



Australian Government
Department of Finance and Deregulation

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Mr Robert Oakeshott MP
Chair
Joint Committee of Public Accounts and Audit
Parliament House
CANBERRA ACT 2600

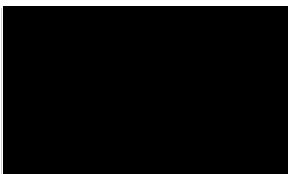
Dear Mr Oakeshott

I enclose a submission from the Department of Finance and Deregulation (Finance) to the Joint Committee of Public Accounts and Audit inquiry into the Public Governance, Performance and Accountability Bill 2013 (the Bill).

Finance has undertaken extensive consultation since December 2010 to identify options for reform of the Commonwealth's financial framework that will improve productivity, performance, efficiency and accountability in government operations now and into the future. The Bill represents a key step in this process and has been developed with extensive input from many entities across the Commonwealth.

Finance does not consider the information in the submission to be such that it needs to be kept confidential.

Yours sincerely



David Tune
22 May 2013

Inquiry into Public Governance, Performance and Accountability Bill 2013

Joint Committee of Public Accounts and Audit

**Submission by the Department of Finance and
Deregulation**

May 2013

Introduction

1. The *Public Governance, Performance and Accountability Bill 2013* (the Bill) underpins a broader agenda to deliver a modern government. The Bill replaces the existing financial framework with a modern, flexible and forward looking legislative structure.
2. The Bill builds on an expansive consultation process that has ensured that the Australian Public Sector and other stakeholders have been engaged and been able to shape the policies presented in the Bill. It is the key legislative proposal of the Commonwealth Financial Accountability Review (CFAR), which was announced by the Minister for Finance and Deregulation on 8 December 2010.

The current framework is no longer adequate for modern Government

3. The Commonwealth financial framework underpins the appropriation, expenditure and use of money and resources, and the governance of Australian Government entities. It is primarily based on two principal Acts that aim to govern the behaviour of people when they make decisions about the management and use of public resources: the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (CAC Act). These Acts, together with the *Auditor-General Act 1997*, replaced the *Audit Act 1901*, which the Joint Committee of Public Accounts (JCPA) noted in 1994 in Report 331, was “unable to accommodate the demands of modern public sector management”.
4. While these Acts have served the Australian Public Sector (APS) well, they are increasingly outdated. The financial framework has slipped from world’s best practice over a decade ago to being adequate today. This reflects the changes in the way government operates, and the expectations of Australians on the services that governments provide, and how these services are provided. Complacency in improving the financial framework could impact our leading international reputation in public sector management.
5. The development of the FMA and CAC Acts in the early 1990s predated a number of major changes in government operations, including significant accrual budgeting and reporting developments implemented in the financial year 1999-2000, the introduction of the Goods and Services Tax and the *Federal Financial Relations Act 2009*. In 2000, the Joint Committee of Public Accounts and Audit (JCPAA) completed a review of the effectiveness of the FMA and CAC Acts “because the legislation was drafted before the accruals framework was complete”.¹
6. Additionally, the models for delivering products and services to the Australian public have changed in line with people’s expectations that the delivery of government services should be quicker, better targeted, easier to use and should take advantage of new technology. Furthermore, since the introduction of the FMA and CAC Acts, third parties increasingly administer services through arrangements with the Commonwealth, including state and territory governments, commercial partners and the not-for-profit sector.

¹ JCPA Report 374, *Review of the FMA and the CAC Act*, tabled 16 March 2000.

7. The FMA and CAC Acts have been amended regularly to address specific issues as they have arisen. For example, significant amendments were made to the FMA Act shortly after it commenced through the *Financial Management Legislation Amendment Act 1999*. As noted in Bills Digest No. 130², “key changes were to the structure and operation of the Consolidated Revenue Fund”. There have also been 13 *Financial Framework Legislation Amendment Acts* since 2004.
8. While specific issues have been addressed through regular amendments, there has been limited consideration of the cumulative impact of these changes on the overall framework. While any framework will require maintenance over time, an unintended consequence of the high number of amendments has been that some changes have resulted in inconsistency, fragmentation and added complexity relative to the benefit they were expected to deliver.
9. Despite this activity, significant issues continue to emerge. For example, the Auditor-General has in recent times raised concerns about the quality of performance information and has also identified systemic issues concerning potential breaches of section 83 of the Constitution. Collaboration also continues to be a challenge, both within government and with external partners. **Attachment A** describes some of the shortcomings of the existing framework. These include:
 - The current framework can adversely impact efficiency and productivity;
 - The current framework does not encourage cooperation;
 - The current framework does not properly address risk;
 - The current binary choice does not reflect the operational diversity of the Commonwealth;
 - The rationale for the original classification of bodies is no longer valid;
 - The existing arrangements do not reflect a common logic; and
 - A lack of coherence to accountability arrangements.

The Bill sets a foundation for future reform

10. The Bill provides the legislative basis for the CFAR reform package – which is centred on four guiding principles:
 - performance of the public sector is more than financial;
 - engaging with risk is a necessary step in improving performance;
 - government should operate as a coherent whole; and
 - uniform duties should apply to all officials responsible for using and managing public resources.

² Bills Digest No. 130, 1998-99 Financial Management Legislation Amendment Bill 1999.

11. 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.
12. 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.
13. Delaying the passage of the legislation would defer needed improvements to the Commonwealth's financial framework, pushing back the implementation of desirable reforms and increasing the uncertainty facing agencies. A further consequence of deferral would be to increase the likelihood that additional, incremental and piecemeal changes would be required to the current framework.
14. Considerable feedback has been received during CFAR consultations about the transactional and compliance-focused nature of the FMA Act compared to the CAC Act and the adverse impact this can have on the cost profile and performance of an entity. Contributing factors range from the level of prescription in the FMA Act and its subsidiary legislation to the role of boards, especially the contribution of non-executive directors, to maintaining mature and rigorous risk and performance management systems in CAC Act bodies.
15. Entities that have been moved from the CAC Act to the FMA Act have been almost unanimous in commenting that the costs associated with being under the FMA Act outweigh the benefits.

Development of the Rules

16. As is the case with the FMA and CAC Acts, the key accountability features of the framework are included in the Bill; the Rules will provide detail on what entities have to deliver and the way they go about delivering on the requirements in legislation.
17. The current framework involves the FMA and CAC Acts being supported by a range of regulations, Finance Minister's Orders and various other legislative instruments, determinations and directions.
18. The Bill provides more transparency in relation to the matters on which rules can be made compared to the FMA or CAC Acts. There is, for example, only one clause regarding regulations and one related to Finance Minister's Orders across the two Acts, but there is an extensive framework for regulations and Orders that provide substantive detail on the operational elements of the framework;
 - the FMA Regulations comprise some 52 clauses; and
 - the CAC Regulations comprise some 18 clauses.
19. 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 there is certainty about the key features and overarching design of the framework.

20. The Rules will be developed in consultation with Commonwealth entities and other relevant stakeholders (building on the mechanisms which have been established by the Review 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*.

Consequential amendments

21. The EM recognises that consequential amendments will be required to the enabling legislation of most Commonwealth entities and to other legislation.
22. The majority of the consequential amendments will be to replace references to the FMA and CAC Acts with the title of the new Act, should it be passed by the Parliament. Among other things, this will preserve existing exemptions to the framework that are contained in enabling legislation.
23. The consequential amendments will be presented to the Parliament in conjunction with the Rules being finalised.

The Bill builds on the key strengths of existing legislation

24. The FMA and CAC Acts contain many sound provisions that have given a sound basis for government operations since they commenced.
25. The Bill to replace these Acts should be seen as evolutionary – it is a logical next step for the Commonwealth financial framework. The Bill draws on the best elements of the current FMA and CAC Acts as the fundamental building blocks for effective governance and accountability. Key legal and accountability signposts have been retained and, in some instances, their content has been clarified or strengthened. In total, 80 of the 110 clauses in the Bill³ are based on, or build on, provisions in the current FMA and CAC Acts. **Attachment B** provides a comparison of the clauses in the Bill with clauses in the FMA and CAC Acts.
26. The remaining 30 clauses in the Bill include the following:
- 13 clauses are merely guides to parts of the Bill (this reflects new drafting conventions);
 - 1 provision is relates to the Objects of the Act;
 - 4 clauses relate to duties imposed on accountable authorities, including to effectively govern the entity, establish and maintain systems relating to risk and control, encourage cooperation and to take into account the burden imposed on others;
 - 4 clauses relate to measuring, assessing and reporting performance. These complement recent amendments to the *Auditor-General Act 1997* that were recommended by the JCPAA;⁴

³ Combined, the FMA Act (71 clauses) and the CAC Act (90 clauses) comprise 161 clauses.

⁴ Recommendation 3 of JCPAA Report 419: *Inquiry into the Auditor-General Act 1997* (December 2010)

- 4 clauses describe Commonwealth entities, accountable authorities and officials. These are currently found in the definitions section of the FMA and CAC Acts and also in the FMA Regulations;
 - 1 clause deals with the termination of board members; and
 - 1 clause reflects that the duties on officials who are public servants are enforceable through the *Public Service Act 1999* (PS Act).
27. When compared to current arrangements, the Bill seeks to strengthen the focus on risk, cooperation, performance and accountability. There is also a clear articulation of the resource management cycle (the cycle of planning, budgeting, implementing, evaluating and being held accountable) in the Bill to better address the needs of stakeholders and users of the legislation.
28. The Bill is also designed to provide flexibility for different governance structures irrespective of the form of the entity (for example, bodies corporate). This recognises the diversity of Commonwealth entities⁵ and acknowledges that a decision on whether governance is vested in an individual or a board of directors should depend on the functions of the entity.
29. Ideally, form should follow function, but this is not currently the case in the financial framework. For example, the primary consideration under the current framework when a new entity is established is typically whether it will be under the FMA or the CAC Act, especially in relation to Commonwealth-state entities.

Independence

30. The Bill does not impinge on the general scope of detailed provisions that provide for the independence of particular entities as established in their enabling legislation by Parliament. This relationship with executive government varies from entity to entity, and can cover policy autonomy, investment powers, editorial independence and regulatory roles.
31. To provide some confidence that changes to the financial framework do not mean a threat to independence, it is worth noting that the operational independence of entities that have been reclassified from the CAC Act to the FMA Act over recent years has not been compromised, reflecting that the financial framework legislation is not a determinant of independence. These entities include the Australian Prudential Regulatory Authority and the Australian Securities and Investments Commission. Other entities under the FMA Act with significant operational independence include the Australian Federal Police, the Parliamentary Budget Office and the Australian National Audit Office.

⁵ In commenting on the FMA and CAC Acts, the JCPAA noted, among other things, that “... the Acts ... were constructed as generalised legislation designed to cover the two types of public sector entity.” (p22 JCPAA Report 374, *Review of the FMA and the CAC Act*).

Accountability is strengthened

32. Key accountability requirements in the FMA and CAC Acts have been retained in the Bill. However, some key differences in the Bill help to strengthen accountability.
33. One of the key differences in the Bill compared to the FMA and CAC Acts is that the Bill brings together into a single piece of legislation all the elements of the resource management cycle, in order to ensure clarity around accountability and transparency (refer to Part 2-3 of the Bill – *Planning, performance and accountability*).
34. The key change from the existing requirements imposed by the Bill relates to the introduction of the requirement for accountable authorities to record and report on the entity's performance. This provision seeks to parallel performance reporting with financial reporting by recognising the inherent value of quality performance reporting.
35. The specific requirements relating to performance reporting 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.
36. The Bill strengthens financial accountability by introducing the requirement that the basis for financial reporting will be the accounting standards as set by the Australian Accounting Standards Board. This means that the basis for financial reporting is set independently.⁶

Partnering

37. 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. The Bill introduces a number of provisions to better accommodate the increasingly joined-up nature of government operations and the increasing role played by external stakeholders in the design and delivery of public programs and services.
38. The Bill makes clear that the responsibilities of officials can extend beyond their individual organisation to include wider government objectives. This is recognised in the objects clause (clause 5) and there is a duty on accountable authorities to encourage cooperation with others (clause 17).
39. In working cooperatively, the Bill requires that the burden imposed on others needs to be a key consideration (clause 18). Importantly, such consideration needs to take risk into account. As noted in the EM, compliance and reporting requirements should focus on areas of high risk. It is also important that compliance requirements be appropriately placed.

⁶ There is a residual capacity retained in the Bill for the Rules to establish other requirements.

40. The concept of collective responsibility has also been taken further in the Bill. While the CAC Act acknowledged collective responsibility of board members, there was no equivalent in the FMA Act. Under the Bill, board structures can be established for all bodies (clause 12). There is also explicit provision for non-executives on advisory boards (clause 24).
41. The Bill also provides the capacity for corporate entities to be established by the Rules (clause 87). It is based on the *Primary Industries and Energy Research and Development Act 1989* model, which has been used for establishing research and development corporations by regulation (Part 2, Division 1 of that Act refers). Among other things, it is envisaged that clause 87 could form the basis for developing templates for Commonwealth-State entities and for joint ventures with other sectors, such as the not-for-profit sector.

Simplification

42. The Bill simplifies existing requirements in a number of areas including:
 - removing drawing rights requirements, which are a feature of the FMA Act;
 - technical requirements in the FMA Act concerning the definition of public money, officials and financial task; and
 - the removal of civil and criminal penalty provisions and relying on existing frameworks, such as employment arrangements and the criminal code to address breaches.
43. The concept of public money in the FMA Act has been replaced by the notion of 'relevant money', which is broadly all money held by a Commonwealth entity. The term will be consistent across all entities.
44. Much of the complexity in the FMA Act and FMA Regulations relates to the treatment and handling of public money, which is subject to a range of complex and technical requirements. In contrast, public money is not defined in the CAC Act.⁷ Yet there is no evidence to suggest CAC entities are not managing public resources prudently.
45. The ANAO has observed that many instances of non-compliance with the requirements of the financial framework are relatively minor in terms of their impacts and consequences.⁸ Legislative requirements should be focused on areas of high risk and less on procedural requirements that have immaterial impacts and consequences and can be addressed through internal controls, such as delegations and authorisations.
46. The change to relevant money also seeks to address concerns raised by a number of entities that the term public money could suggest that such money forms part of consolidated revenue. For example, this issue was raised by the Reserve Bank of Australia, the Commonwealth Superannuation Corporation (in relation to the superannuation funds of members) and the cultural institutions, including the

⁷ Subsection 7(3) of the CAC Act provides that all money that a body holds is held on its own account, unless the money is public money as defined in section 5 of the *Financial Management and Accountability Act 1997*.

⁸ The ANAO audit on the management of the Certificate of Compliance process indicated that external audit committee members had advised that many instances of non-compliance are relatively minor in terms of their implications (ANAO, *Management of the Certificate of Compliance Process in FMA Act Agencies*, p. 23).

Australian War Memorial and the National Gallery of Australia (in relation to their capacity to attract commercial sponsorship).

47. The Bill provides the opportunity for Commonwealth entities to reconsider the way they manage public resources and places greater accountability on the entity to manage its resources well. All resources within the control of the entity, regardless of whether they have been provided by Parliament or other sources should be managed to the same high standards.
48. While corporate planning and performance management have been strengthened in the Bill, compared to the FMA and CAC Acts, the scope of what is proposed is seen by many entities as reflecting better practice requirements for promoting accountability between planned and actual results. We anticipate that entities will recognise (once the Rules have been finalised) opportunities to refine and simplify their internal systems and processes such that the benefits of these requirements outweigh the costs.
49. Some prescription has been retained in relation to non-corporate Commonwealth entities to ensure constitutional requirements are met, especially in relation to sections 81 and 83 of the Constitution.

Uniform Duties

50. As a general principle, entities in the public sector should not be held to a lower standard than that applying to similar entities in the private sector. If anything, they should be held to a higher standard, given that taxpayers do not have a choice as to whether they are to be 'shareholders' of public sector entities.
51. The duties in the Bill broadly align to the duties in the CAC Act and the *Corporations Act 2001* (Corporations Act). Aligning duties in this way provides consistency across the private, public and not-for-profit sectors⁹. 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.
52. A major difference between the Bill and the CAC and Corporations Acts (a comparison of which is provided at **Attachment C**) is that there is no distinction between duties imposed on 'officers' and those imposed on officers and employees. The duties in the Bill apply to all officials. The rationale for placing duties on all officials is that it clarifies the standards of behaviour that are expected of individuals when using public resources.

⁹ These duties are not a recent invention. They evolved over several hundred years in the form of English case law. They essentially evolved as trust law and were subsequently adapted to companies when the current company form came into existence in the mid-nineteenth century. As a consequence, there is a substantial body of law that underpins these duties.

53. Under both the FMA Act and CAC Act, duties are placed on leaders, such as chief executives and directors, or on senior management. Other officials are subject to the duties through a trickle down of delegations and authorisations, through internal controls, or through employment frameworks. These links are not always apparent to people, particularly those unfamiliar with the financial framework. Placing duties directly on all officials aims to overcome this issue.
54. Some of the duties in the Bill are similar to some of the requirements of the APS Code of Conduct. However, as noted in the EM to the Bill, the PS Act only covers around 50 per cent of officials in the Commonwealth public sector that use and manage public resources. For example, the PS Act does not cover approximately 57,000 members of the Australian Defence Force and nearly 80 per cent of statutory authorities under the CAC Act. Providing consistent rules around behaviours to those who manage and use public resources is highly desirable, and is at the heart of this Bill, which seeks to improve public accountability.
55. Public servants who are subject to both the PS Act and duties under this Bill will have to comply with both sets of duties. However, this should not cause practical difficulties. The duties are largely similar, or complementary to each other. The responsibilities on officials under the financial management framework (detailed in the FMA and CAC Acts 1997) and the APS Code of Conduct have existed side by side since the passage of the PS Act in 1999. Since this time, chief executives, including secretaries, and APS employees, have had at least two general sets of conduct requirements they need to uphold.
56. The duties also continue to exist alongside other legislative requirements on officials, including under the *Fair Work Act 2009*, the work health and safety legislation, the *Privacy Act 1988*, the *Freedom of Information Act 1982*, the *Archives Act 1983*, the *Ombudsman Act 1976*, the *Auditor-General Act 1997*, and the *Crimes Act 1914*.

The Bill is part of an integrated package

57. While the Bill is only part of an integrated package of reforms, it is an important first step in encouraging cultural change and in the way government does business. This is especially evident in relation to risk. CFAR seeks to recognise that a prudent appetite for risk is crucial for innovation and improved productivity and efficiency. Moreover, appropriate risk-taking and innovation are consistent with careful and proper control of public resources.
58. In this regard, the concept of earned autonomy (a model for escalating regulation) is central to the proposed CFAR reforms. Rather than the current “one size fits all” approach to oversight and regulation, the nature and extent of regulatory intervention will be dependent on an entity’s risk profile and performance. While implied under the current arrangements, the Bill, through the rules (clause 101), allows the Finance Minister to vary requirements for specific entities or types of entities beyond core obligations on a broad range of financial reporting and accountability matters. The concept is intended to also apply in relation to arrangements with partners, such as grant application and acquittal processes.

Comparison with Other Jurisdictions

59. Development of the Bill was accompanied by a review of comparable legislation in other jurisdictions within Australia and internationally (including New Zealand, Canada, the United Kingdom and the United States). In most cases, developments in these jurisdictions are in areas that Australia has already introduced or is in the process of refining, such as program management and budgeting, and the use of accrual information.
60. The Bill has taken approaches in Queensland and United States legislation to address issues of performance management and reporting, although it has sought to encompass these approaches in a simple and streamlined fashion.¹⁰ Reference has also been made to proposed amendments to relevant New Zealand legislation arising from the *State Sector and Public Finance Reform Bill*, which was informed by a review of the public management system in New Zealand.
61. The Bill seeks to balance these differing approaches in the context of the Commonwealth's Constitutional obligations, providing clear direction on requirements and expectations in legislation while at the same time reducing unnecessary prescription and placing greater explicit accountability on Commonwealth entities to manage resources.

Response to specific Terms of Reference

62. The terms of reference to the JCPAA specifically request that the Committee ensure that the Bill does not:
 - impose additional and unnecessary reporting requirements;
 - reduce transparency; and
 - remove important oversight.
63. The aim of the Bill and of the broader CFAR reform program being pursued by Finance, while seeking to develop a simpler framework that is easier to administer with more streamlined obligations, does not seek to reduce an entity's accountability obligations to Parliament or their responsibility to meet such obligations. Any changes to reporting requirements by entities will be based on simplifying requirements in such a way as to improve the availability of meaningful information to Parliament and the public.
64. In this regard, oversight and transparency under this Bill have been clarified and strengthened in specific areas compared to the FMA and CAC Acts. This includes: requiring financial statements to be prepared in accordance with accounting standards; requiring entities to prepare corporate plans (clause 35); and, introducing requirements for entities to measure, assess and report performance (clauses 37 – 40). The FMA and CAC Acts are silent on these requirements. Risk management has also been elevated to the primary law (clause 16).

¹⁰ Division 8 of the *Financial Accountability Act 2009* (Qld) and the *Government Performance and Results Act 1993* (GPRA) and the *GPRA Modernization Act of 2010* (US).

65. There may be a perception that these new requirements impose additional reporting requirements. While they are new to the framework legislation¹¹, this is necessary due to identified and persistent shortcomings in the quality of performance information and performance reporting. These shortcomings have been recognised by the ANAO and the JCPAA. Accountability for performance is an essential feature of an effective devolved framework.¹²
66. The additional legislative requirements would be complemented by broader reforms to the framework designed to better target and reduce the reporting burden. For example, Portfolio Budget Statements (PBS) in future could be streamlined to focus on explaining information in the appropriation bills for an entity, with performance information currently in the PBS detailed elsewhere, such as in corporate plans. In addition, annual reporting requirements could be changed to ensure a greater alignment between the means by which planned and actual performance are reported. The aim is a clear line of sight between appropriations, the PBS, corporate plans and annual reports.

Implementation

67. The Bill will require significant time and work to implement. It is essential that this work be done effectively and coherently to ensure its success. Consequently, the operational provisions of the Bill commence by proclamation, which is anticipated to be 1 July 2014. The aim will be to provide an adequate transition period after the passing of the legislation to allow entities time to manage legislative, regulatory and policy changes effectively. Entities will be consulted on the transitional arrangements.
68. No change is envisaged to financial reporting requirements at this stage. To the extent that changes are introduced, they are likely to be by way of simplification and will be undertaken in consultation with the Parliament and the ANAO. This should not require entities to invest in new financial management systems.
69. Finance will provide training and guidance material to support implementation. The focus will be on improving financial literacy and recognising that it is a core skill for officials and employees who have financial management responsibilities.
70. Consideration will also be given to developing web-based tools to provide guidance and raise awareness of financial management obligations across the Commonwealth. This could include developing a central repository for guidance material.

Consultation

71. Extensive consultation, both within and outside government, has been a fundamental feature of the Review. More than 130 written submissions were provided in response to the two Papers (<http://www.cfar.finance.gov.au>). There was strong support from stakeholders to the directions for reform outlined in both documents. **Attachment D** summarises feedback on the Position Paper and how the Bill reflects the key themes of the Position Paper.

¹¹ A number of entities are already required to produce corporate plans through their enabling legislation or through the CAC Act, and many other entities do so as a matter of good practice.

¹² JCPAA Report 374, *Review of the FMA and the CAC Act*, pp 31 - 45.

72. The development of the Bill has also been informed by feedback obtained during an intensive consultation period. **Attachment E** outlines the entities consulted during the development of the Bill.
73. The Bill has been developed with the assistance and advice of the Office of Parliamentary Counsel and the Australian Government Solicitor. The Bill was discussed widely within Government. A copy of the draft Bill and EM was distributed on two occasions to all portfolio Departments for distribution to portfolio bodies. In addition, drafts of the Bill and EM were provided direct to a number of entities with known issues or complexities in their enabling legislation or statutory role to allow for particular matters to be resolved. Finance received comprehensive comments from many of the entities consulted.
74. These comments led to both general and specific adjustments to the draft Bill. The comments have also led to various clarifying statements in the Explanatory Memorandum (EM) and various consequential amendments will be required to the enabling legislation of various statutory bodies, especially to maintain the independence of entities and to preserve existing exemptions to specific elements of the financial framework. **Attachment F** details how the feedback obtained during the Bill development process has been addressed in specific areas.

SHORTCOMINGS WITH THE EXISTING COMMONWEALTH FINANCIAL FRAMEWORK

The current framework impacts efficiency and productivity

The current financial framework is ill-equipped to manage the demands of government policy, and the expectations of the community in terms of services provision. The result of this misalignment is administrative work arounds, and additional compliance and red tape across the APS. This misalignment can impact adversely on the efficient operations of the public sector. This is most noticeable for entities operating under the FMA Act.

Considerable feedback has been received during CFAR consultations about the transactional and compliance-focused nature of the FMA Act compared to the CAC Act and the adverse impact this can have on the cost profile and performance of an entity. Contributing factors range from the level of prescription in the FMA Act and its subsidiary legislation to the role of boards, especially the contribution of non-executive directors, to maintaining mature and rigorous risk and performance management systems in CAC Act bodies.

Entities that have been moved from the CAC Act to the FMA Act have been almost unanimous in commenting that the costs associated with being under the FMA Act outweigh the benefits.

Moreover, the ANAO has observed that many instances of non-compliance with the requirements of the financial framework are relatively minor in terms of their impacts and consequences.¹³ A common concern raised during consultation was to ensure that the inclusion of requirements in relation to the commitment and expenditure of public money in the Rules does not repeat the issues arising from the current FMA regulations.

It is also informative to note commentary on the *Sarbanes-Oxley Act 2002*, which was enacted in the United States in response to significant corporate failures. It is widely believed that additional compliance requirements have not contributed significantly to improving the quality of financial management in listed public companies.

The current framework does not encourage cooperation

Increasingly there is an expectation that the government will work collaboratively with other sectors of the economy and the community. This includes working more closely with the not-for-profit sector in the delivery of essential services.

A major limitation is that the existing framework is entity focused with linear lines of accountability. Delivery of many services over the longer term does not align easily with such a framework. For example, citizens expect services that meet their needs, rather than services that reflect organisational boundaries and structures. What is needed is more collaborative arrangements, improved performance management and reporting that recognises the models used to deliver services, and a reduction in red tape and compliance costs.

¹³ The ANAO audit on the management of the Certificate of Compliance process indicated that external audit committee members had advised that many instances of non-compliance are relatively minor in terms of their implications (ANAO, *Management of the Certificate of Compliance Process in FMA Act Agencies*, p23).

The current framework does not properly address risk

Even though risk is important for the Commonwealth, there is no explicit reference to risk management in the current financial framework legislation.

The treatment of risk under the FMA Act is no longer adequate to meet the needs of a modern government. There is a tendency towards risk aversion and risk shifting. This is partly influenced by the approach taken in that Act, which is increasingly prescriptive.

There are numerous regulations and requirements concerning the commitment and expenditure of public money imposed under the FMA Act when making funding decisions. Similar requirements are not imposed under the CAC Act. This provides for a more principles-based approach to regulating activity and flexibility for entities to tailor controls and processes based on risk. There is no evidence to suggest CAC bodies do not have effective controls in place to manage expenditure or that they are not managing such expenditure prudently, even though there are no prescriptive requirements imposed by the CAC Act.

The existing framework can dampen innovation. In particular, incentives in the framework may not encourage the pursuit of new ways of delivering government programs and services. An appetite for risk is crucial for innovation.

The current binary choice does not reflect the operational diversity of the Commonwealth

Fundamentally, the Commonwealth's financial framework should provide: overarching rules for the governance of Commonwealth entities; for the use of money and other resources within the Commonwealth; and support for the Government in meeting its obligations and responsibilities to the public and the Parliament. The framework underpins an accountable and transparent public sector and should inform the daily work of Commonwealth entities, office holders and employees.

The existing bifurcated model does not provide an overarching set of rules for Commonwealth entities, but rather provides two sets – one under the FMA Act and the second under the CAC Act. The framework offers, in practice, only a choice between a single chief executive under the FMA Act and directors under the CAC Act. Operational reality is more diverse than this.

A choice between the two basic governance models may not lead to appropriate governance outcomes. There have been instances where those involved in proposing a new body have expressed a preference for the CAC Act because the CAC Act is seen as less prescriptive. However, the CAC Act has its own complexities and obligations, such as directors' duties which can involve personal risk. The consequences of applying sub-optimal governance arrangements to a body are often not well understood.

There are instances where the bifurcated structure has been tweaked or even twisted to develop appropriate governance arrangements for entities that do not neatly fit into either the FMA Act model or the CAC Act model. This is especially the case in relation to inter-jurisdictional arrangements involving State and Territory governments. This issue is likely to become more problematic in the future as governments seek to join up more to address complex and intractable societal concerns.

The rationale for the original classification of bodies is no longer valid

Broadly, the current split between bodies under the FMA Act and the CAC Act is based on whether an entity is a body corporate and holds money on its own account. However, there is no evidence to suggest that the rationale underpinning the original classification of bodies as FMA or CAC was based on a normative policy for structuring bodies in government.

First, while being a body corporate may have been a clear delineation between the FMA Act and CAC Act previously, there are now 15 FMA agencies that are bodies corporate under enabling legislation, such as the Australian Prudential Regulatory Authority and the Australian Competition and Consumer Commission. These entities often have complex rules specifying that the resources they control are held on behalf of the Commonwealth to ensure that the entity can be accommodated under the FMA Act.

Second, the requirement for CAC bodies to hold money on their own account is overly simplistic and fails to recognise the operational reality that CAC bodies can hold or directly access money that forms part of the Consolidated Revenue Fund (CRF), despite not being legally part of the Commonwealth. For example, Comcare has access to a special appropriation and Australia Post receives money on behalf of the Commonwealth (as an agent of the Australian Taxation Office) that forms part of the CRF, such as through tax returns. Therefore, an important operational objective of the split has not been achieved.

Third, when the FMA and CAC Acts commenced, FMA agencies did not have their own bank accounts, with the then Department of Finance and Administration maintaining a central account for these agencies. However, when agency banking arrangements were introduced in 1999, FMA agencies were given authority to open and manage their own bank accounts. Effectively, this means that both FMA agencies and CAC bodies now hold their own bank accounts; FMA agencies do not, however, receive the interest benefit from holding these accounts.

Finally, bodies have been readily shifted between the two Acts, which questions the utility of using body corporate status as the basis for classifying entities as either an FMA agency or a CAC body. There has also been little consistent logic underpinning the basis for such shifts. While the Uhrig Review sought to provide a policy basis for distinguishing between FMA and CAC bodies and establishing appropriate governance structures, its terms of reference were limited to the existing legislative framework. This meant that its findings did not necessarily result in fit-for-purpose governance arrangements.

The existing arrangements do not reflect a common logic

In contrast to arrangements under the *Audit Act 1901*, the FMA and the CAC Act were drafted on the assumption that there should be less prescription in the financial governance arrangements for individual bodies. Overall, both Acts (particularly the FMA Act) include a mixture of requirements, some principles-based and others highly prescriptive.

In the case of the FMA Act, many provisions reflect those that were contained in the *Audit Act 1901*, with the main change being that some of the provisions retained were moved from the primary Act to the subsidiary legislation. As a consequence, the FMA Act does not follow a logical narrative and has a largely transactional focus.

On the other hand, the CAC Act has a clearer conceptual basis compared to the FMA Act. It is largely a governance Act and has an alignment to the *Corporations Act 2001* through the duties imposed on directors and officers.

The CAC Act duties are designed to largely mirror the *Corporations Act 2001* duties. However, arguably the most significant duty for directors of private corporations - not to trade while insolvent - is not included. This reflects the public sector nature of CAC bodies and a recognition that, in practice, government effectively remains the bearer of risk in the last resort for such bodies.

Having directors' duties is only part of the regulatory equation. It also requires an expert and well-resourced regulator. Under the CAC Act the Minister for Finance and Deregulation is the regulator. Placing that responsibility on a single official makes regulation a difficult proposition.

The significant distinction between the structure and content of the FMA and CAC Acts also fails to recognise that many CAC bodies:

- receive all or most of their funding from government through the budget process, as do all FMA agencies; and
- are classified in the General Government Sector (GGS), which is the statistical classification for all FMA agencies.

In addition, while the independence of CAC bodies is frequently mentioned, both FMA and CAC statutory bodies have a level of operational independence from government. For example, the Australian Federal Police, the Australian Security Intelligence Organisation and the Australian National Audit Office are FMA agencies and have considerable operational independence.

Inevitably, the lack of coherence associated with the split between the FMA and CAC Acts means that dealing with joint activities (including within government) can involve unnecessary complexity and the need to develop one-off solutions that may depart from the original framework structure.

Finally, it is increasingly necessary to retro fit coherence at the level of subsidiary law. This has recently occurred in relation to credit cards. Establishing the Bill would provide coherence at the level of primary law.

The Bill would bring coherence to accountability arrangements

The Finance Minister has overarching responsibility for the financial management framework, including governance and accountability arrangements. However, the role of the Finance Minister is variable across the two Acts. This has, at times, led to tensions concerning the level of independence particular entities have from government decisions about resource management. In particular, tensions arise when entities dispute the need to implement a government decision or policy and claim independence in circumstances where a clear statutory basis cannot be identified.

The Bill has the potential to remove ambiguity around roles and responsibilities. The Finance Minister would be responsible for the overall financial management framework of the Commonwealth and would remain the primary authority of the framework. The Bill seeks to strike a balance between allowing for flexibility and efficiency while still ensuring accountability for public money and resources.

The role of the Auditor-General in relation to auditing the financial statements of all Commonwealth bodies exemplifies the importance of a coherent underpinning logic. This logic was also evident in the implementation of the accrual budgeting and reporting reforms, which were uniformly applied to all Commonwealth bodies.

PUBLIC GOVERNANCE, PERFORMANCE AND ACCOUNTABILITY BILL 2013 (PGPA Bill)

- * Clause contains a rule-making power in PGPA Bill
 A Clause applies to **all** Commonwealth entities
 N Clause applies to **non-corporate** Commonwealth entities
 C Clause applies to **corporate** Commonwealth entities
 Comp Clause only applies to Commonwealth companies

References in brackets in FMA and CAC columns are equivalent rules in those Acts respectively

Clause	Section heading	FMA section (s) or Regulation (r)	CAC section (s) or Regulation (r)	Clause applies to...	Reason
Chapter 1 - Introduction					
Part 1-1 – Introduction					
1	Short title	s1	s1	A	Consistency maintained.
2	Commencement	s2	s2	A	Consistency maintained.
3	This Act Binds the Crown	s3	s3	A	Consistency maintained.
4	This Act extends to things outside Australia	s4	s4	A	Consistency maintained.
5	Objects of this Act	-	-	A	Provides an indication of the PGPA Bill's purpose and aims.
6	Guide to this Act	-	-	A	Gives a short guide to the PGPA Bill's structure for those unfamiliar with its contents and replaces the "Summary to this Act" contained in the reader's guides in the FMA and CAC Acts.
Part 1-2 – Definitions					
7	Guide to this Part	-	-	A	This is a new drafting protocol to improve readability of each part.
8*	The Dictionary	s5	s5	A	Consistency maintained.

Clause	Section heading	FMA section (s) or Regulation (r)	CAC section (s) or Regulation (r)	Clause applies to...	Reason
Chapter 2 –Commonwealth entities and the Commonwealth					
Part 2-1 – Core provisions for this Chapter					
9	Guide to this Part	-	-	A	This is a new drafting protocol to improve readability of each part.
10*	Commonwealth entities	s5	s5	A	Consistency largely maintained, but the PGPA Bill provides greater granularity around what makes up a Commonwealth entity. This allows a more risk based tailoring of rules to bodies.
11	Types of Commonwealth entities	s5	s5	A	Explains the classification of Commonwealth entities.
12*	Accountable authorities	s5 (Schedule 1)	s5	A	This establishes a consolidated definition to replace the definition of Chief Executive in the FMA Act and the directors of a board in the CAC Act. It provides flexibility in governance arrangement beyond the current rigid financial framework.
13*	Officials	s5 (rr3 and 4)	s5	A	This provides a consolidated definition to replace ‘official’ in the FMA Act and ‘employees’ in the FMA Regulations; and replaces ‘senior manager’ and ‘employee’ in the CAC Act.
Part 2-2 – Accountable authorities and officials					
14	Guide to this Part	-	-	A	This is a new drafting protocol to improve readability of each part.
15	Duty to govern the Commonwealth entity	s44 (partly)	-	A	This expands section 44 of the FMA Act. An entity’s enabling legislation will also prescribe the purpose of the entity and may also place obligations on members of the entity.
16	Duty to establish and maintain systems relating to risk and control	-	-	A	Emphasises the focus on risk management.
17	Duty to encourage cooperation with others	-	-	A	Increases focus on collaboratively working with others to achieve results. Designed to recognise the importance of joining-up, which has been the subject of multiple ANAO reports.
18	Duty in relation to requirements imposed on others	-	-	A	Recognises that Government should not add unnecessary red-tape to third parties.
19*	Duty to keep responsible Minister and Finance Minister informed	s44A	ss15 and 16 (Minister’s guidelines)	A	Consistency maintained.

Clause	Section heading	FMA section (s) or Regulation (r)	CAC section (s) or Regulation (r)	Clause applies to...	Reason
20*	Rules about general duties of accountable authorities	-	-	A	Allows rules to provide more detail about complying with duties.
21	Application of government policies – non-corporate Commonwealth entities	s44 (rr7, 7A, 7B and 16A)	N/A	N	Consistency maintained – for entities that are legally part of the Commonwealth.
22	Application of government policies – corporate Commonwealth entities	-	ss28 and 48A	C	Consistency maintained, but a change to simplify the process – for entities that are legally separate to the Commonwealth.
23	Power in relation to arrangements	s44 (r8)	N/A	N	Consistency maintained – applies only to entities that are legally part of the Commonwealth.
24	Power to establish advisory boards	s44	N/A	N	Consistency maintained – the FMA Act does not prevent this, but the Bill is making it explicit - applies only to entities that are legally part of the Commonwealth.
25	Duty of care and diligence	-	s22	A	Covers officials of all Commonwealth entities and not just directors and senior management as per section 22 of the CAC Act. While not in the FMA Act, the provision complements the <i>Public Service Act 1999</i> (Public Service Act).
26	Duty to act in good faith and for proper purpose	-	s23	A	Covers officials of all Commonwealth entities and not just directors and senior management as per section 23 of the CAC Act.
27	Duty in relation to use of position	-	s24	A	Covers officials of all Commonwealth entities. While not in the FMA Act, the provision complements the Public Service Act.
28	Duty in relation to use of information	-	s25	A	Covers officials all Commonwealth entities. While not in the FMA Act, the provision complements the Public Service Act.
29*	Duty to disclose interests	-	ss27F and 27G	A	Covers officials of all Commonwealth entities. While not in the FMA Act, the provision complements the Public Service Act. An important difference is that the PGPA Bill is concerned with material personal interests, whereas the Public Service Act covers all conflicts of interest (whether real or perceived).
30*	Termination of appointment for contravening general duties of officials	-	-	C	Provides a clearer and more pragmatic process to deal with members breaching their duties. This is particularly important given the removal of civil penalty regime.

Clause	Section heading	FMA section (s) or Regulation (r)	CAC section (s) or Regulation (r)	Clause applies to...	Reason
31	Interaction between Subdivision A (clauses 25 to 29) and other laws	-	s27B	A	Consistency maintained. The application is expanded given that the duties apply to officials of all Commonwealth entities.
32	Officials to whom the Public Service Act applies			A	Confirms that the bill when passed is an Australian law for the purpose of the Public Service Act.
Part 2-3 – Planning, performance and accountability					
33	Guide to this Part	-	-	A	This is a new drafting protocol to improve readability of each part.
34	Key priorities and objectives of the Australian Government	-	-	A	Recognises value of a statement of Government priorities and objectives, including for further planning by agencies.
35*	Corporate plan for Commonwealth entities	-	s17 (r6AAA)	A	The requirement for the accountable authority of Commonwealth entities to prepare place a strong planning rigour on entities. Many entities already do this voluntarily.
36	Budget estimates for Commonwealth entities	r22D	s14	A	Consistency maintained, moved from a requirement under the FMA Regulations into the Act.
37*	Records about performance of Commonwealth entities	-	-	A	Refocuses the Commonwealth public sector on the value of evaluation to drive better performance and efficiency.
38*	Measuring and assessing performance of Commonwealth entities	-	-	A	Refocuses the Commonwealth public sector on the value of evaluation to drive better performance and efficiency.
39*	Annual performance statements for Commonwealth entities	-	-	A	Refocuses the Commonwealth public sector on the value of evaluation to drive better performance and efficiency.
40	Audit of annual performance statements for Commonwealth entities	-	-	A	Refocuses the Commonwealth public sector on the value of evaluation to drive better performance and efficiency.
41*	Accounts and records for Commonwealth entities	s48 (FMO 4)	s20	A	Consistency maintained.
42*	Annual financial statements for Commonwealth entities	s49 (FMO Sch 1)	s9 and Schedule 1 (FMO Sch 1)	A	Consistency maintained – however accountability is strengthened as financial statements must be prepared in accordance with accounting standards (rather than Finance Minister’s Orders (FMO)), which are independently set.
43*	Audit of annual financial statements for Commonwealth entity	s57	Schedule 1 clauses3-7	A	Consistency maintained.

Clause	Section heading	FMA section (s) or Regulation (r)	CAC section (s) or Regulation (r)	Clause applies to...	Reason
44	Audit of subsidiary's financial statements	-	s12	C	Consistency maintained.
45*	Audit committee for Commonwealth entities	s46 (r22C)	s32 (r6A)	A	Consistency maintained.
46*	Annual report for Commonwealth entities	-	s9 (C'wth Authorities (Annual Reporting) Orders)	A	Consistency maintained, but also clarifies the current disconnect between the production of annual reports and financial statements in the FMA Act.
47	Monthly financial statements	s54	-	A (only GGS)	Consistency maintained, but also explicitly requires monthly financial statements that were previously requested as a matter of policy.
48*	Annual consolidated financial statements	s55 (r22A)	-	A	Consistency maintained.
49	Audit of consolidated financial statements	s56 (r22B)	-	A	Consistency maintained.
Part 2-4 – Use and management of public resources					
50	Guide to this Part	-	-	A	This is a new drafting protocol to improve readability of each part.
51	Making amounts appropriated available to Commonwealth entities	ss26 and 27	-	A	Consistency maintained – for a corporate Commonwealth entity, this requirement is typically found in its enabling legislation.
52*	Commitment and expenditure of relevant money	rr7, 7A, 7B, 8, 9, 10, 10A, 11 and 12	-	A	Allows for rules to be made for the commitment and expenditure of relevant money
53*	Banking by the Commonwealth	ss8 and 9	-	A	Consistency maintained.
54*	Banking by corporate Commonwealth entities	-	ss18 and 19	C	Consistency maintained.
55*	Banking of relevant money by Ministers and officials	ss10 and 11 (rr17 and 18)	-	A	Consistency maintained, but is also expanded to cover officials of all Commonwealth entities and Ministers.
56*	Borrowing by the Commonwealth	ss37 and 38 (r21)	-	N	Consistency maintained.
57*	Borrowing by corporate Commonwealth entities	-	s28A	C	Consistency maintained. CAC Act currently only covers borrowing by way of credit card and other borrowing is covered by enabling legislation. These provisions clarify the process to authorise borrowing., including when provision is made in enabling legislation.
58*	Investment by the Commonwealth	s39 (r22)	-	N	Consistency maintained.

Clause	Section heading	FMA section (s) or Regulation (r)	CAC section (s) or Regulation (r)	Clause applies to...	Reason
59	Investment by corporate Commonwealth entities	-	ss18 and 19	C	Consistency maintained.
60*	Indemnities, guarantees or warranties by the Commonwealth	- (r11)	-	N	Consistency maintained.
61*	Indemnities, guarantees or warranties by corporate Commonwealth entities	-	-	C	Places greater controls on the ability for Commonwealth to constrain corporate Commonwealth entities from committing future budget funding.
62	Insurance obtained by corporate Commonwealth entities	-	27N	C	Consistency maintained.
63*	Waiver of amounts owing to the Commonwealth	s34	-	N	Consistency maintained.
64*	Setting off amounts owed to, and by, the Commonwealth	s35	-	N	Consistency maintained.
65*	Act of grace payments by the Commonwealth	s33 (r29)	-	N	Consistency maintained.
66*	Gifts of relevant property	s43	-	N	Consistency maintained.
67	Liability for unauthorised gifts of relevant property	ss15 and 42	-	N	The PGPA Bill clarifies that a Minister or official is liable for losses caused by making unlawful gifts.
68	Liability for loss—custody	ss15and 42	-	N	Consistency maintained.
69	Liability for loss—misconduct	ss15and 42	-	N	Consistency maintained.
70	Provisions relating to liability of Ministers and officials	ss15 and 42	-	N	Identifies amounts payable under clauses 67, 68 and 69 of the PGPA Bill as a recoverable debt from the Minister or official.
71*	Approval of proposed expenditure by a Minister	s36 (r9 and 12)	-	N	Consistency maintained for both Ministers and Presiding Officers, but brings something previously in regulation into the Act.
72*	Minister to inform Parliament of certain events	s39A (r22AA)	-	A	Accountability increased by extending requirement to inform Parliament from Commonwealth to include events involving corporate Commonwealth entities.
Part 2-5 – Appropriations					
73	Guide to this Part	-	-	A	This is a new drafting protocol to improve readability of each part.

Clause	Section heading	FMA section (s) or Regulation (r)	CAC section (s) or Regulation (r)	Clause applies to...	Reason
74*	Receipts of amounts by non-corporate Commonwealth entities	s31 (r15)	-	N	Consistency maintained – the regulations will expand creditable receipts to include amounts currently covered under s30 (repayments to Commonwealth) and 31 (GST amounts).
75	Transfers of functions between non-corporate Commonwealth entities	s32	-	N	Consistency maintained.
76	Notional payments and receipts by non-corporate Commonwealth entities	s6	-	N	Consistency maintained.
77	Repayments by the Commonwealth	s28	-	N	Consistency maintained.
78	Establishment of special accounts by the Finance Minister	s20	-	N	Consistency maintained.
79	Disallowance of determinations relating to special accounts	s22	-	N	Consistency maintained.
80	Special accounts established by other Acts	s21	-	N	Consistency maintained.
Part 2-6 Cooperating with other jurisdictions					
81	Guide to this Part	-	-	A	This is a new drafting protocol to improve readability of each part.
82*	Sharing information with other jurisdictions	s43A	s33A	A	Consistency maintained.
83	Auditing by State and Territory Auditors-General	-	-	A	Protects mandates of State and Territory Auditors-General to conduct audits where Commonwealth money is involved.
Part 2-7 – Companies, subsidiaries and new corporate Commonwealth entities					
84	Guide to this Part	-	-	A	This is a new drafting protocol to improve readability of each part.
85*	The Commonwealth's involvement with companies	s39B	-	N	Consistency maintained.
86	Subsidiaries of corporate Commonwealth entities	-	s29	C	Consistency maintained – applies only to entities that are legally separate to the Commonwealth.
87*	Establishing new corporate Commonwealth entities	-	-	N	Provides a new mechanism to create a body corporate other than primary legislation or <i>Corporations Act 2001</i> .
Chapter 3 – Commonwealth companies					

Clause	Section heading	FMA section (s) or Regulation (r)	CAC section (s) or Regulation (r)	Clause applies to...	Reason
Part 3-1 – General					
88	Guide to this Part	-	-	Comp	This is a new drafting protocol to improve readability of each part.
89	Commonwealth companies	-	s34	Comp	Consistency maintained.
90	Wholly-owned Commonwealth companies	-	S34	Comp	Consistency maintained.
91*	Duty to keep the responsible Minister and Finance Minister informed	-	ss40 and 41 (Minister's guidelines)	Comp	Consistency maintained.
92*	Audit committee	-	s40 (r6B)	Comp	Consistency maintained.
93	Application of government policy	-	ss43 and 48A	Comp	Consistency maintained.
Part 3-2 – Planning and accountability					
94	Guide to this Part	-	-	Comp	This is a new drafting protocol to improve readability of each part.
95*	Corporate plan for Commonwealth companies	-	-s42 (r6AAA)	Comp	Consistency maintained.
96	Budget estimates for wholly-owned Commonwealth companies	-	s39	Comp	Consistency maintained.
97*	Annual reports for Commonwealth companies	-	s36 (C'wth companies (Annual Report) Orders)	Comp	Consistency maintained.
98	Auditor of Commonwealth companies	-	s35	Comp	Consistency maintained.
99	Audit of subsidiary's financial statements	-	s37	Comp	Consistency maintained.
Chapter 4 – Rules and delegations					
Part 4-1 – The Rules					
100	Guide to this Part	-	-	A	This is a new drafting protocol to improve readability of each part.
101	The rules	s63	s48	A	Consistency maintained. Regulations are now called rules.
102	Rules relating to the Commonwealth and Commonwealth entities	s65	s49	A	Consistency maintained.
103	Rules relating to the Commonwealth and non-corporate Commonwealth entities	s65	-	N	Consistency maintained.

Clause	Section heading	FMA section (s) or Regulation (r)	CAC section (s) or Regulation (r)	Clause applies to...	Reason
104*	Rules modifying the application of this Act	s58 (rr 27, 28, 28A and Sch 2)	ss46 and 47 (r8)	A	Consistency maintained.
105*	Rules in relation to other CRF money	-	-	N	This provision has been included to ensure Constitutional integrity around other money the Commonwealth may hold.
Part 4-2 – Delegations					
106	Guide to this Part	-	-	A	This is a new drafting protocol to improve readability of each part.
107	Finance Minister	s62	s48B	A	Consistency maintained.
108	Treasurer may delegate powers	s62A	-	A	Consistency maintained.
109	Finance Secretary	s53	-	A	Clarifies the role of the Finance Secretary.
110	Accountable authority	s53	-	A	Consistency maintained.

COMPARISON OF DUTIES IN THE BILL AND OTHER LEGISLATION

The coverage of the duties in the Bill compared to the PS Act and the CAC Act are noted in the table below.

Duty	Bill	PS Act*	CAC Act	Comparison
Care and diligence	25	13(2)	22(1)	PS Act does not specify standard of care and diligence. CAC Act only applies to senior managers and directors.
Good faith and proper purpose	26	—	23(1)	Bill does not require powers and functions to be exercised in the best interest of the Commonwealth entity, reflecting a focus on government as a whole.
Use of position	27	13(10)(b)	24(1)	PS Act does not cover causing detriment.
Use of information	28	13(10)(b)	25(1)	PS Act does not cover causing detriment.
Disclose interests	29	13(7)	27F to 27L	Bill applies only to a 'material personal interest', whereas the PS Act applies to any conflict of interest, real or apparent. CAC Act prescribes the process for dealing with a material personal interest, whereas the Bill provides that the rules will prescribe the process.

**CFAR POSITION PAPER AND PUBLIC GOVERNANCE, PERFORMANCE AND ACCOUNTABILITY
BILL 2013 (PGPA Bill) INTERACTION**

Position Paper theme	PGPA Bill provisions
Government as a whole	<p>The PGPA Bill reflects government as a whole in a number of ways:</p> <ul style="list-style-type: none"> • its structure covers almost all Commonwealth entities and Commonwealth companies in one piece of legislation, rather than splitting them between two Acts; there are uniform duties on the officials of all Commonwealth entities; and • accountable authorities have a specific duty to encourage cooperation with other entities to achieve common objectives.
Independence of entities	<p>The PGPA Bill does not impinge on entity independence:</p> <ul style="list-style-type: none"> • 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.
Accountable performance	<p>The PGPA Bill lays the foundations for greater accountability for performance:</p> <ul style="list-style-type: none"> • the high-level stages of the resource management cycle are expressly recognised; • the value of articulating key priorities and objectives is expressly recognised; • combined with a greater focus on corporate planning, this will provide a basis for overarching planning and performance management; and • it expressly requires accountable authorities to measure and report on performance, which will include effective monitoring and evaluation by Commonwealth entities.
Engaging with risk	<p>Noting that legislation is a building block towards better risk management, the PGPA Bill addresses risk in the following ways:</p> <ul style="list-style-type: none"> • accountable authorities would be required to establish and maintain an appropriate system of risk oversight; • accountable authorities must take into account the risks when imposing obligations on others’ use and management of public resources. This means that lower-risk third parties should face less onerous obligations; and • the use of boards in non-corporate Commonwealth entities, including non-executives, can be used to more effectively understand and engage with risk within

Position Paper theme	PGPA Bill provisions
	an entity.
Earned autonomy	<p>The PGPA Bill does not itself establish earned autonomy. However, the Rules under the Bill will enable a model of earned autonomy to be created. Using subsidiary legislation has the following benefits:</p> <ul style="list-style-type: none"> • it is a more flexible approach to regulation than primary legislation, which is the philosophy behind earned autonomy; and • it will allow sufficient time for the development of an administratively simple, robust and predictable system based on objective and clear criteria before the system is enacted. This development will be in collaboration with entities, including the ANAO.
Joining-up	<p>The PGPA Bill addresses joining-up in a number of ways:</p> <ul style="list-style-type: none"> • accountable authorities have a specific duty to encourage cooperation with others (including third parties) to achieve common objectives, where practicable; • accountable authorities must take into account the risks when imposing obligations on others' use and management of public resources. This means that lower risk third parties should face less onerous obligations, which should allow for working more effectively with partners; and • new bodies corporate can be established by Rules under the Bill, which will allow the governance structure to include multiple partners (both from other jurisdictions and from other sectors of the economy) if desirable.
Capability and culture	<p>Noting that legislation is only a first step towards better capability and culture, the PGPA Bill does the following:</p> <ul style="list-style-type: none"> • it is simpler and clearer, which will make understanding legislation and providing training easier; • risk management and performance management have been expressly recognised, which sends a clear message about expectations; • it keeps many existing provisions from the FMA and CAC Acts to ensure that there is some familiarity with the new financial framework. Existing knowledge will still be relevant; and • it allows for an earned autonomy model. The earned autonomy model will expressly recognise capability as a criterion for assessing the risk rating of an entity.
Public money is public money	<p>The PGPA Bill recognises these concerns:</p> <ul style="list-style-type: none"> • the banking, investment and borrowing provisions for non-corporate Commonwealth entities and corporate Commonwealth entities remain the same as under the FMA and CAC Acts; and • the Bill ensures that accountable authorities and officials have uniform duties around the use and management of money regardless of its source.
Simplification	<p>The PGPA Bill does a number of things to simplify the framework:</p> <ul style="list-style-type: none"> • its nature as one piece of legislation to cover the financial framework of

Position Paper theme	PGPA Bill provisions
	<p>Commonwealth entities will help clarify the scope of the framework;</p> <ul style="list-style-type: none"> • several definitions have been clarified, including “relevant money”; • it provides more clarity about officials and their duties. For example, the FMA Act has convoluted rules around “allocated officials”, “outsiders” and “financial tasks”; • it leaves the detail of risk and control frameworks to accountable authorities to implement as appropriate to the Commonwealth entity; • the recognition of performance reporting will help move Commonwealth entities towards integrated reporting; and • drawing rights have been replaced with a power for the Finance Minister to make appropriated amounts available in such instalments and at such times as the Finance Minister determines which aligns with the appropriation structures of many existing CAC Act bodies. <p>Much of the simplification will come with clearer rules made under the PGPA Bill. These will be developed in collaboration with Commonwealth entities over the coming 12 months.</p>

**CONSULTATION ON PUBLIC GOVERNANCE, PERFORMANCE AND ACCOUNTABILITY BILL
2013 (PGPA Bill) AND EXPLANATORY MEMORANDUM (EM)**

- An extensive consultation process has been undertaken in the drafting of the PGPA Bill and the EM.
- Consultation included interstate meetings on a number of occasions. We convened teleconferences with Canberra-based and interstate agencies, roundtable meetings, attended conferences, provided presentations and chaired general meetings.
- Further to consultation meetings held, the draft PGPA Bill and EM were issued to all the agencies/bodies that we had met with and also to all portfolio departments and agencies (x26) a number of times for comment, at different stages throughout the drafting process.
- An independent, eminent, legal adviser, Mr Henry Burmester QC, who is well recognised for his knowledge of the Commonwealth financial framework due to his years of experience with Australian Government Solicitor, was also consulted during the process.

Consultation list

The following list outlines the stakeholders included in our consultation process:

- 1 Agency Risk Forum, including members from
- 2 *Austrac*
- 3 *Australian Crime Commission*
- 4 *Australian Federal Police*
- 5 *Australian Securities and Investments Commission*
- 6 *Australian Securities Intelligence Organisation*
- 7 *Crimtrac*
- 8 *Office of National Assessment*
- 9 Australian Accounting Standards Board
- 10 Australian Broadcasting Corporation
- 11 Australian Institute of Company Directors
- 12 Australian Institute of Marine Science
- 13 Australian National Audit Office
- 14 Australia Post
- 15 Australian Prudential Regulation Authority
- 16 Australian Public Service Commission
- 17 Australian Taxation Office
- 18 Commonwealth Superannuation Corporation
- 19 Commonwealth Scientific and Industrial Research Organisation
- 20 Commonwealth Authorities and Companies Act (CAC) Bodies conference in Melbourne (attended by CAC body representatives)
- 21 Defence Materiel Organisation
- 22 Department of Human Services

23 Department of Agriculture, Fisheries and Forestry and Research and Development
Corporations Round table, including:

24 *Australian Fisheries Management Authority*

25 *Australian Pesticides and Veterinary Medicines Authority*

26 *Cotton Research and Development Corporation*

27 *Fisheries Research and Development Corporation*

28 *Grains Research and Development Corporation*

29 *Grape Wine Research and Development Corporation*

30 *Rural Industries Research and Development Corporation*

31 *Sugar Research Development Corporation*

32 *Wine Australia*

33 Department of Regional Australia, Local Government, Arts & Sport and representatives from a
large number of regional agencies

34 Defence Housing Authority

35 Department of the Treasury

36 Federal Court of Australia

37 Future Fund Management Agency

38 Great Barrier Reef Marine Park Authority

39 Heritage and Cultural Agencies Roundtable, including:

40 *Museum of Australian Democracy, Old Parliament House*

41 *Australian War Memorial*

42 *National Archives of Australia*

43 *National Film and Sound Archive of Australia*

44 *National Gallery of Australia*

45 *National Library of Australia*

46 *National Portrait Gallery*

47 High Court of Australia

48 Indigenous Land Council

49 Institute of Internal Auditors

50 Indigenous Business Australia

51 Medibank

52 NSW Audit

53 NSW Treasury

54 Reserve Bank of Australia

55 Special Broadcasting Service Corporation

56 Victorian Treasury

SUMMARY OF FEEDBACK

Issue	Summary of feedback
Independence of entities	<p>Maintaining the operational independence of Commonwealth entities has been a central goal of CFAR, which was emphasised in the CFAR Position Paper. During the drafting of the PGPA Bill, a number of entities raised specific issues about the potential for the Bill to affect independence, including the ABC, SBS, the Reserve Bank of Australia (RBA), the High Court, the Future Fund, the Indigenous Land Corporation (ILC) and the Federal Court.</p> <p>The PGPA Bill was adjusted as a result of this feedback to ensure the level of operational independence determined by Parliament is assured. It allows for modification of features in some cases, such as ensuring reporting obligations by courts are limited to administrative matters, to ensure responsibilities in enabling legislation are not compromised (refer subclause 19(2)), and by not requiring a Commonwealth entity to explain how it will contribute to the Government's strategic priorities and objectives where this would be inconsistent with the entity's enabling legislation (refer to subclause 35(4)).</p>
Duties on accountable authorities	<p>There was generally positive feedback on the proposed duties on accountable authorities noting that they provide clear expectations. Entities, such as the RBA and Australia Post, were uncertain about the operation of these new duties. Where necessary, the PGPA Bill was adjusted. For example, the duty to encourage cooperation with others was altered to make it clear that cooperation need only be encouraged where practicable (refer to clause 17). This caveat was added to recognise that the duty to cooperate needs to be considered in the context of enabling legislation or other legal requirements.</p> <p>Further comments on the duties expressed concern that some requirements in the CAC Act, such as the business judgment rule, had been removed from the PGPA Bill. To address such concerns, the Rules can provide for such matters if appropriate (refer to clause 20).</p> <p>UnitingCare Australia's submission to the CFAR Position Paper advocated reforming the financial framework in a way that would enable more effective and collaborative arrangements between government and not-for-profit organisations. As an important step to driving cultural change, the PGPA Bill contains positive duties on accountable authorities to encourage cooperation and take into account the impact of imposing requirements on others (refer to clauses 17 and 18).</p>
Interaction with the <i>Public Service Act 1999</i>	<p>There was concern from the Australian Public Service Commission (APSC) about potential overlaps between the <i>Public Service Act 1999</i> (PS Act) and the PGPA Bill.</p> <p>Finance has worked with entities, including the APSC, throughout the development of the Bill to avoid potential conflicts. The duties in the PGPA Bill sit alongside those in the Code of Conduct for APS employees in the PS Act.</p> <p>The following changes were made to the PGPA Bill to address concerns:</p> <ul style="list-style-type: none"> • a clause requiring officials to act with honesty and integrity was removed;

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	<ul style="list-style-type: none"> • a clause making breaches of the PGPA Bill (and subsidiary legislation) a breach of the APS Code of Conduct was added (refer to clause 32). <p>Additionally, the proposed Finance Minister’s power to establish a body corporate through the use of rules in the Bill (refer to clause 87) does not affect the existing PS Act power to create executive agencies. It is an additional method that provides the capacity to set up a governance model involving a board with a mix of skills and experience. A governing board is not possible in the context of an executive agency, although there is scope for an advisory board. Commonwealth-State bodies could be established under this mechanism.</p>
Funding – receipts and investment	<p>A number of bodies, including the cultural institutions (such as the National Gallery of Australia and the Australian War Memorial), Indigenous Business Australia (IBA), the RBA and Commonwealth Superannuation Corporation raised concerns about the term “public money”, which appeared in early versions of the Bill.</p> <p>In response, there has been a change in terminology from “public money” to “relevant money” to reflect that some money, such as superannuation contributions, is actually the money of private persons (refer clause 8).</p> <p>Also, the PGPA Bill has been drafted to ensure that donations of funds and property can still be held by individual entities and investments by those bodies will be subject to the same rules used currently. The change from the existing arrangements is one approach. Regardless of the source of funds Commonwealth entities should manage the funds under their control to the high standard expected of a public sector entity.</p>
A lack of penalties and sanctions	<p>Comments on earlier drafts of the PGPA Bill raised the lack of penalties and sanctions and enforcement mechanisms as a possible weakness.</p> <p>The PGPA Bill does not generally include specific penalties and sanctions for a number of reasons:</p> <ul style="list-style-type: none"> • Criminal activity should be addressed through the <i>Criminal Code Act 1995</i> which would more effectively cover criminal activity in relation to public office rather than under the PGPA Bill; and • Civil provisions in current legislation have not been successfully used since their introduction and a more effective and practical approach is to use the employment frameworks of the entities concerned. <p>In terms of enforcement, the introduction of such an approach does not lead to a reduction in accountability. It ensures that the method of dealing with inappropriate or illegal behaviour is the method most suited to the circumstances.</p> <p>The inclusion of a termination provision (discussed further below) also provides a clear sanction in the event that a member of an accountable authority of a corporate Commonwealth entity contravenes his or her duties (refer clause 30).</p>

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Termination of appointment	<p>There were a number of comments from entities including the RBA, ABC and SBS about the proposal to allow for members of accountable authorities of corporate Commonwealth entities to be terminated for contraventions of the general duties on officials. In particular, there were concerns that:</p> <ul style="list-style-type: none"> • a Minister could terminate an appointment even when the Minister did not appoint the member; • termination could be done where the person who appoints the member is of a personal belief that a member has contravened their duties (rather than where the facts substantiate a contravention); and • some appointments should not be terminated in this way, such as <i>ex officio</i> appointments. <p>In response to these concerns, the PGPA Bill has been adjusted to make the person responsible for appointing a member (the “appointer”) also responsible for terminating that appointment (refer to subclause 30(1). An appointer can only exercise this power where an actual contravention takes place – it does not rely on the subjective belief of the appointer (refer to paragraph 30(1)(c)) . Finally, positions can be excluded from the operation of this provision under the Rules (refer to subclause 30(5)).</p>
Maintaining existing exemptions	<p>A number of entities, including the RBA, ABC, SBS, ILC and Indigenous Business Australia, have existing exemptions from various parts of the current framework. For example, the RBA has exemptions around banking and investment, given its role as Australia’s central bank; and the ABC is exempt from complying with government policies.</p> <p>Entities have been assured that their existing exemptions will be maintained as part of the drafting of consequential amendments, should the PGPA Bill be passed. This assurance has been strengthened by referencing in the explanatory memorandum that a number of exemptions will be maintained (for example, see paragraph 72 of the explanatory memorandum).</p>