

The Bill – areas of impact

- 4.1 Over the course of the inquiry there were a number of more specific matters raised. This chapter examines the areas of:
- Independence
 - Risk and earned-autonomy
 - Cooperation
 - Performance monitoring, reporting and evaluation
 - Interaction with the *Public Service Act 1999*

Independence

- 4.2 The Explanatory Memorandum outlines that the Commonwealth Financial Accountability Review (CFAR) reforms aim to increase ‘strategic coherence and coordination’; it also acknowledges the importance of appropriate operational independence.¹ Under the existing framework, there are both FMA and CAC Act bodies operating with significant statutory independence.²
- 4.3 The Explanatory Memorandum further states that the ‘Bill will not seek to alter the operational independence of entities as set out in their enabling legislation’.³
- 4.4 Throughout the CFAR process quite a number of submissions reviewed raised concerns about operational independence. Responding to these in

1 Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (PGPA Bill 2013), p.2.

2 Explanatory Memorandum, PGPA Bill 2013, p.2.

3 Explanatory Memorandum, PGPA Bill 2013, p.6

its initial submission to the Committee's inquiry, Finance laid out the following statements responding to concerns raised regarding the PGPA Bill's potential impingement on entity independence:

- it does not affect the purposes for which entities have been established;
- it does not change the ability for corporate Commonwealth entities to 'hold money on their own account';
- the requirement for corporate plans to detail how they comply with Australian Government priorities is limited where this would conflict with enabling legislation;
- the process of applying Government policy to Commonwealth entities and companies remains the same as under the FMA and CAC Acts; and
- information to be provided to Ministers relates to the activities of entities with an administrative focus. It does not, for example, extend to judicial activity or parliamentary functions.⁴

4.5 Finance's Submission also explained that during the Bill's drafting process adjustments were made to 'ensure the level of operational independence determined by Parliament is assured'.⁵ Supporting this in his opening statement to the Committee, the Finance Secretary again reiterated the view that the Bill has 'no effect on the independence of entities'.⁶

4.6 As noted above, entities that appeared before the Committee acknowledged the consultative approach Finance has taken throughout the process, and particularly in regard to addressing concerns regarding independence.

4.7 The ABC noted its appreciation that its concerns had been addressed through explicit statements in the Explanatory Memorandum, and Finance's assurance that consequential amendments to the ABC Act 'will be passed before the commencement of the relevant provision of the Bill'.⁷

4.8 The SBS agreed that like the ABC most of its concerns had been addressed. However, the SBS noted that the process had since highlighted a discrepancy in the ABC's and SBS's respective enabling legislation with regard to independence. The SBS has requested that this matter be addressed through the consequential amendment process.⁸

4.9 In a submission to the Committee, the Department of the House of Representatives queried the implications of clause 19, which amongst

4 Department of Finance and Deregulation (Finance), *Submission 9*, p. 30.

5 Finance, *Submission 9*, p. 30.

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

7 Mr David Pendleton, ABC, *Proof Committee Hansard*, Canberra, 24 May 2013, p.16.

8 Mr John Torpy, SBS, *Proof Committee Hansard*, Canberra, 24 May 2013, p.17.

other things, requires that the Commonwealth entity ‘give the responsible Minister or the Finance Minister any reports, documents and information in relation to those activities as that Minister requires’.⁹

- 4.10 Responding, Finance advised that this was an existing provision within the CAC Act and as such should not present any concerns to existing FMA Act agencies on establishment of the PGPA Act. However, Finance also suggested that amendments could be made to further clarify the scope of this clause.¹⁰

Consequential amendments

- 4.11 In a supplementary submission to the Committee, Finance reiterated that the Explanatory Memorandum to the Bill contains a commitment that ‘consequential amendments to enabling legislation will be made as necessary to protect operational independence’.¹¹
- 4.12 Further, Finance advised that they had received legal advice on the process for addressing conflicts or inconsistencies between an enabling Act and this Act (once passed). Finance summarised that,
- while not always being able to conclude that the enabling Act will prevail, 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.¹²
- 4.13 Finance also indicated that, in recognition that consequential amendments are unlikely to have occurred before the passage of this Bill, the Australian Government Solicitor (AGS) has provided options to address remaining concerns regarding the maintenance of independence. These include:
- amendments to the Explanatory Memorandum:
 - ⇒ ...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;
 - ⇒ ...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

9 Public Governance, Performance and Accountability Bill 2013, p. 19.

10 Finance, *Supplementary Submission 9.1*.

11 Finance, *Supplementary Submission 9.1*.

12 Finance, *Supplementary Submission 9.1*.

before Parliament to delay the commencement of clauses 6 to 110 of the PGPA [Act]

⇒ [to] 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.

■ amendment to clause 2 of the 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.¹³

Committee comment

4.14 Concerns around independence have been raised repeatedly, both throughout the CFAR consultation period and during the Committee's inquiry. This is despite references to maintenance of independence in the Explanatory Memorandum and Finance's assurances that there is no intent to expand the Finance Minister's powers to impede on independence. As such, the Committee is of the view that tangible action is required, and recommends that changes to the Explanatory Memorandum as outlined by the AGS are progressed. The Committee has made a recommendation to this effect in Chapter 5.

A new approach to risk

4.15 The Explanatory Memorandum to the Bill describes 'earned autonomy' as a targeted approach to financial framework regulation where the nature and extent of oversight and regulatory intervention depends on an entity's risk profile and performance. In the second reading speech the Minister noted that this approach is 'akin to world leading practices in regulation and compliance adopted by APRA, ASIC and the ATO'¹⁴. Some examples of potential applications are also provided in the Explanatory Memorandum:

13 Finance, *Supplementary Submission 9.2*

14 The Hon David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation, PGPA Bill 2013 Second Reading Speech, House of Representatives Hansard, 16 May 2013, p. 9.

Consistent with earned autonomy, well governed entities may have capacity to commit a greater percentage of forward budget relative to another entity where there is scope to improve governance.¹⁵

For example, the Expenditure Review Principles could be mandated for entities that exhibit continuous shortcomings in the quality of evaluations.¹⁶

- 4.16 While the term ‘earned autonomy’ does not appear in the Bill itself, the Finance minister is empowered to differentiate between entities in setting out the rules to the Bill:

The rules may:

- (a) prescribe matters in relation to a particular Commonwealth entity, or a class of Commonwealth entities; or
 - (b) make different provision in relation to different Commonwealth entities, or classes of Commonwealth entities.
- (Subclause 101(2))

- 4.17 During the public hearing, Finance stated that the development of the rules in relation to earned autonomy will be a consultative process, involving the Auditor-General, the Australian Accounting Standards Board, the relevant Commonwealth entities and others. Finance expects this process will be time consuming:

Our intention is to have the initial set of rules in place by 1 July 2014...The rules in relation to earned autonomy will probably take another year to develop and fully implement, because it is quite a different approach. We are moving from a one-size-fits-all regulatory framework to a very nuanced approach that is based on the risk maturity of entities. Just gathering the information on which to form that sort of assessment will take time.¹⁷

- 4.18 Stakeholders and experts in the field were very supportive of earned autonomy in principle but several concerns were expressed in relation to its application:

- A lack of clear distinction between ‘differential reporting’ which should be based on the nature and size of an entity and ‘differential oversight’ which should be based on its risk profile.¹⁸

15 Explanatory Memorandum, PGPA 2013, p. 23.

16 Explanatory Memorandum, PGPA 2013, p. 34.

17 Mr George Sotiropoulos, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 6.

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

- The complexity of comparing Commonwealth entities which serve vastly different purposes:
 - ...you can tell whether school A is producing better results than school B with the same money – whereas it is a lot harder with the diversity of Commonwealth agencies.¹⁹
- That the approach may give the Finance Minister undue power:
 - ⇒ The rules, we have not yet seen, and they are to be set by government, not by the parliament. ... The bill will allow the Minister for Finance and Deregulation to create multiple frameworks and then decide who applies to which body.²⁰
 - ⇒ If earned autonomy is reliant on the subjective judgment of advisers to the Finance Minister delivered with no scrutiny or oversight, then it opens up the possibility of capricious and unfair treatment of different agencies. Earned autonomy will only work if the criteria are transparent, discussed openly, and the basis for judgements revealed. The Bill provides for different rules for different agencies (s101 (2) (b)) but is silent on how this rule making power will be exercised. Before endorsing an earned autonomy approach, the JCPAA should seek information on the criteria on which it will be based.²¹

4.19 However, there are also those who consider that not moving toward a system of earned autonomy and the related streamlined reporting requirements would be a lost opportunity. In its submission, the CPA expressed its support for the proposals outlined in the Explanatory Memorandum to 'explore options to streamline financial reporting requirements for Commonwealth entities, including through the introduction of tiered or differential financial reporting arrangements that are appropriately calibrated'.

CPA Australia believes it is important that this work is commenced earlier rather than later and that it is at the very least informed by the Australian Accounting Standards Board's mandated differential reporting framework and the outcomes of the ongoing discussions around the functionality of the reporting entity concept.²²

19 Mr Stephen Bartos, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 32.

20 Mr William Burmester, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 28.

21 Mr Stephen Bartos, *Submission 7*, p. 2.

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

Achieving better outcomes through cooperation

- 4.20 As highlighted by the Finance Secretary, joined-up government is ‘a constant theme of the way governments operate in Australia – and around the world’.²³
- 4.21 One of the key objectives of the Bill is to facilitate cooperation between Commonwealth entities (subclause 5(c)(iv)). This is achieved in the Bill via:
- Clause 17 – which requires accountable authorities to encourage officials to cooperate with others to achieve common objectives, where practicable; and
 - Clause 18 – which requires accountable authorities to consider the risks involved and the effects of imposing requirements on others in relation to the use or management of public resources.
- 4.22 The Explanatory Memorandum outlines the importance of doing so as follows:
- Effective collaboration between Commonwealth entities, with other levels of government, and with the private and not-for-profit sectors, is critical to the achievement of the government’s priorities and national goals.²⁴
- 4.23 Beyond clauses 17 and 18, there are several clauses in the Bill that facilitate improved cooperation between levels of government – in particular, clauses 82, 83 and 87. When asked about partnering between levels of government, Finance stated the Bill would allow:
- ... for information-sharing on joint Commonwealth, state and territory bodies. It also allows for state auditors-general to audit the moneys that are in the hands of those joint bodies. There is clause 87 as well, which allows models of bodies to be established in the rules, and we hope that those models will be templates, if you like, for how the Commonwealth joins up so there is a ready-made way for the Commonwealth to engage with others.²⁵
- 4.24 The House of Representatives Selection Committee asked the JCPAA to ensure that combining the two Acts into a single Act would not impose additional and unnecessary reporting requirements on bodies subject to the Act. In addition to considering the impact on Commonwealth entities, the Committee also sought input from external service providers on the

23 Mr David Tune, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 1.

24 Explanatory Memorandum, PGPA Bill 2013, p. 21.

25 Mr Lembit Surr, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 1.

potential effect of the Bill, including issues related to reporting to those entities.

Impact on the third sector

- 4.25 In responding to a question from the Committee on work in relation to understanding how the financial framework is impacting on governance relationships with the third sector and remote area services, Finance advised that they were very conscious of the issues in grants administration.
- 4.26 In relation to Indigenous issues, Finance explained that they had consulted with various Indigenous bodies to gain further understanding of current frustrations. Finance also flagged their intention to continue the dialogue on issues that are 'unique and nuanced'.²⁶
- 4.27 The National Congress of Australia's First Peoples, a peak representative body for Aboriginal and Torres Strait Islander Australians, provided a submission to the Committee reiterating comments made during a recent JCPAA inquiry about the problems faced with the administration of grants, including the burden of reporting and compliance mechanisms, and the need for stronger governance structures.²⁷
- 4.28 National Congress suggested that
- If these are the sorts of changes envisaged by the current reform agenda and this Bill, then they will certainly improve the experience of Aboriginal and Torres Strait Islander community organisations and service providers in their interaction with Government agencies.²⁸
- 4.29 However, the National Congress noted that despite the long pre-bill consultation period, time to reflect on the actual Bill was very short. The National Congress is still seeking further clarity on the implications of clause 18, suggesting that the existing very broad wording may lead to unintended consequences.²⁹
- 4.30 UnitingCare Australia expressed its support for clauses 17 and 18, citing their potential to reduce the compliance and reporting obligations it faces when sourcing funds from Commonwealth entities. UnitingCare pools funds from multiple entities because its funding programs tend to span several portfolio areas. For example:

26 Mr Lembit Suur, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 9.

27 National Congress of Australia's First Peoples, *Submission 15*, p. 3.

28 National Congress of Australia's First Peoples, *Submission 15*, p. 3.

29 National Congress of Australia's First Peoples, *Submission 15*, pp. 2-3.

... long-term unemployment is not simply about a lack of access to the job market; it can be linked to learning disabilities, physical and mental health issues, family and relationship problems, lack of transport, homelessness and other contributing factors. These contributing factors are often being addressed in a number of other portfolios and jurisdictions, which presents us with a number of challenges when trying to deliver holistic services.³⁰

4.31 UnitingCare stated that an excessive compliance burden is created because in pooling funds from multiple areas it must meet the specific requirements of each entity. This can involve reporting the same information in different formats. UnitingCare expect that this burden will reduce if cooperation between Commonwealth entities increased.³¹

4.32 While supporting increased cooperation between Commonwealth entities, UnitingCare noted that:

... the bill could be strengthened if the term 'others' in clauses 5 and 17 were made more overt to identify the types of entities covered.³²

4.33 Further, praising the consultation process undertaken by Finance on the CFAR review, UnitingCare cautioned that:

... the pace and manner in which this bill is implemented will be critical to realising its full potential and thus its importance to our sector. We think it is vital that the government include key stakeholders in the implementation process.³³

4.34 Finance noted that they had not specifically consulted the third sector on the relevant clauses in the Bill, but that they had been inserted in recognition that 'the Commonwealth in its internal regulation imposes costs on others and those burdens need to be taken into account'.³⁴

4.35 Referring back to comments made in relation to the third sector, Finance suggested that:

at this stage government could do better on all those fronts. So part of the objective of this legislation is to make way for better joining-up between the Commonwealth and other partners not only by removing some of the impediments that exist in relation to that in the financial framework but also by signalling to government and government officials that joining up is part of

30 Mr Joseph Zabar, UnitingCare, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 22.

31 Mr Joseph Zabar, UnitingCare, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 22.

32 Mr Joseph Zabar, UnitingCare, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 22.

33 Mr Joseph Zabar, UnitingCare, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 22.

34 Dr Stein Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 23.

how they are expected to discharge their public duty, and that, in joining up, they have to be mindful of the needs of others and of the impacts they have on the others that they join up with. This is a long-term piece of reform, but the beginnings are in this legislation, and this legislation, I believe, sends some very important signals as to how the government should operate in the future.³⁵

Committee comment

- 4.36 In recent years, the JCPAA has been largely focused on ensuring that the Commonwealth achieves the best possible outcomes with its limited resources. The Committee has made a number of recommendations in reports to improve amongst other things: relationships between agencies; cross-agency reporting; interaction with the third sector; and following the money across the federal-state sphere.
- 4.37 In regard to cooperation between levels of government, the committee welcomes any moves toward more effective partnering to achieve national outcomes. The committee does, however, suggest that all governments need to give consideration to the possible 'accountability gaps' and remedies for these gaps suggested in correspondence from the Australasian Council of Auditors-General.³⁶
- 4.38 The committee would be concerned if new jurisdictional bodies were in any way distanced from oversight bodies or parliaments; but believes that the intent expressed in the Bill provides an opportunity to enhance these critical partnership arrangements while also improving oversight elements.
- 4.39 While the committee strongly endorses all efforts being made to improve cooperation across government, jurisdictions and other stakeholders; it was particularly pleased to hear that Finance is working closely with the third sector to improve outcomes and efficiency.
- 4.40 On a related matter, part of effective cooperation is effective communication. On a number of occasions the JCPAA has raised the importance of citizen engagement and accessibility through the use of plain English.³⁷ Following this theme, the Committee suggested that the Explanatory Memorandum was complicated by the use of anomalous words such as 'bifurcated'. Therefore the committee appreciates Finance has undertaken to revisit the Explanatory Memorandum with a view to

35 Mr Lembit Suur, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 23.

36 Correspondence is available on the Committee's website at: www.aph.gov.au/jcpaa

37 For example see JCPAA Report 432: APS – Fit for Service (August 2102), p. 10.

improving readability.³⁸ The Committee has also made a recommendation to this effect in Chapter 5.

Performance monitoring, reporting and evaluation

- 4.41 Clauses 37 to 40 of the Bill require entities to measure and assess their performance in achieving their purposes, keep records of their performance, and produce annual performance statements for inclusion in annual reports which may be examined and reported on by the Auditor-General. These elements of the Bill are intended to introduce ‘a framework for measuring and assessing performance, including requiring effective monitoring and evaluation’.³⁹
- 4.42 The Explanatory Memorandum states that the requirements for measuring performance would be outlined in the rules, which would focus on:
- ... exchanging the quality and integration of performance information required by Government and the Parliament to assess actual against planned results. The rules may also provide the capacity to mandate particular requirements that are currently voluntary, consistent with the concept of earned autonomy’.⁴⁰
- 4.43 The submission from Finance added that the clauses requiring entities to monitor and report on their performance sought to ‘parallel performance reporting with financial reporting by recognising the inherent value of quality performance reporting’.⁴¹ The clauses would also:
- ... build on the JCPAA’s findings in Report 419, *Inquiry into the Auditor-General Act 1997*, which recommended that the Auditor-General’s mandate be enhanced to give explicit authority to undertake audits of entities’ key performance indicators and the reporting by entities against those indicators.⁴²
- 4.44 Participants in the inquiry expressed general support for the inclusion of explicit obligations for performance monitoring and reporting. For example, the submission from CPA Australia indicated its support for audited annual performance statements. The submission noted that financial performance and position allowed for only a partial evaluation of an entity’s success, and that audited quantitative and qualitative

38 Dr Stein Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 29.

39 Explanatory Memorandum, PGPA Bill 2013, p. 7.

40 Explanatory Memorandum, PGPA Bill 2013, p. 34.

41 Finance, *Submission 9*, p. 7.

42 Finance, *Submission 9*, p. 7.

performance information about services provided was ‘critical’ in this context.⁴³

- 4.45 The Auditor-General’s submission similarly expressed strong support for the Bill’s provisions dealing with the obligation of accountable authorities to measure, assess and report on performance. It noted the shortcomings in the existing performance framework that had previously been highlighted by both the ANAO and the Committee. The submission added that:

A strong ongoing commitment to developing and implementing an appropriate performance framework that underpins these provisions will be essential if the intended benefits are to be realised.⁴⁴

- 4.46 However, the Auditor-General also suggested that the wording of subclause 38(1) – ‘[t]he accountable authority of a Commonwealth entity must measure and assess the performance of the entity in achieving its purposes’ – could be interpreted narrowly. He considered that:

... this wording could be reviewed to give greater confidence that assessment of performance relates to the impact or effectiveness of government programs and activities for which the entity carries administrative responsibility, including those that involve multiple entities and other jurisdictions.⁴⁵

- 4.47 Finance responded to the Auditor-General’s concerns in a supplementary submission as follows:

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.⁴⁶

- 4.48 Mr Stephen Bartos raised similar concerns in his submission that the intent of subclause 38(1) was unclear. The submission expressed support for the Explanatory Memorandum’s reference to ‘effective monitoring and evaluation’, but noted that there was no clear reference to evaluation in
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43 CPA Australia, *Submission 5*, p. [2].

44 Auditor-General, *Submission 8*, p. 3.

45 Auditor-General, *Submission 8*, p. [9].

46 Finance, *Supplementary Submission 9.1*, p. 23.

the Bill. Mr Bartos suggested that the Bill could include a requirement for periodic independent evaluations of program and agency performance, with the results to be published.⁴⁷

Committee comment

- 4.49 The Committee strongly supports the intent of the Bill to provide for a stronger framework for monitoring and reporting on performance. As the Auditor-General has pointed out in his submission, deficiencies in the implementation of the current framework have been an area of longstanding concern by this Committee, expressed in a wide range of reports covering many programs over many years. While the detail of how the revised performance framework will be implemented will not be known until the rules are developed, it appears that the Bill provides a suitable basis for a renewed focus on entity performance against outcomes, in support of the Auditor-General's new powers.
- 4.50 While it is clear that the intent of these provisions is well-supported, the Committee notes that some inquiry participants – notably including the Auditor-General – have suggested that there is room for more clarity in wording of subclause 38(1). To remove doubt, the Committee suggests that Finance, in consultation with the Auditor-General, should ensure the wording of the associated rules provides emphasis on the need for evaluation of programs.
- 4.51 In addition, the Committee notes that there is no explicit provision in the Bill for a post-implementation evaluation of the new financial framework itself. The Committee suggests that, within three years of the Bill's implementation, an independent evaluation of the revised framework should take place to consider its success in achieving its aims and the need for any further refinements. The Committee considers there would be value in this requirement being included in the Bill.
- 4.52 This evaluation should be complemented by a wide-ranging inquiry into the Act by a parliamentary committee, along similar lines to the JCPAA's 2000 review of the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*. A recommendation to this effect has been included in Chapter 5.
- 4.53 Further supporting the view of the Australian Information Commissioner on increased transparency, results of all evaluations should be made public.

47 Mr Stephen Bartos, *Submission 7*, pp.2-3.

Interaction with the *Public Service Act 1999*

Uniform duties of officials

4.54 Clauses 25 to 29 of the Bill impose a series of duties on officials. These duties, broadly aligned to the duties in the CAC Act and the *Corporations Act 2001*, are:

- Duty of care and diligence
- Duty to act in good faith and for proper purpose
- Duty in relation to use of position
- Duty in relation to use of information
- Duty to disclose interests.

4.55 In its submission to the Committee, Finance explained that this alignment of duties was intended to provide consistency across the private, public and not-for-profit sectors. It added that the major difference between the duties in the Bill and those in the CAC and Corporations Acts was that they applied to all officials, with no distinction between leaders or entities and their employees.⁴⁸

4.56 Finance further outlined the aims of the uniform duties as follows:

This is designed to help government to join up with other sectors and will help with recruiting experienced directors for government boards, recognising that most of the members of boards of CAC Act authorities are members of boards in the private sector. It will facilitate more effective corporate governance if those directors can confidently draw on their knowledge and experience gained in the private sector knowing that they are working within a familiar legal structure. It can also create an overarching culture and environment of better practice corporate governance.⁴⁹

4.57 Finance noted that 'some of the duties in the Bill are similar to some of the requirements of the APS Code of Conduct', contained within section 13 of the *Public Service Act 1999* (PS Act). However, Finance also pointed out that only around 50 per cent of Commonwealth public sector officials were covered by the PS Act, and that having 'consistent rules around behaviours to those who manage and use public resources' was 'highly desirable' and 'at the heart of this Bill'.⁵⁰

48 Finance, *Submission 9*, pp. 9–10.

49 Finance, *Submission 9*, p. 9.

50 Finance, *Submission 9*, p. 10.

4.58 At the Committee's public hearing, the Australian Public Service Commissioner (the Commissioner) provided the Committee with a table outlining the differences between section 13 of the PS Act and the duties of officials contained in the Bill.⁵¹ The Commissioner raised his concern that the duties contained in the Bill, although not inconsistent,⁵² were expressed differently to those contained in the PS Act:

So what we actually have are two expressions of the duties of officials and two expressions of the duties of secretaries in two different pieces of legislation ... It seems to us to be a pity to pass up the opportunity to simplify things by making it clear that if you are a public servant under the Public Service Act that the Public Service Act has got the clear and consistent statement of the code of conduct, the values and the ethical framework in which public servants are accountable.⁵³

4.59 The Commissioner argued that the obligations in the Bill were more limited than those in the APS Code of Conduct, and that a preferable outcome would be for the Bill to refer to the PS Act as the single statement of duties for people employed under the PS Act:

It will not be the end of the world, frankly, if they stay the way they are but it would seem to us a lot simpler and a lot easier to explain if this act could rely on the Public Service Act.

... if it is possible to say that, in the case of a Commonwealth company, your duties and obligations are specified in the Corporations Act, which is what it does, then why can't you say that for those others who are employed under the Public Service Act their duties and responsibilities are specified in the Public Service Act and then the material that is here covers the rest? It is as simple as that.⁵⁴

4.60 Responding to the issue raised by the Commissioner, Finance explained that while there were nuanced differences between the duties in the Bill and those in the PS Act, these differences were not material.⁵⁵ It described the complexities of combining a unified set of obligations to cover people operating under a range of frameworks:

51 Australian Public Service Commissioner, *Submission 13*, pp. [5-7].

52 Mr Stephen Sedgwick, Australian Public Service Commissioner, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 34.

53 Mr Stephen Sedgwick, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 33.

54 Mr Stephen Sedgwick, *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 33-34.

55 Dr Stein Helgeby, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 34.

The way we have tried to tackle that is by focusing on the CAC Act obligations, because they are the ones that really come from the Corporations Law, and trying to bring them as close as we can in a practical way to the Public Service Act language. But why we have not been able to get 100 per cent there is that the Public Service Act covers a range of people whereas the combined CAC and FMA legislation covers a different group of people who have slightly different arrangements in place. The intent has been to get everything as close as possible; the issue is whether you can get everything to line up so that there is not a bit of space in between the duties in the Public Service Act, this piece of legislation and the Corporations Law.⁵⁶

- 4.61 Finance added to its comments in a written submission to the Committee after the hearing, indicating that, as the duties in the Bill and in the PS Act were 'not inconsistent', there 'should be no issues of compliance by public servants'.⁵⁷ It highlighted that placing uniform duties and obligations on all officials was a desirable part of the CFAR principle of 'government as a whole':

Officials managing public resources should be able to look in one place to determine their duties in relation to those resources. Consistent with the *Corporations Act 2001*, the duties are fiduciary in nature and it is appropriate to include them in the Bill.⁵⁸

- 4.62 Finance also pointed out that some of the duties in the Bill were 'scalable and recognise materiality to a different degree compared to the PS Act', particularly the duties relating to care and diligence and conflicts of interest.⁵⁹

Enforcement of duties and termination provisions

- 4.63 The Committee was interested to learn about the procedures for investigating potential breaches of the duties of officials contained within the Bill.
- 4.64 The Australian Public Service Commissioner explained that, under the PS Act, it was the responsibility of the agency head to investigate allegations within their agency. Allegations concerning agency heads would be investigated by the Commissioner, and any individuals dissatisfied with the process could make a whistleblowing report to either the

56 Dr Stein Helgeby, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 34.

57 Finance, *Supplementary Submission 9.1*, p. 13.

58 Finance, *Supplementary Submission 9.1*, p. 13.

59 Finance, *Supplementary Submission 9.1*, p. 14.

Commissioner or the Merit Protection Commissioner.⁶⁰ Finance indicated that allegations involving non-PS Act employees would be likely to similarly be the responsibility of the head of the entity, subject the individual rules governing each organisation.⁶¹

- 4.65 Clause 30 of the Bill provides for the person who appoints a director, or equivalent official, of a corporate Commonwealth entity to terminate an appointee for contravening one of the general duties of officials outlined above.⁶²
- 4.66 Finance stated at the public hearing that these provisions ‘sit alongside the termination provisions in the enabling legislation of various statutory bodies’. Finance explained that, for people employed or appointed under the PS Act, the provisions of that Act would continue to apply, but for others, it would be a ‘supplementary power’.⁶³
- 4.67 The termination provisions would replace criminal provisions and civil provisions in the current CAC Act – such as fines and imprisonment – with specific provisions for issues to be managed as part of the employment relationship:
- So we have done away with the regime of fines and civil penalties, largely because they have never been successfully used and the advice that we have been given from the Attorney-General's Department is that the Criminal Code is sufficient to deal with criminal provisions ... We thought the employment relationship is the best way for matters of misbehaviour and failure to meet duties to be dealt with, and that is universal ... If they do not meet their duties or they do not properly manage public resources, that issue is dealt with between them and their employer as a matter of their employment.⁶⁴
- 4.68 Finance indicated that it expected clause 30 of the Bill would be used ‘from time to time but rarely’, because issues relating to the performance of a director currently came up ‘every few years’.⁶⁵
- 4.69 Finance undertook to obtain for the Committee the number of senior appointment terminations that had taken place over the last three to five years.⁶⁶ In a written response, Finance said:

60 Mr Stephen Sedgwick, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 35.

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

62 See Explanatory Memorandum, PGPA Bill 2013, pp. 28–29.

63 Mr Lembit Suur, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 4.

64 Mr Lembit Suur, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 4.

65 Mr Lembit Suur, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 36.

66 Mr Lembit Suur, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 4–5.

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.⁶⁷

- 4.70 Finance's response added that, since 1999, there had been only one prosecution of a Commonwealth authority official under the criminal provision of the CAC Act, and that it would 'not anticipate many terminations of employment given the standing and integrity of persons appointed as directors in government'.⁶⁸
- 4.71 Asked about the rules of evidence that would apply to potential breaches of duties, Finance explained at the hearing that clause 30 of the Bill included a natural justice requirement and a requirement for a copy of a notice outlining the reasons for any termination to be tabled before each house of the Parliament within 15 sitting days. Finance also highlighted that there were options other than termination for managing breaches, including counselling and mechanisms outlined in the enabling legislation of individual entities.⁶⁹

Committee comment

- 4.72 The Committee understands the concerns raised by the Australian Public Service Commissioner that, if the Bill is passed in its current form, the duties of Australian Public Service officials will be contained in two separate pieces of legislation and expressed in different terms. It is a legitimate concern that this duplication may lead to confusion amongst officials as to which legislation contains the authoritative statement of duties. However, the Committee understands that this is a situation which already applies to entities operating under the CAC Act that employ officials under the PS Act.
- 4.73 While expressed differently and with a different focus, the duties in the Bill appear to be broadly consistent with those in the PS Act. As the employment framework for Australian Public Service employees, the PS Act will continue to provide a clear statement of the duties and performance standards expected of individuals employed under that Act. However, with regard to the distinct matter of financial management that this Bill addresses, the Committee accepts Finance's proposition that it is desirable to have a uniform statement of duties that covers all officials

67 Finance, *Supplementary Submission 9.2*, p. [5].

68 Finance, *Supplementary Submission 9.2*, p. [5].

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

with responsibility for managing public resources – whether or not they fall under the PS Act.

- 4.74 The Committee also notes that the duties in the Bill have been modelled on the duties in the *Corporations Act 2001*, and will therefore provide a more consistent statement of duties for the management of resources across the private and public sectors. The Committee considers that the benefits of having a consistent set of financial management duties applied across all Commonwealth entities outweighs concerns about the complexity of PS Act employees having two sets of duties to work under.
- 4.75 The Committee accepts that the termination clauses in the Bill, which will in practice apply to the directors of corporate entities and operate alongside other legislative provisions, provide an appropriate ‘last resort’ for managing breaches of the duties contained in the Bill. The Committee agrees with Finance’s view that it is more appropriate for issues of breach of duties to be managed as part of the employment relationship rather than through the civil and criminal provisions of the existing CAC Act, and notes that the Criminal Code will still be applicable for dealing with serious breaches.

