relation to risk, performance and partnering, each of which have been ongoing issues of concern for the JCPAA and the ANAO for many years. Almost everyone who appeared at the public hearing supported the directions and intentions that are covered in these new provisions.
4. Importantly, we have also attempted to directly consult on the Bill with all entities that have expressed concerns about the possible impact of the policy directions contained in the Position Paper and Discussion Paper. A number of the witnesses who appeared at the hearing confirmed that Finance had addressed their concerns directly in the Bill, or through commentary included in the Explanatory Memorandum (EM), and that they look forward to seeing their concerns addressed with respect to the rules. Many have offered to be part of the working groups involved in developing the rules.
5. The Bill builds on an expansive consultation process that has ensured that the Australian Public Sector and other stakeholders have been engaged and have been able to shape the policies presented in the Bill. In this regard, the Bill builds on the key principles established in the Position Paper that was released in November 2012.
6. One of the key principles of the Position Paper was that a single Act replace the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (CAC Act). Most of the submissions to the Position Paper were supportive of this proposal.
7. The proposed reforms contained in the Bill have been informed by many years of experience and consultation, including outside the CFAR process. Specifically, the Bill has been informed by:
  - 13 Financial Framework Legislation Amendment Acts (FFLA Acts) since 2004;
  - an extensive consultation process since 8 December 2010, when CFAR commenced. This has involved stakeholders from within and outside government;
  - a broad but intensive consultation process directly related to the Bill. The original Finance submission to the Committee provided detail at [Attachment E](#) about the nature and extent of this consultation, which involved many key stakeholders in the Commonwealth. As noted earlier, a number of the witnesses at the public hearing noted that they had been consulted and that changes were made to the Bill or the Explanatory Memorandum as a result of these consultations; and

- direct participation by the Australian Government Solicitor (AGS) in all meetings with the Office of Parliamentary Counsel on drafting the provisions of the Bill to, among other things, ensure the constitutional integrity of the Bill.
8. The timeframe from when CFAR commenced until the Bill was introduced into Parliament in May 2013 is about 30 months.
  9. By comparison, the timing for passage of the package of three Acts (the FMA and CAC Acts and the *Auditor-General Act 1997*) to replace the *Audit Act 1901*, was broadly as follows:
    - the then Joint Committee of Public Accounts (JCPA) decided upon a proposal for three Acts in November 1991;
    - the FMA, CAC and Auditor-General Bills 1994 were introduced into the House of Representatives in June 1994 – approximately 30 months after the government agreed to the JCPA recommendation;
    - the then JCPA presented an advisory report<sup>1</sup> to the House in September 1994; and
    - the legislation lapsed with the calling of the 1996 election. It was reintroduced into Parliament in December 1996 and passed in March 1997.
  10. The timeframe from November 1991 to when the FMA, CAC and Auditor-General Acts were introduced into Parliament in June 1994 was some 31 months.
  11. However, this Bill is evolutionary in its nature compared to the FMA, CAC and Auditor-General Acts, which replaced the *Audit Act 1901*; the fourth piece of legislation passed by the Commonwealth Parliament in 1901.<sup>2</sup>
  12. As noted in the earlier Finance submission, 80 of the 110 provisions reflect, or build on, provisions in the FMA Act and the CAC Act. By comparison, the CAC Act was completely new legislation and the Auditor-General Act established, for the first time, the ANAO as a statutory agency. Many of the issues raised in relation to the package of three Bills concerned the CAC Act and the Auditor-General Act, noting that the FMA Bill contained many of the fundamental principles of financial control contained in the Audit Act.<sup>3</sup>

### **Would more time improve the content of the Bill?**

13. There was commentary in the hearing that additional consultation could assist to highlight additional issues that require further consideration. There was, however, no evidence presented of material shortcomings in the Bill.
14. In the submissions and the public hearing, there were concerns raised about particular provisions in the Bill. The interesting thing about those concerns is how many of them related to the existing framework; the comments were suggesting that there should be more change than is proposed in the Bill to existing provisions. For example, the ANAO has suggested that provisions that are currently handled in the regulations (or rules)

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<sup>1</sup> Joint Committee of Public Accounts, Report 331 – An advisory report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994

<sup>2</sup> Joint Committee of Public Accounts, Report 331, p.4.

<sup>3</sup> Joint Committee of Public Accounts, Report 331, p.7.

should be brought into the primary legislation. This comment was particularly relevant in relation to the documentation of decisions to spend money by officials.

15. The Bill has replicated the current arrangements in this area. We have not heard in the process of public consultation and submissions that the current arrangements are lacking. The Bill takes the cautious view that no change should be made here until a case is built.
16. The ANAO has suggested in its submission that because we have strengthened the way the legislation handles the decisions of Ministers, that we should therefore do the same for officials. There is, however, a difference. The whole of the regulatory scheme in the Bill is designed to make officials accountable for how they manage public resources. As ministers are not officials for the purposes of the Bill, the Bill makes specific provision for how ministers commit and spend public resources. In the absence of such a provision, the Minister for Finance is left to make the rules with which they have to comply; one Minister is making rules for other Ministers and for themselves. It is appropriate that this provision is established by the Parliament in primary legislation, rather than by the Minister for Finance in the rules.
17. In the context of the legislative scheme as a whole, however, it is appropriate that detailed controls over how officials commit and spend public resources can be dealt with in the rules. We have not heard that there is an issue with the Minister for Finance making rules, in consultation with the Parliament, for officials.
18. A key issue raised in the submissions and the public hearing was that there are different views about what should be in the primary legislation, and what should be in the rules. The implication is that the framework is weaker than it should be if important requirements are in the rules, rather than in the main legislation. This is a criticism that applies as much to the current framework as to the proposed framework. It is a debate that is endemic to any arrangement where it is important to balance control with flexibility or precision with an ability to adapt to changing circumstances. Finance's response to specific issues raised in submissions to the JCPAA is at **Attachment A**.
19. Experience regarding the FMA Act, the CAC Act and the Auditor-General Act indicate that ongoing maintenance of the financial framework legislation is necessary. For example, the first FFLA Act in 2004, sought to amend over 100 Acts to align those Acts with changes to the financial framework legislation in 1999. And recently, the Auditor-General Act was amended in 2009 and then again in February 2011.

### **Visibility of the rules**

20. The Bill is only part of the process to replace the FMA Act and the CAC Act. Rules will be developed to provide the detail behind the principles of the Bill and provide guidance to officials. An additional Bill will also have to be passed to repeal the FMA and CAC Acts and detail consequential amendments to the enabling legislation of many Commonwealth entities to remove inconsistencies with the Bill and clarify interaction

with the Bill. This corresponds closely with the process regarding the three Bills to replace the Audit Act.<sup>4</sup>

21. A comparison of provisions providing for rules under the Bill compared to regulations and orders currently in place is at **Attachment B**. Of the specific references to rules, 26 percent (12 of 47) reflect new references, while the remaining 74 percent (35 of 47) would involve replicating or amending existing requirements that are currently in place.

### ***The rules***

22. The Bill contains the fundamental principles of financial control and accountability contained in the FMA Act, which is designed to ensure that constitutional requirements are met. However, there are modifications to existing provisions in the FMA Act to align with modern developments in financial management and provide opportunities to reduce the compliance burden, especially where the costs outweigh the benefits. For example, drawing rights<sup>5</sup> do not appear in the Bill and have been replaced by the requirement at clause 51 of the Bill.<sup>6</sup> Key accountability requirements in the CAC Act have also been retained in the Bill, with minor modifications.
23. As is the case with the FMA and CAC Acts, the Bill does not provide explicit details for all of the standards, arrangements and administrative procedure that will be required to comply with the Bill. This detail will be in the rules, which will complement the Bill and be disallowable instruments.<sup>7</sup>
24. The matters that have been taken out of primary legislation to be included in the Rules include:
  - detail about official bank accounts in the FMA Act;
  - detail about use of credit cards from both the FMA and CAC Acts;
  - procedural requirements around how to deal with a material personal interest in the CAC Act; and
  - procedural requirements around indemnities and insurance in the CAC Act.
25. Importantly, the operational provisions of the Bill will not commence until 1 July 2014. This delayed commencement of the operational provisions is designed to allow for the development and testing of the Rules in an environment where Commonwealth entities have certainty about the key features and overarching design of the framework.
26. Until the Bill is passed the development of the rules would be more difficult as the overarching legal and policy framework within which the rules must operate will not be sufficiently clear, including, for example, whether there is to be one Act or two, whether performance is to be financial alone, whether risk is a key concept to be given legislative prominence, and whether all decisions about the use of resources are to meet the same

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<sup>4</sup> Joint Committee of Public Accounts, Report 331, p.6.

<sup>5</sup> See sections 26 and 27 of the FMA Act.

<sup>6</sup> Clause 51 is broadly consistent with section 32 of the *Audit Act 1901* and provisions in the enabling legislation of many CAC Act bodies.

<sup>7</sup> Joint Committee of Public Accounts, Report 331, p.10.

set of high standards. Resolution of these issues is fundamental to the drafting of the rules.

27. As noted in the Explanatory Memorandum, the rules will be developed on a consultative basis. The process is likely to be more effective with the Act in place as the consultative process will be able to proceed from a position of greater certainty as to the content of the Act and, therefore, what the content of the rules will need to cover.
28. Rules that are based on current regulations, for example, audit committees, are likely to be refined through consultation and finalised within 12 months, whereas rules in relation to earned autonomy and tiered reporting are likely to take longer.
29. Any rules around cooperation (including templates to support partnering with the States and Territories and joint ventures with other sectors under clause 87 of the Bill) may also take some time to develop, given that multiple stakeholders outside government will need to be consulted.
30. The rules will be developed in consultation with Commonwealth entities and other relevant stakeholders (building on the mechanisms which have been established by CFAR to date). The rules will also come to the JCPAA for comment and consultation. This has been specified in the EM to the Bill. The Rules are disallowable legislative instruments under the *Legislative Instruments Act 2003*.

#### Do the rules provide too much flexibility?

31. There has been commentary that the rules may provide too much flexibility. For example, an article in the Australian Financial Review on Thursday 23 May 2013, suggested that the rule in relation to Government Business Enterprises may provide opportunities to circumvent the framework. The article did not acknowledge that the requirement in the Bill is exactly the same as the requirement under the CAC Act and there is no suggestion that this provision has been misapplied.
32. There have also been comments in some of the submissions that some additional rules may provide unnecessary flexibility. These include the rules relating to officials and the modification provision in relation to the Commonwealth Superannuation Corporation. At one level, such comments go to the heart of considerations about risk. While something may be theoretically possible, such possibility should not be considered in isolation, but should be considered in the context of all relevant controls and accountabilities in place. This includes the fact that the rules will be contained in disallowable instruments presented to the Parliament, following consultation with the JCPAA.
33. We are concerned by suggestions that these control mechanisms, which provide a high level of oversight, may not be sufficient in relation to remote and unlikely risks.

#### **Impact of delaying commencement of the Bill**

34. Introducing the Bill now will put in place key legislative elements for reforms that can only be achieved over a number of years. This would help provide certainty for entities,

which can begin planning for a new framework with confidence and an understanding of the key principles. Such an approach is not without precedent.<sup>8</sup>

35. Many of the contributors and key stakeholders have been engaged with CFAR since its inception and have a good level of understanding of the direction and intent of the reform. This understanding will help in the implementation phase.
36. Delaying the passage of the legislation would defer needed improvements to the Commonwealth's financial framework, pushing back the implementation of desirable reforms, increasing the uncertainty facing agencies and further embedding inefficiency and cost that the Bill is seeking to address.
37. Many respondents to the Discussion and Position Papers supported proposals to reduce the compliance burden, particularly in the FMA Act. Some of these proposals have been reflected in the Bill. The remainder will be addressed through the rules, including opportunities to streamline reporting requirements for small entities.
38. A further consequence of deferral would be to increase the likelihood that additional, incremental and piecemeal changes would be required to the current framework to embed better practice and improve reporting to the Parliament. The benefits of changes undertaken in this way may be eroded over time if they are not embedded in the financial framework. For example, one aim of this Bill is to embed requirements, including budgetary and financial changes made in 1984 arising from the introduction of the Financial Management Improvement Program and which were intended to introduce new responsibilities for planning and reporting:

The requirements for departments to prepare corporate plans, program performance statements, and improve their annual reports were important devices for improving organisational effectiveness by ensuring departmental priorities, objectives and missions were more clearly articulated. They also contributed to more effective reporting to Parliament.<sup>9</sup>

39. Noting existing shortcomings, the Bill seeks to provide in primary law the requirements for both corporate planning and the production of performance statements by Commonwealth entities. Any delay is likely to result in less than optimal performance information continuing to be provided to Parliament.
40. Finance notes that Parliament passed amendments to the *Auditor-General Act 1997* in February 2011 strengthening the Auditor-General's role in relation to key performance indicators. The reforms in this Bill reinforce these changes. In particular, the Bill recognises that good performance information starts with strong planning about what is to be achieved. The effectiveness of changes to the Auditor-General Act in relation to key performance indicators would be strengthened by the changes proposed in the Bill in relation to planning and performance.

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<sup>8</sup> Joint Committee of Public Accounts, Report 331, p.10.

<sup>9</sup> Joint Committee of Public Accounts, Report 323, *Managing People in the Australian Public Service: Dilemmas of devolution and diversity*, 1992, p. 9.

41. The Bill also significantly enhances requirements for partnering through inclusion of the following provisions:
- the requirements in the Objects clause (clause 5) requiring entities to work cooperatively, where practicable. This sends a clear message about the importance of cooperation;
  - clause 17 imposes a positive duty on accountable authorities to encourage cooperation, where practicable;
  - clause 18 requires an accountable authority to consider the burden imposed on others;
  - clause 24 allows for non-executive directors on advisory boards;
  - clause 83 regarding auditing arrangements, which has been supported as a positive inclusion by State jurisdictions that Finance has consulted. This could help to further collaborative audits in relation to national funding agreements.<sup>10</sup>
  - clause 87 allows for bodies corporate to be established using a similar process to that used to establish Research and Development Corporations under the *Primary Industries and Energy Research and Development Act 1989*. We envisage that this provision will provide the foundation for developing templates for Commonwealth-State partnerships and for joint ventures with other sectors, including the not-for-profit sector.
42. Finally, there is clause 82, which replicates the only provision in the FMA or CAC Acts concerning inter-jurisdictional arrangements.

*Timing for implementation of reforms should Bill commencement be delayed*

43. Should the Bill's passage be delayed until after the election, as suggested in the public hearing, commencement is unlikely to occur until 1 July 2015 at the earliest. The reasons for this include:
- commencement at the beginning of a financial year would simplify implementation for entities;
  - loss of momentum in the process; and
  - possible delayed development of the rules as entities will be less likely to invest time and resources on a prospective legislative framework.
44. Delaying passage until after the election would also not ensure that the rules are finalised by this time so they can be considered by Parliament together with the legislation. Our judgement is that it will take at least 12 months for the rules to be developed in a collaborative manner.

## **Independence**

45. Throughout the consultation process, Finance has been conscious about the need to protect the operational independence of key institutions, such as the ANAO, the RBA, the ABC, and the SBS to name a few.

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<sup>10</sup> Joint Committee of Public Accounts, Report 427, Inquiry into National Funding Agreements, November 2011, p.96.



46. The Bill takes the view that the independence of such institutions is guaranteed by their own legislation, and that the financial framework is neither the place to guarantee it nor to prosecute it. In this respect, the Bill is framed cautiously.
47. As the ABC has noted in the public hearing, Finance has worked collaboratively to ensure the Bill adequately addresses operational independence, and funding independence, of entities, where relevant.
48. The EM to the Bill also notes that consequential amendments to enabling legislation will be made as necessary to protect operational independence. Inclusion in the EM, emphasises the importance of this issue to the integrity of the financial framework.
49. Finance has been advised that in the event that a particular obligation imposed by the Bill, or rules made under the Bill was thought to be in conflict with, or be inconsistent with, the enabling legislation of a particular Commonwealth entity, the first inquiry would be directed at whether or not such a conflict or inconsistency did, in fact, arise. The starting assumption is that Parliament does not, generally, enact legislation which is in conflict with or inconsistent with other legislation it has enacted. The process of statutory interpretation therefore involves, in the first instance, seeing whether it is possible to read both provisions in a way which would enable both to have effect. This would involve considering the meaning of each provision concerned by reference to its ordinary meaning read in context, and by reference to any relevant extrinsic materials, such as the Explanatory Memorandum and parliamentary debates.
50. This could involve, for example, reading general obligations imposed by or under the Bill as being consistent with particular obligations imposed under enabling legislation. For example, in understanding the content of the duty in clause 15 of the Bill for a particular accountable authority, it would be appropriate to take account of the particular functions and powers conferred on the particular accountable authority by the relevant enabling legislation.
51. If it was not possible as a matter of construction to read both pieces of legislation so that each could operate, it might then be necessary to consider whether one might prevail over the other. There are a range of principles which can be applied to assist in the resolution of such a situation. However, generally speaking, specific legislation will prevail over general legislation. In the present context, this would mean that, generally speaking, if the enabling legislation of a Commonwealth entity expressly or by implication indicated that it was not subject to a particular obligation, and the Bill imposed such an obligation, then the enabling legislation would prevail. This would be the case even though the Bill was enacted later in time than the enabling legislation.<sup>11</sup> The obvious exception to this general position would be where the general legislation exhibits an intention to override enabling legislation.<sup>12</sup>

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<sup>11</sup> See *Saraswati v The Queen* (1991) 172 CLR 1 at 17 - 18 per Gaudron J.

<sup>12</sup> Section 57 of the PGPA provides an example of such an exception. That section states that in the absence of an express authorisation to borrow in an Act, a corporate Commonwealth entity may not borrow without the authorisation of the Finance Minister or the rules. This would present borrowing by the entity even if the enabling legislation of an entity might implicitly authorise borrowing by the entity.

52. Additionally, delegated legislation such as rules do not generally prevail over Acts of Parliament. It follows that if an obligation is imposed on a Commonwealth entity by rules made under the Bill, that obligation will not prevail over a countervailing provision in enabling legislation that is an Act of Parliament.
53. To summarise, the resolution of apparent inconsistencies or conflicts between provisions in legislation requires the careful consideration of what was intended by Parliament in enacting two pieces of legislation which appear to be contradictory. It is not possible to say that enabling legislation will always prevail over the provisions of a general applicable scheme such as that contained in the Bill. However, it is reasonable to assume that, where there is a direct inconsistency between enabling legislation and the Bill, the enabling legislation is likely to prevail in the absence of a clear indication in the Bill that a particular provision of that Bill is to prevail over enabling legislation.

#### Possible amendments to clause 19 of the Bill

54. Section 19 imposes a duty on the accountable authority of a Commonwealth entity to keep the responsible Minister and the Finance Minister informed about various matters. Section 19(2) rolls back the requirement to some extent insofar as it applies to courts and tribunals. It would be possible to amend the provision as it relates to Parliamentary Departments.
55. Finance has also been advised that it is possible to include a provision which generally deals with the interaction between this section and the enabling legislation of Commonwealth entities, perhaps modelled on clause 35(4) of the Bill.

#### Consequential amendments

56. The preferred approach for dealing with any issues relating to the interaction of the Bill would be to not include anything in the Bill itself, but instead to amend the enabling legislation of the various entities which might be affected by the Bill to specify how the Bill is, or is not, to apply to those entities. This would be done, in the ordinary course of events, in a bill containing consequential amendments.
57. To address possible concerns by Parliament due to the absence of a consequential Bill, the EM to the Bill could 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 the Parliament to delay the commencement of clauses 6 to 110 of the Bill. 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.
58. If this was not sufficient, an alternative would be to amend clause 2 of the Bill so as to provide that clauses 6 to 110 of the Bill would commence on the same day as a bill containing amendments consequential on the Bill, or that clauses 6 to 110 of the Bill would not commence unless and until such a consequential amendment bill commenced.

## Length of the explanatory memorandum

59. The EM to the Bill seeks to clarify requirements in the Bill and provide assurance about the process for, among other things, developing the rules and ensuring the independence of entities through consequential amendments to enabling legislation. During consultations on the Bill, Finance received support for this approach.
60. The EM seeks to meet better practice requirements. It seeks to assist the Parliament, officials and the public understand the objectives and detailed operation of the clauses of the Bill, rather than providing a prose rendering of each provision of the Bill that gives little understanding of the provisions of the Bill.<sup>13</sup>
61. As has been noted by the Scrutiny of Bills Committee:
- The transparency of the legislative process, the quality of the legislation and the ability of people to read and understand the laws passed by the Parliament will all be improved if the standard of explanatory material is improved.<sup>14</sup>
62. Noting the important role played by the EM, Finance welcomes the suggestion made by the Committee in the public hearing to have the EM independently edited for plain English and has commenced this process.

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<sup>13</sup> Was there an EM?: Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Browse\\_by\\_Topic/Key\\_Internet\\_Links/Copy\\_of\\_law/explanmem/wasthereanEM](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/Key_Internet_Links/Copy_of_law/explanmem/wasthereanEM), accessed on 26 May 2013 at

<sup>14</sup> Senate Foreign Affairs, Defence and Trade Legislation Committee, *Export, Finance and Insurance Corporation Bill 2006*, Canberra, September 2006, p.13. (noted in Was there an EM?: Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament)

Department of Finance and Deregulation (Finance) response to written submissions

Submission	Issue	Finance response
<p>Department of the House of Representatives</p>	<p>Clause 19 of the <i>Public Governance, Performance and Accountability Bill 2013</i> (the Bill) would extend the Finance Ministers existing powers be kept informed about the “activities” of a Commonwealth entity, rather than the “financial affairs of the agency” as is the case under the <i>Financial Management and Accountability Act 1997</i> (FMA Act).</p>	<p>The Bill does not require an accountable authority of a Commonwealth entity to keep the Finance Minister informed about the activities of the Commonwealth entity. However, the Finance Minister would be permitted to request “reports, documents and information in relation to [the] activities” of the Commonwealth entity.</p> <p>This could be seen as an extension of the existing powers of the Finance Minister in the FMA Act, which is limited to obtaining reports, documents and information in relation to the “financial affairs of the agency”.</p> <p>The PGPA Bill reflects the existing arrangements under the <i>Commonwealth Authorities and Companies Act 1997</i> (CAC Act), where he or she can request documents etc in relation to the operations of a Commonwealth authority (section 16). These arrangements have not been problematic since the CAC Act was enacted and no concerns have been raised by CAC Act bodies.</p> <p>The change in emphasis is justified as the Bill places a far greater emphasis on the non-financial performance of a Commonwealth entity (for example, see clauses 37-40). In order to provide effective accountability for performance, the Finance Minister should be able to obtain non-financial information from a Commonwealth entity, given the Finance Minister has whole-of-government responsibility for governance and performance.</p> <p>Experience indicates that limiting the wording to “financial affairs” could lead to unintended consequences and a restricted interpretation in relation to non-financial performance information.</p>

Submission	Issue	Finance response
	<p>Clause 36 of the Bill in relation permitting the Finance Secretary to issue written directions to an accountable authority about budget estimates is broader than the existing requirement to prepare budget estimates in the form required by the Finance Chief Executive.</p>	<p>Finance’s view is that clause 36 is no broader than the existing provision in the FMA Regulations. The wording has been adjusted in accordance with contemporary drafting practice.</p>
	<p>Clauses 37 and 40 regarding records about performance and auditing of annual performance statements are additional requirements.</p>	<p>Finance notes that these clauses may be construed as additional requirements. However, throughout the Commonwealth Financial Accountability Review, there has been consensus that non-financial performance needs to be better recognised in the financial framework and generally needs to improve. These clauses are intended to do this.</p> <p>Finance believes that these clauses recognise better practice for many entities and these requirements will not impose additional burdens, except where the quality of performance information produced by an entity does not meet high standards required for accountability and transparency to Parliament.</p>
	<p>Clause 87 may need clarification to explain which entities would be covered by this provision.</p>	<p>It would be a matter for the Government of the day to consider whether a body corporate should be established through this mechanism, given a number of variables, including the functions the entity is expected to perform.</p> <p>Finance notes that Parliament will maintain ultimate control, over the establishment of a new body corporate, given it can disallow the instrument establishing the body. By way of contrast, Parliament has no control over the creation of Executive Agencies under the <i>Public Service Act 1999</i> or the creation of Commonwealth companies.</p>

Submission	Issue	Finance response
	<p>A mirror provision to clause 32 and therefore a mirror note to clause 16 could be added to make breaching the finance law an Australian law for the purposes of conduct proceedings against a member of the Parliamentary Service.</p>	<p>Finance agrees that a mirror provision similar to clause 32 will need to be included.</p>
	<p>It is unclear whether subclause 35(3) (requiring a Commonwealth entity's corporate plan to explain how the entity will contribute to the Australian Government's key objectives and priorities) is intended to apply to the department.</p>	<p>Under subclause 35(4), a Commonwealth entity only needs to comply with subclause 35(3) to the extent that compliance is not inconsistent with an entity's enabling legislation. In relation to departments of the Parliament, this would be the <i>Parliamentary Services Act 1999</i>. Finance notes that paragraph 10(1)(a) of the <i>Parliamentary Service Act 1999</i> ensures the independence of the service from the Executive Government.</p>
<p>Australian Public Service Commission (APSC)</p>	<p>The Bill would place a second set of duties on officials in addition to the duties under the <i>Public Service Act 1999</i> Code of Conduct. Therefore public servants should be excluded from the operation of the general duties on officials under clauses 22-29 of the Bill.</p>	<p>Finance disagrees with the APSC's submission to exclude public servants from the operation of the general duties of the Bill. As the Public Service Commissioner noted during his evidence, the two sets of duties are "not inconsistent". Therefore there should be no issues of compliance by public servants.</p> <p>In addition, Finance submits that as part of ensuring the concept of "government as a whole", one of CFAR's principles, placing uniform duties and obligations on all officials, whether they are public servants or not, is desirable to ensure that everyone is complying with the same basic duties, especially in relation to the use and management of public resources.</p> <p>Officials managing public resources should be able to look in one place to determine their duties in relation to those resources. Consistent with the <i>Corporations Act 2001</i>, the duties are fiduciary in nature and it is appropriate to include them in the Bill.</p>

Submission	Issue	Finance response
		<p>There have been no issues raised in relation to overlaps, since the Public Service Act came into operation in 1999, or in relation to recent amendments to the Public Service Act.</p> <p>An important difference is that some of the duties in the Bill are scaleable and recognise materiality to a different degree compared to the Public Service Act. In particular, the duties relating to care and diligence and conflicts of interest.</p> <p>Clause 32 of the Bill recognises that the <i>Public Service Act 1999</i> will apply to any breaches of duties by APS employees.</p>
Australian National Audit Office	The ANAO estimates that over 250 Commonwealth entities and companies will be regulated by the PGPA Bill.	<p>Finance submits that there are 196 Commonwealth entities and Commonwealth companies regulated by the PGPA Bill (as at 28 May 2013) consisting of:</p> <ul style="list-style-type: none"> <li>• 110 agencies currently under the FMA Act;</li> <li>• 65 Commonwealth authorities currently under the CAC Act;</li> <li>• 20 Commonwealth companies under the CAC Act; and</li> <li>• 1 statutory corporation subject to only certain CAC Act provisions.</li> </ul> <p>In addition, there are a number of subsidiaries of corporate Commonwealth entities that will also be regulated to some degree by the provisions, including in relation to auditing by the ANAO.</p>
	The short timeframe for introduction of the PGPA Bill means that stakeholders have had little opportunity to provide comments on the Bill.	<p>As noted in Attachment E to Finance's original submission to the JCPAA, Finance has consulted with many stakeholders during the development of the PGPA Bill.</p> <p>In addition:</p> <ul style="list-style-type: none"> <li>• 80 of the Bill's 110 clauses generally reflect existing provisions in either the FMA or CAC Acts, meaning that users will be familiar with much of the content;</li> <li>• the development of the original FMA and CAC Bills was done in approximately 30 months following a Joint Committee of Public Accounts' report – a similar timeframe to the development of the Bill</li> </ul>

Submission	Issue	Finance response
		<p>since CFAR commenced;</p> <ul style="list-style-type: none"> <li>• the development of much of the Bill has been informed by many years of experience and consultation, including outside of the CFAR process; and</li> <li>• AGS has been engaged throughout the drafting process to provide assurance on constitutional requirements.</li> </ul>
	<p>Many provisions of the Bill will rely on yet-to-be released rules to operate effectively. There has been no visibility around the proposed rules.</p>	<p>The development of the rules will take place if and after the A Bill is passed. Finance has committed to developing the rules in consultation with entities and other stakeholders. This is clearly articulated in the Explanatory Memorandum.</p> <p>The rules will be developed in tandem with necessary consequential amendments in a fully consultative process. Not all rules will be developed within 12 months. Rules relating the earned autonomy and tiered reporting may take longer to develop in order to ensure that a robust system has been established.</p> <p>Developing rules and standards after legislation is in place is not without precedent. For example, ANAO Report 28 of 2012-13, The Australian Government Performance Measurement and Reporting Framework, notes that the pilot project was designed to, among other things, “develop a suitable audit methodology”. (for example, refer pages 17 and 21). The <i>Auditor-General Act 1997</i> was amended in 2011 to provide for a more focused approach to the audit of key performance indicators.</p>
	<p>The ANAO considers that the objects clause of the Bill (clause 5) could be improved by:</p> <ul style="list-style-type: none"> <li>(a) considering whether to merge paragraphs 5(a) and (b);</li> <li>(b) reviewing whether “requiring” the Commonwealth and Commonwealth entities to meet high standards of governance, performance and</li> </ul>	<p>In relation to (a), Finance believes that separating out the establishment of a performance framework provides a clear signal that this is to become a focus of public sector management in the future.</p> <p>In relation to (b), Finance considers that the use of the word ‘require’ sets an appropriate high standard expectation.</p> <p>In relation to (c), Finance submits that the explanatory memorandum is clear that the <i>Corporations Act 2001</i> is the primary regulatory framework for</p>



Submission	Issue	Finance response
	<p>accountability is reasonable; and (c) modifying the construction of paragraph 5(d) to make it clearer why Commonwealth companies are being treated differently.</p>	<p>Commonwealth companies and that no further clarification in paragraph 5(d) of the Bill is needed.</p>
	<p>The Bill should consider continuing to use “public money” and “public property”, rather than “relevant money” and “relevant property” given their long history.</p> <p>Alternatively, “relevant money” and “relevant property” could be replaced with a different expression like “accountable money” and “accountable property”.</p>	<p>Finance does not support reverting to the terms “public money” and “public property”. Several Commonwealth entities, including the Commonwealth Superannuation Corporation (CSC), the Reserve Bank of Australia, Indigenous Business Australia and the Indigenous Land Council have raised concerns that this would be problematic in relation to the monies that they handle.</p> <p>Using the term “public money” may lead to an implication that the money has public characteristics. The terms “relevant money” and “relevant property” are designed to avoid this implication.</p>
	<p>Under clause 13, the Bill could exclude classes of persons or the entire workforce of a Commonwealth entity from the scope of the framework.</p>	<p>The use of the Bill in this way would be entirely against principles of good governance and accountability that Finance seeks to ensure as a central agency.</p> <p>In any case, the rules could be disallowed by Parliament if Parliament is of the belief that the power in clause 13 is being used in bad faith.</p>
	<p>Consequential amendments will need to be made to the <i>Future Fund Act 2006</i> to maintain the Auditor-General’s mandate to audit the Future Fund Management Agency’s (FFMA) annual financial statements.</p> <p>Consequential amendments could also clarify that the Auditor-General’s financial statement mandate extends to the subsidiaries of the Future Fund Board of</p>	<p>Finance has discussed necessary amendments with the FFMA. It will also consult with the Auditor-General and the Future Fund Board of Guardians in relation to appropriate amendments.</p> <p>There is no intention to impact on existing auditing arrangements between the Auditor-General and FFMA.</p> <p>Changes in the Bill seek to provide clarification that the Auditor-General’s financial statement mandate extends to the subsidiaries of all Commonwealth entities and companies, including the Future Fund Board of Guardian</p>

Submission	Issue	Finance response
	Guardians.	
	The combined operation of paragraphs 15(1)(a) and clause 21 of the PGPA Bill means that the operational independence of Commonwealth entities could be affected. A provision similar to subclause 35(4) should be included in clause 21.	Finance does agree with the ANAO's interpretation of the effect of paragraph 15(1)(a) and clause 21. Finance considers the effect is comparable to section 44 of the FMA Act.
	Clause 16 should be amended to require accountable authorities to implement measures to ensure officials comply with "the law", rather than just the "finance law"	Finance does not support this proposal. The Bill is principally a resource and financial management framework and the matters the Bill deals with go to that framework. It would be inappropriate to place a duty on accountable authorities to implement measures to ensure officials comply with "the law" in general, given this is such a broad phrase.
	The phrase "measure and assess the performance of the entity in achieving its purposes" in subclause 38(1) could be interpreted narrowly. It should be reviewed to give greater confidence that assessment of performance relates to the impact of government programs and activities.	It is not clear how "purposes", which appears to be the relevant part of the phrase, could be interpreted narrowly. For a government department, its purposes could include its functions under the Administrative Arrangements Order and the programs as set out in its corporate plan. This would address the issue that the ANAO raises.  For the avoidance of doubt, the rules under subclause 38(2) could include that measurement and assessment must be done of the effectiveness of programs.
	Subclause 41(3) should be amended to add that the responsible Minister is entitled to full and free access to the accounts and records of the Commonwealth entity - the same as the Finance Minister	Finance agrees to including the responsible Minister within the scope of subclause 41(3).
	Consideration should be given to including in the PGPA Bill, an obligation on officials in relation to the commitment and	Finance does not support this proposal. The specific inclusion of Ministers in the PGPA Bill recognises the fact that they are not officials and any constraints on their power in relation to spending decisions should be at the explicit

Submission	Issue	Finance response
	expenditure of money consistent with the duty on Ministers under clause 71).	direction of the Parliament rather than through the actions of another Minister.  Imposing a statutory requirement on officials when there are multiple statutory controls already in place (such as the duties under clauses 25-29), as well as internal controls (such as internal audit and an investment in IT systems) is likely to suggest an unnecessary focus on compliance, which is typically accompanied by red tape and an excessive compliance burden. Our consultations suggest this is unlikely to be supported by Commonwealth entities
	The Bill deals with the concepts of collective responsibility and multiple accountabilities in a limited manner through clauses 17, 82 and 83.	Finance notes the ANAO's view. However Finance submits that the Bill further recognises cooperation and partners in the following clauses: <ul style="list-style-type: none"> <li>• clause 18 (duty on an accountable authority to consider risks when imposing obligations on others) will assist Commonwealth entities to work more closely with partners in formulating appropriate oversight and cooperation arrangements.</li> <li>• clause 87 (establishment of corporate Commonwealth entities) would allow the Commonwealth to establish corporate bodies with not-for-profit organisations and other jurisdictions in a timely and collaborative manner.</li> </ul>
	The ability to modify the application of the Bill to the Commonwealth Superannuation Corporation (CSC) is too broad and could be used to exclude the CSC from requirements to prepare and audit annual financial statements.	The use of the Bill in this way would be entirely against principles of good governance and accountability that Finance seeks to ensure as a central agency.  The rules could be disallowed by Parliament if Parliament is of the belief that the power in clause 104 is being used in bad faith.
Australian War Memorial (AWM)	There is potential for the Rules that are to be developed to adversely affect the AWM's reporting and compliance obligations or day to day business operations.	Finance notes that the rules will be developed in consultation with entities to prevent imposing unnecessary requirements on an entity's operations nor conflict with an entity's enabling legislation. This is also specified in the EM.

Submission	Issue	Finance response
	<p>Confirm that the new requirement for accountable authorities to consider public resources generally is not intended to be restrictive or prevent the Council of the AWM from making decisions in the best interest of the entity.</p>	<p>Clause 15 requires an accountable authority to consider the broader impact of its governance decisions on public resources generally. This involves recognising the potential effect of its decisions on other Commonwealth entities, even when the decision is made in the best interest of the entity concerned.</p>
<p>Professor Kerry Jacobs</p>	<p>Care should be taken to consult on the development of the framework rules and differential reporting so as to prevent unnecessary complexity.</p> <p>Earned autonomy is a potentially valuable and world leading proposition, but will be difficult to develop.</p>	<p>Finance agrees. The rules underpinning the Bill will be developed in stages to ensure each aspect of the financial framework is sufficiently clear and robust.</p> <p>Professor Jacobs comments on the distinction between differential reporting and differential oversight is particularly insightful.</p>
	<p>There should be a greater number of external members on the government committees.</p> <p>For example, if an accountable authority establishes an advisory board under clause 24, the appointment of external members should be mandatory and not optional. In the case of audit committees constituted under clause 45, there should be a majority of external members and the chair should be held by an external member.</p>	<p>This will be a matter for the rules.</p> <p>The Bill expressly provides for non-executive membership on advisory boards and audit committees. This is broader than existing requirements, which are only concerned with audit committees.</p>
	<p>The Australian Tax Office's SBR/XBRL project, which has the potential to simplify government-to-government transactions and</p>	<p>In progressing reforms under CFAR and the single Act, Finance will continue to consider opportunities to link up with existing reforms across the Commonwealth.</p>

Submission	Issue	Finance response
	reduce costs, should be considered when looking at changes to planning and reporting requirements.	
UnitingCare Australia	Appropriate guidance will be essential to give proper effect to clause 16 (Duty to establish and maintain systems relating to risk and control) and clause 18 (Duty in relation to requirements imposed on others)	Finance agrees. The rules and associated guidance material around the duties in the Bill will be developed and implemented in close consultation with stakeholders, including the not-for-profit sector, to ensure they are well understood and help drive the desired cultural change.
	Implementation of clause 38, which requires accountable authorities to measure and assess its entity's performance, will require Commonwealth entities to reconsider issues such as the short term nature of many funding agreements and funding for evaluations.	The Bill places a greater commitment on Commonwealth entities to measure and evaluate their performance against its objectives and purposes. In order to meet the requirements for measuring performance detailed in the rules, an entity may need to re-examine their current practices including the information requirement they impose on others.
	To better identify the non-Commonwealth partners within the PGPA Bill, the reference to 'others' in clause 5 (objects of the Bill) and clause 17 (duty to cooperate with others) should be defined to acknowledge State and Territory government agencies and bodies, charity and not-for-profit entities as well as for-profit organisations.	The Bill deliberately refers to cooperation between the Commonwealth and its partners in a non-restrictive way, to encourage a broad interpretation of the duty to encourage cooperation. The Explanatory Memorandum explains this to include cooperation with other Commonwealth entities, other jurisdictions, and other public and private bodies and organisations including in the not-for-profit-sector.
	The Bill does not adequately address the multi-portfolio nature of many social issues. Currently, funding from different programs is pooled to deliver seamless support to individuals. This creates a significant	Finance acknowledges the complexity of tackling many social issues and that Commonwealth entities should explore more effective ways of partnering with each other and other sectors to deliver more sophisticated and coordinated solutions, including through more flexible funding models. Finance has included in the Bill the principles to drive this change, which will be examined

Submission	Issue	Finance response
	reporting workload and inhibits innovation and service delivery.	further as part of other CFAR proposals around reporting and funding arrangements.
SBS	SBS seeks an additional amendment to clauses 37 to 39 (around measuring and assessing the performance of Commonwealth entities) so that they only apply to the extent that they are not inconsistent with an entity's enabling legislation.	This issue, which goes to preserving the operational independence conferred on the SBS by Parliament, will be considered as consequential amendments are developed for the SBS's enabling legislation.
	<p>As part of the consequential amendments to this Bill, SBS's enabling legislation should be amended to exempt SBS from being subject to Ministerial Directions or General Policy Orders, where this would conflict with their other responsibilities.</p> <p>This would provide SBS with the same level of independence in this regard as the ABC.</p>	The Bill will not compromise the independence of Commonwealth entities as currently set out in their enabling legislation. Changes to the level of independence of particular entities is a matter for the responsible Minister, Government and Parliament to decide.
	Assurance that there will be meaningful consultation in relation to the rules.	Finance has committed to developing the rules in wide consultation within the Commonwealth, with the JCPAA itself and with stakeholders in other sectors.
Mr Stephen Bartos	The development of the PGPA Bill should be given the same level of consideration as the process to introduce the FMA and CAC Acts.	<p>Finance agrees that there should be careful scrutiny of the proposed Bill and notes that there has been a high level of consultation in the development of the Bill as detailed in Finance's initial submission. In addition:</p> <ul style="list-style-type: none"> <li>• 80 of the Bill's 110 clauses generally reflect existing provisions in either the FMA or CAC Acts, meaning that users will be familiar with much of</li> </ul>

Submission	Issue	Finance response
		<p>the content;</p> <ul style="list-style-type: none"> <li>• the development of the original FMA and CAC Bills was done in approximately 30 months from their original genesis following a Joint Committee of Public Accounts’ report – a similar timeframe to the development of the Bill since CFAR commenced;</li> <li>• the development of much of the PGPA Bill has been informed by many years of experience and consultation, including outside of the CFAR process; and</li> <li>• AGS has been engaged throughout the drafting process to provide assurance on constitutional requirements.</li> </ul>
	<p>The principles around accountability and performance are to be given effect by the rules and have not been well covered by the Bill.</p>	<p>Provisions in relation to finances are covered well in the Bill. There are also provisions requiring effective measurement, assessment and reporting of performance (clauses 37 to 40) and an ability for the Finance Minister to prescribe matters in relation to particular entities, or classes of entities are covered in the Bill.</p> <p>These principles will underpin a Commonwealth framework for performance monitoring and evaluation, and a risk based approach to regulating accountability. These are new aspects of the financial framework that will require further consultation to develop, with the rules giving effect to the targeted regulation required.</p>
	<p>The Bill, and the ability to create rules under it, centralises too much power to the Finance Minister and the Finance department, for example, in relation to setting the requirements for corporate plans.</p>	<p>The Finance Minister is responsible for the financial accountability, governance and financial management frameworks of the Commonwealth and one of the key principles of CFAR is the concept of ‘government as a whole’. Part of this approach is ensuring a coherent approach to reporting requirements to assist comparability across entities and a high standard of transparency to the Parliament. The Finance Minister already has the power to set corporate reporting requirements for government business enterprises (CAC Regulation 6AAA)</p>

Submission	Issue	Finance response
	<p>A system of earned autonomy will require transparent criteria, open discussion and clear rationale for decisions. The JCPAA should seek information on the criteria before endorsing such an approach.</p>	<p>Finance agrees with the need for a clear and robust system of earned autonomy to be established before it is implemented. it agrees to broad consultation on this issues, including with the JCPAA.</p>
	<p>Confirm that Division 3, and in particular clause 38 (measuring and assessing performance of Commonwealth entities), covers evaluation.</p> <p>There should also be a requirement that independent evaluations of program and agency performance be carried out periodically and the results published.</p>	<p>Clause 38 is intended to include evaluation so that an entity’s performance against their stated purposes can be assessed. Finance can amend the Explanatory Memorandum to reference evaluation in the discussion of clause 38</p> <p>Clause 40 also allows for the Auditor-General to examine an entity’s annual performance statements if requested by the responsible Minister or Finance Minister. As the Explanatory Memorandum notes, this complements the Auditor-General’s existing mandate under the <i>Auditor-General Act 1997</i> to undertake an independent performance audit of an entity.</p>
<p>Professorial Fellow, Mr Bill Burmester</p>	<p>The Bill limits Parliament’s control of financial administration for the greater convenience of the executive government.</p> <p>For example, the greater use of rules rather than regulations and the use of rules to establish new corporate Commonwealth entities (clause 87).</p>	<p>The Bill actually further empowers Parliament in the following ways:</p> <ul style="list-style-type: none"> <li>• The notification to Parliament of the Commonwealth and corporate Commonwealth involvement in companies is broader than under the CAC Act.</li> <li>• The Bill provides for non-financial performance to be monitored and reported on in addition to financial accountability.</li> </ul> <p>In addition, the Bill maintains the existing parliamentary oversight for:</p> <ul style="list-style-type: none"> <li>• the review of subsidiary legislation (i.e. the rules);</li> <li>• appropriations, including the creation on special accounts by legislative instrument; and</li> <li>• annual reports, including audited financial statements.</li> </ul>



Submission	Issue	Finance response
		<p>The use of rules, rather than regulations is on the insistence of the First Parliamentary Counsel. The reasons for this are explained in the Explanatory Memorandum in the section dealing with clause 101.</p> <p>The rules created to give effect to the Bill are disallowable instruments that will be subject to the scrutiny of Parliament. The power to create statutory bodies corporate using the rules (clause 87) is an option that does not negate the alternative of using an Act of Parliament and the Parliament also has the power to disallow the legislative instrument creating the body.</p>
	<p>The process of developing and passing this Bill has been rushed and there has not been opportunity to examine the rules or the consequential and transitional bill.</p>	<p>Attachment E of Finance's first submission to the JCPAA provides details of the extensive consultation process which has been carried out in the development of the Bill. This consultative approach will be carried through to the development of consequential amendments and the rules to ensure that the needs of different entities are appropriately considered.</p>
	<p>In following the principle that government should operate as a whole, the Bill treats the diverse financial affairs and the breadth of functions in the Commonwealth far more homogeneously than it should.</p>	<p>A principles based approach has been applied to this Bill to develop a coherent approach to the financial framework, while allowing flexibility in implementation to reflect the diversity of Commonwealth entities. In addition, there is no intention for this Bill to override the enabling legislation of entities.</p>
	<p>The Bill assumes that all the officials in an entity have equal influence on the conduct of the entity. This is at odds with corporation law which recognises the greater influence of directors and applies sanctions and penalties to them.</p>	<p>All officials who manage and handle public resource should be accountable. The duties on employees under the Bill (clauses 25-29) are no more onerous than the duties imposed on public servants under the <i>Public Service Act 1999</i>. Including these duties brings a new level of consistency to the financial framework and will help ensure that all officials are subject to a uniform level of responsibility.</p>

Submission	Issue	Finance response
	<p>Also, it may not be appropriate to enforce the duties in the Bill through employment arrangements.</p>	<p>In addition, the Bill places additional duties on accountable authorities in recognition of their greater influence and responsibility within their entity (refer to clauses 15-19).</p> <p>It is appropriate to enforce the duties on officials through employment arrangements, given this already occurs. For example, a public servant that contravenes the FMA Act is likely to face disciplinary proceedings under the <i>Public Service Act 1999</i>.</p>
	<p>The case for replacing the FMA and CAC Acts with this Act has not been made. The Bill does not strengthen financial management practice. Areas of risk management and collaboration are already addressed by the Auditor-General and the <i>Public Service Act 1999</i>.</p>	<p>This is mere opinion. The considerable feedback received throughout the CFAR consultations indicates strong stakeholder support for the CFAR reform package, including having a single financial framework Act. Finance considers that the Bill better articulates a coherent system of financial management and governance which strengthens accountability across the Commonwealth. It brings together both the financial and non-financial aspects of resource management into the one legislative framework.</p>
	<p>The Bill does not appropriately ensure compliance with section 83 of the Constitution.</p> <p>Clause 52 of the Bill merely states that rules may be used to detail arrangements to ensure against breach and clause 105 of the Bill, which allows a special appropriation for the expenditure of other CRF money, may not be accepted by the High Court.</p>	<p>Both of these assertions are contrary to Finance’s legal advice.</p> <p>The thinking behind other CRF Money evolved in large part from the policy decision to exclude persons who were not part of a Commonwealth entity (such as private sector providers) from the requirements of the financial framework thus removing various complexities under the current FMA framework including those relating to outsiders (under section 12 FMA Act) and to persons performing financial tasks (who are ‘allocated’ to an agency under the FMA regulations). These complexities can impose a significant compliance burden on those outside the framework.</p> <ul style="list-style-type: none"> <li>• It was recognised that there still needed to be some mechanism for regulating the receipt and handling of money forming part of the CRF, so the rule-making power was inserted. It was also recognised that the arrangements between Commonwealth entities and contractors often involved the contractor retaining amounts received on behalf of the</li> </ul>

Submission	Issue	Finance response
		<p>Commonwealth e.g. persons organising Commonwealth conferences; or selling Commonwealth vehicles.</p> <ul style="list-style-type: none"> <li>The only irreducible legal requirement for such retention is for there to be an appropriation authorising the expenditure of money from the CRF and clause 105(3) provides that mechanism subject to the purposes for which the appropriation may be used being identified in the rules.</li> </ul>
Mr Peter Goon	The PGPA Bill further disempowers Parliament in performing its oversight function.	See previous discussion relating to Professor Burmester.
	The short timeframe is inappropriate for a piece of legislation as fundamental as the PGPA Bill.	See previous discussion relating to ANAO
Mr Michael Wunderlich	The Bill does not improve enforcement and accountability to prevent fraud and waste.	<p>The control of fraud and waste is a responsibility of the accountable authority as part of its duties to:</p> <ul style="list-style-type: none"> <li>govern the Commonwealth entity (clause 15) – in particular, the duty to promote the proper use and management of public resources for which the authority is responsible; and</li> <li>maintain systems relating to risk and control (clause 16).</li> </ul> <p>It would be inappropriate for principles-based legislation to detail exhaustively with how fraud and waste are to be controlled.</p> <p>In relation to enforcement, criminal acts or omissions are covered by the <i>Criminal Code Act 1995</i> (in particular, see Chapter 7). Non-criminal contraventions of duties in the PGPA Bill can be dealt with:</p> <ul style="list-style-type: none"> <li>as a breach of the conditions of employment, including a breach of the APS Code of Conduct; or</li> </ul>

Submission	Issue	Finance response
		<ul style="list-style-type: none"> <li>through the termination of appointment of a member of an accountable authority of a corporate Commonwealth entity (clause 30).</li> </ul>
CPA	Clause 36 (budget estimates) has not relocated provisions on the preparation of the Budget that are contained in the <i>Charter of Budget Honesty Act 1998</i> (CBH Act).	The CBH Act and PGPA Bill are aimed at different aspects of the Commonwealth Budget. The CHB Act places requirements on the Treasurer at a whole-of-government level, whereas the PGPA Bill places requirements at the Commonwealth entity-level.

## Attachment B

The below table outlines the substantive provisions of the *Public Governance, Performance and Accountability Bill 2013* that allow the making of “Rules” by the Finance Minister compared to existing subsidiary legislation, under the FMA and CAC Acts on these matters, and supporting guidance material issued by departments – primarily the Department of Finance and Deregulation

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
8	<p><b>The Dictionary</b> (Includes.... <i>Department of State</i> (a) includes any body (except a body corporate), organisation or group of persons that is prescribed by the <b>rules</b></p> <p><i>government business enterprise</i> means a Commonwealth entity or Commonwealth company prescribed by the <b>rules</b>.</p> <p><i>relevant property</i> means: (b) any other thing prescribed by the <b>rules</b>.</p>	<p><i>Financial Management and Accountability Regulations 1997</i> (FMA Regulations) regulation 4 (Allocation of certain persons to Departments of State and Departments of the Parliament)</p> <p>N/A</p> <p>—</p>	<p>N/A</p> <p><i>Commonwealth Authorities and Companies Regulations 1997</i> (CAC Regulations) – regulation 4 (Government business enterprises)</p> <p>—</p>	<p>Update</p> <p>Update – the equivalent of CAC Regulation 4</p> <p>New</p>
10	<p><b>Commonwealth entities</b> (Includes.... 10(1)(c) a listed entity)</p>	FMA Regulations Schedule 1 (Prescribed agencies)	N/A	Update – the equivalent of FMA Regulations Schedule 1
12	<p><b>Accountable authorities</b> (Includes....</p>	FMA Regulations Schedule 1 (Prescribed agencies)	—	Update– the equivalent of FMA Regulations Schedule 1 plus any

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
	12(2), table item 3 for a listed entity – the person or group of persons prescribed by the <b>rules</b> as the accountable authority of the entity)			clarification needed for corporate Commonwealth entities
<b>13</b>	<b>Officials</b> (Includes... 13(3)(iii) is an individual, or an individual in a class, prescribed by the <b>rules</b> Does not include an individual who (iv) is an individual, or an individual in a class, prescribed by the <b>rules</b> )	FMA Regulations 4 (Allocation of certain persons to Departments of State and Departments of the Parliament)	—	Update
		—	—	New
<b>19</b>	<b>Duty to keep the responsible Minister and Finance Minister informed</b> (19(3) Without limiting subsection (1), the <b>rules</b> may prescribe matters to be taken into account in deciding whether a decision or issue is significant)	—	— (however, section 15 of the CAC Act provides detail about what constitutes a significant event)	Update In the rules, significant issues and decisions will be based upon those in section 15 of the CAC Act.
<b>20</b>	<b>Rules about general duties of accountable authorities</b> (20 The <b>rules</b> may prescribe matters relating to discharging duties under subdivision A (General duties of accountable authorities))	—	— (the CAC Act clarifies the duties through matters such as, reliance on information provided by others (section 27D) and responsibility for actions of a delegate (section 27E))	Update In the rules, provisions, such as those like section 27D of the CAC Act (reliance on information provided by others) could be used to clarify the duties in the PGPA Bill.
<b>25</b>	<b>Duty of care and diligence</b> (25(2) The <b>rules</b> may prescribe circumstances in which the requirements of subsection (1) are taken to be met.)	—	— (the CAC Act clarifies the duty through the business judgment rule (subsection 22(2))	Update In the rules, provisions, such as those like subsection 22(2) of the CAC Act, could be used to clarify the duty in the PGPA Bill.
<b>29</b>	<b>Duty to disclose interests</b> (29(2) The <b>rules</b> may do the following:	—	— (the CAC Act includes procedural	Update The rules will include procedural

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
	<p>(a) prescribe circumstances in which subsection (1) does not apply;</p> <p>(b) prescribe how and when an interest must be disclosed;</p> <p>(c) prescribe the consequences of disclosing an interest (for example, that the official must not participate at a meeting about a matter or vote on the matter.)</p>		requirements around material personal interests – refer sections 27F to 27K)	requirements similar to those currently in the CAC Act.
30	<p><b>Termination of appointment for contravening general duties of officials</b></p> <p>(30(5) Without limiting paragraph (1)(d), the <b>rules</b> may prescribe positions in relation to which appointments must not be terminated under this section.)</p>	N/A	—	New
35	<p><b>Corporate plan for Commonwealth entities</b></p> <p>(35(1) The accountable authority of a Commonwealth entity must:</p> <p>(b) give the corporate plan to the responsible Minister and the Finance Minister in accordance with the <b>rules</b>.</p> <p>(35(2) The corporate plan must comply with, and be published in accordance with, any requirements prescribed by the <b>rules</b>.)</p>	—	CAC Regulations 6AAA – Corporate Plan for GBE – setting out of matters, details of which must be provided in corporate plans	Update – based on CAC Regulation 6AAA
37	<p><b>Records about performance of Commonwealth entities</b></p> <p>(37(2) The accountable authority must ensure that the records are kept in a way that:</p> <p>(a) complies with any requirements prescribed by the <b>rules</b>;) </p>	—	—	New

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
38	<p><b>Measuring and assessing performance of Commonwealth entities</b></p> <p>(38(2) The measurement and assessment must comply with any requirements prescribed by the <b>rules</b>)</p>	—	—	New
39	<p><b>Annual performance statements for Commonwealth entities</b></p> <p>(39(2) The annual performance statements must:</p> <p>(b) comply with any requirements prescribed by the <b>rules</b>.)</p>	—	—	New
41	<p><b>Accounts and records for Commonwealth entities</b></p> <p>(41(2) The accountable authority must ensure that the accounts and records are kept in a way that:</p> <p>(a) complies with any requirements prescribed by the <b>rules</b>)</p>	<p><i>Finance Minister's Orders (Financial Statements for Reporting periods ending on or after 1 July 2011) (FMO)</i></p> <ul style="list-style-type: none"> <li>• Issued annually. FMO 4 requires the Chief Executive of an Agency to ensure that the Agency's accounts and records properly record and explain the Agency's transactions and financial position and ensure that accounts and records are kept in a prescribed way.</li> </ul>	<p>—</p> <p>(the CAC Act requires the directors of a Commonwealth authority to keep accounting records in a way that enables the preparation and auditing of financial statements)</p>	Update
42	<p><b>Annual Financial Statements for Commonwealth entities</b></p> <p>(42(2) The annual financial statements must:</p> <p>(a) comply with the accounting standards and any other requirements prescribed by the <b>rules</b>.)</p>	FMOs updated annually	FMOs updated annually	Update



PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
45	<b>Audit Committee for Commonwealth entities</b> (45(2) The committee must be constituted, and perform functions, in accordance with any requirements prescribed by the <b>rules</b> .)	FMA Regulation 22C (Audit Committee)	CAC Regulation 6A (audit committees for Commonwealth authorities)	Update
46	<b>Annual report for Commonwealth entities</b> (46(3) The annual report must comply with any requirements prescribed by the <b>rules</b> .)	—	<i>Commonwealth Authorities (Annual Reporting) Orders 2011</i>	Update
48	<b>Annual consolidated financial statements</b> (48(2) The annual consolidated financial statements must: (a) comply with the accounting standards and any other requirements prescribed by the <b>rules</b> .)	FMA Regulation 22A (Preparation of annual financial statements by Finance Minister)	—	Update
52	<b>Commitment and expenditure of relevant money</b> (52 The rules may prescribe matters relating to the commitment or expenditure of relevant money by the Commonwealth or a Commonwealth entity.)	FMA Regulations 7 (Commonwealth procurement) FMA Regulation 7A (Commonwealth Grant Guidelines) FMA Regulation 7B (Commonwealth Cleaning Services Guidelines) FMA Regulation 8 (Entering into an arrangement) FMA Regulation 9 (Approval of spending proposals) FMA Regulation 10 (Arrangements beyond available appropriation) FMA Regulation 10A (Contingent liabilities)	N/A	Update

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
		FMA Regulation 11 (Entering into loan guarantees) FMA Regulation 12 (Recording approval of spending proposals)		
53	<b>Banking by the Commonwealth</b> (53(2) The agreement: (b) must be in accordance with any requirements prescribed by the <b>rules</b> .)	FMA Regulation 17 (Prompt banking of money received) FMA Regulation 18 (Public money in non-bankable currency) FMA Regulation 19 (Withdrawals involving internal transfers) FMA Regulation 19A (Withdrawals for payments or notional payments involving drawing rights)	N/A	Update
54	<b>Banking by corporate Commonwealth entities</b> (54 The <b>rules</b> may prescribe requirements relating to banking for corporate Commonwealth entities.)	N/A	—	New
55	<b>Banking of relevant money by officials and Ministers</b> (55A 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 <b>rules</b> ; or (b) otherwise deal with it in accordance with the <b>rules</b> .)	FMA Regulation 17 (Prompt banking of money received) FMA Regulation 18 (Public money in non-bankable currency) FMA Regulation 19 (Withdrawals involving internal transfers) FMA Regulation 19A (Withdrawals for payments or notional payments involving drawing rights)	N/A	Update

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
56	<b>Borrowing by the Commonwealth</b> (56(3) The agreement must: (b) be in accordance with any requirements prescribed by the <b>rules</b> .)	FMA Regulation 21 (Credit Cards)	N/A	Update
57	<b>Borrowing by corporate Commonwealth entities</b> (57 An agreement for the borrowing of money by a corporate Commonwealth entity (including by obtaining an advance on overdraft or obtaining credit by way of credit card or credit voucher) is of no effect unless: (c) the borrowing is authorised by the <b>rules</b> .)	N/A	CAC Regulation 6AA (Commonwealth Authority's Credit Cards) CAC Regulation 6AB (Commonwealth Authority's Credit Vouchers) CAC Regulation 6AC (Authorisation for Use of Commonwealth Authority Credit Cards and Credit Vouchers) CAC Regulation 6AD (Authorised Expenditure Using Commonwealth Authority Credit Cards) CAC Regulation 6AE (Authorised Expenditure Using Commonwealth Authority Credit Vouchers)	Update
58	<b>Investment by the Commonwealth</b> (58(8) Any of the following are an <i>authorised investment</i> : (a) in relation to both the Finance Minister and the Treasurer: (iii) any other form of investment prescribed by the <b>rules</b> ;) )	FMA Regulation 22 (Investment of Public Money) FMOs	N/A	Update

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
60	<p><b>Indemnities, guarantees or warranties by the Commonwealth</b></p> <p>(60(1) The Finance Minister may, on behalf of the Commonwealth, grant an indemnity, guarantee or warranty.</p> <p>(2) The grant of the indemnity, guarantee or warranty must be in accordance with any requirements prescribed by the <b>rules</b>.)</p>	<p>FMA Regulation 10A (Contingent Liabilities)</p> <p>FMA Regulation 11 (Entering into Loan Guarantees)</p> <p>FMOs</p>	N/A	Update
61	<p><b>Indemnities, guarantees or warranties by corporate Commonwealth entities</b></p> <p>(61 The <b>rules</b> may prescribe requirements relating to the granting of indemnities, guarantees or warranties by corporate Commonwealth entities.)</p>	N/A	<p>FMOs</p> <p><i>Commonwealth Authorities (Annual Reporting) Orders 2011</i></p> <p>(the CAC Act includes restrictions around the giving of certain indemnities: sections 27M and 27P)</p>	<p>Update</p> <p>In the rules, indemnity restrictions may be based upon those in sections 27M and 27P of the CAC Act.</p>
62	<p><b>Insurance obtained by corporate Commonwealth entities</b></p> <p>(62 The <b>rules</b> may prescribe requirements relating to the obtaining of insurance by corporate Commonwealth entities.)</p>	N/A	<p>—</p> <p>(the CAC Act includes restrictions around insuring for certain liabilities: sections 27N and 27P)</p>	<p>Update</p> <p>In the rules, insurance restrictions may be based upon those in sections 27N and 27P of the CAC Act.</p>
63	<p><b>Waiver of amounts owing to the Commonwealth</b></p> <p>(63(2) The waiver or modification must be in accordance with the <b>rules</b>.)</p>	<p>FMA Regulation 29 (Act of grace payments and waiver of debts)</p> <p>FMOs</p>	N/A	Update
65	<p><b>Act of grace payments by the Commonwealth</b></p> <p>(65(2) The authorisation of the payment must be</p>	<p>FMA Regulation 29 (Act of grace payments and waiver of debts)</p> <p>FMOs</p>	N/A	Update

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
	in accordance with any requirements prescribed by the rules.)			
66	<p><b>Gifts of relevant property</b></p> <p>(66A Minister or an official of a non-corporate Commonwealth entity must not make a gift of relevant property unless:</p> <p>(b) the making of the gift:</p> <p>(ii) is made in accordance with the <b>rules</b>.)</p>	—	N/A	New
71	<p><b>Approval of proposed expenditure by a Minister</b></p> <p>(71(3) If a Minister approves the expenditure of relevant money, the Minister must:</p> <p>(b) comply with any other requirements prescribed by the <b>rules</b> in relation to the approval)</p>	<p>FMA Regulation 9 (Approval of spending proposals)</p> <p>FMA Regulation 12 (recording approval of spending proposals)</p>	N/A	Update
72	<p><b>Ministers to inform Parliament of certain events</b></p> <p>(72(2) <i>Relevant body</i> means a body of a kind prescribed by the <b>rules</b>.</p> <p>(3) The notice must be in the form (if any), and contain the particulars (if any), prescribed by the <b>rules</b>)</p>	FMA Regulation Schedule 1A – Notice of event under section 39A of the Act	N/A	Update – the equivalent of FMA Regulation Schedule 1A
74	<p><b>Receipts of amounts by non-corporate Commonwealth entities</b></p> <p>(74(1) If a non-corporate Commonwealth entity receives an amount of a kind prescribed by the <b>rules</b> than the amount may be credited to:</p> <p>(b) if the <b>rules</b> prescribe another item in an Appropriation Act, another appropriation or a special account – that item, appropriation or</p>	FMA Regulation 15 (Prescribed receipts that an agency may retain (FMA Act section 31)	N/A	Update – based on FMA Regulation 15, but with new parts to cover repayments to the Commonwealth and GST (FMA Act sections 30 and 31).

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
	special account)			
75	<b>Transfer of functions between non-corporate Commonwealth entities</b> (75(10) The <b>rules</b> may make provision in relation to a transfer of function to which this section applies, including in relation to the exercise of a power, the performance of a function or the discharge of a duty delegated under this Act or the rules.)	—	N/A	New
82	<b>Sharing information with other jurisdictions</b> (82 The <b>rules</b> may do the following: ( <i>various matters related to information sharing such as prescribe the kinds or reports, documents that may be shared</i> )	— (the FMA Act (section 43A) has a regulation making power similar to clause 82, however, regulations were never made under this section)	— (the CAC Act (section 33A) has a regulation making power similar to clause 82, however, regulations were never made under this section)	Update
85	<b>The Commonwealth's involvement in companies</b> (85(2) A <i>relevant company</i> is a company of a kind prescribed by the <b>rules</b> whose objects or proposed activities are of a kind prescribed by the <b>rules</b> .)	<i>Financial Framework Legislation Amendment Bill (No.2) 2013</i> will insert additional regulations to the FMA Regulation on companies	—	New
87	<b>Establishing new corporate Commonwealth entities</b> (87 The <b>rules</b> may do the following: establish a body corporate, name the body corporate etc....)	—	—	New
91	<b>Duty to keep the responsible Minister and Finance Minister informed</b> (wholly-owned Commonwealth companies) (91(2) Without limiting subsection (1), the <b>rules</b> may prescribe: (a) matters to be taken into account in deciding whether a decision or issue is significant;	—	— (however, section 40 of the CAC Act provides detail about what constitutes a significant event)	Update In the rules, significant issues and decisions will be based upon those in section 40 of the CAC Act.

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
	and (b) matters relating to discharging duties under subsection (1).)			
92	<b>Audit Committee</b> (wholly-owned Commonwealth company) (92(2) The committee must be constituted, and perform functions, in accordance with any requirements prescribed by the <b>rules</b> .)	N/A	CAC Regulation 6B (Audit committees for wholly-owned Commonwealth companies)	Update
95	<b>Corporate plan for Commonwealth companies</b> (95(1) The directors of a Commonwealth company must: (b) give the corporate plan to the responsible Minister and the Finance Minister in accordance with any requirements prescribed by the <b>rules</b> . (2) the corporate plan must comply with, and be published in accordance with, any requirements prescribed by the <b>rules</b> .)	N/A	CAC Regulation 6AAA (Corporate plan for GBE) setting out of matters, details of which must be provided	Update
97	<b>Annual reports for Commonwealth companies</b> (97(1) The directors of a Commonwealth company must give the responsible Minister: (b) for a wholly-owned Commonwealth company—any additional information or report prescribed by the <b>rules</b> .)	N/A	<i>Commonwealth Companies (Annual Reporting) Orders 2011</i> The majority of requirements supplied by the <i>Corporations Act 2001</i> with some additional requirements in the Orders.	Update
104	<b>Rules modifying the application of this Act</b> (104(1) The <b>rules</b> may prescribe that all or specified provisions of this Act: (a) do not apply in relation to a Commonwealth entity referred to in	FMA Regulation 27 (Modification of the Act for intelligence or security agency) FMA Regulation 28 (Modification of the Act for prescribed law enforcement agency) FMA Regulation 28A (Non-	CAC Regulation 8 (modification of Act for intelligence or security agency)	Update

PGPA Bill Section	Section heading	FMA Subsidiary Legislation	CAC Subsidiary Legislation	PGPA Bill proposal
	subsection (2); or  (b) apply in relation to a Commonwealth entity referred to in subsection (2), as if specified provisions were omitted or varied as prescribed by the <b>rules</b> .)	application of relevant regulations to operational money)  FMA Regulation Schedule 2 (Modification of the Act for intelligence or security agency or a prescribed law enforcement agency)		
<b>105</b>	<b>Rules in relation to other CRF Money</b> (105(1) The <b>rules</b> may prescribe matters in relation to other CRF money.)	—	N/A	New



