



## **Express law** *fast track information for clients*

16 May 2013

### **BILL TO INTRODUCE NEW PUBLIC GOVERNANCE, PERFORMANCE AND ACCOUNTABILITY FRAMEWORK**

**A Bill that was introduced into the House of Representatives today will, if enacted, create a new framework for the management of performance, financial accountability and the use of public resources across all Commonwealth bodies, regardless of their legal form.**

The Public Governance, Performance and Accountability Bill 2013 would replace the *Financial Management and Accountability Act 1997* (the FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (the CAC Act). The substantive provisions of the Bill would commence on **1 July 2014**.

The Bill operates by reference to several key concepts. The most important of these are:

- Commonwealth entities
- accountable authorities
- officials
- public resources.

#### ***Commonwealth entities***

---

Clause 10 of the Bill provides that all of the following are Commonwealth entities:

- departments of state and parliamentary departments
- 'listed entities' (ie entities prescribed by the rules, similar to prescribed agencies under the FMA Act)
- bodies corporate established by a law of the Commonwealth.

All bodies that are presently agencies under the FMA Act or authorities under the CAC Act will be Commonwealth entities for the purposes of the Bill.

There will be 2 types of Commonwealth entity:

- corporate Commonwealth entities (that is, bodies that are established as corporations by their enabling legislation)
- non-corporate Commonwealth entities (that is, departments and listed entities).

Some provisions of the Bill apply only to corporate Commonwealth entities and some apply only to non-corporate Commonwealth entities.

If enacted, the Bill will empower the Finance Minister to create a corporate Commonwealth entity by rules (cl 87). It is intended that this power be used where it is desirable to establish a corporate entity but the circumstances are such that putting legislation before the Parliament would not be possible or appropriate (for example, where there is urgency).

### ***Accountable authorities***

---

An 'accountable authority' is the person or body responsible for governing the entity. The accountable authority of:

- a department of state or a parliamentary department will be the secretary of the department
- a listed entity will be the person or group of persons prescribed by the rules
- a body corporate established by a law of the Commonwealth will be the governing body of the entity (that is, the board of directors).

### ***Officials***

---

Each Commonwealth entity will have 'officials'. An official of a Commonwealth entity will generally be an individual who is in, or forms part of, the entity (with some specific exceptions such as judges, and consultants and independent contractors unless the rules prescribe that they are officials).

Importantly, all staff of current CAC Act authorities (such as AGS) will be officials and will be subject to the duties of officials (see below).

### ***Public resources***

---

Duties and obligations are imposed on accountable authorities and officials in relation to 'public resources', which is defined to include 'relevant money', 'relevant property' and appropriations.

'Relevant money' means money in any Commonwealth bank account or the bank account of a corporate Commonwealth entity, or money that is held by the Commonwealth or a corporate Commonwealth entity (such as petty cash). Importantly, it does not include money held by an agent of the Commonwealth or controlled by the Commonwealth (by contrast with the definition of 'public money' in the FMA Act).

'Relevant property' means property (other than relevant money) that is owned or held by the Commonwealth or a corporate Commonwealth entity, or any other thing prescribed by the rules.

### ***Duties***

---

The Bill imposes duties on both accountable authorities and officials.

Duties imposed on **accountable authorities** relate to how the accountable authority must govern the entity, as well as how it relates to others.

The most significant duty is that an accountable authority must govern its Commonwealth entity in a way that promotes the proper use and management of the public resources for which it is responsible, promotes the achievement of the purposes of the entity and promotes the financial sustainability of the entity (cl 15).

Accountable authorities also have a duty to establish and maintain systems relating to risk and control, encourage cooperation with others and keep their Minister and the Finance Minister informed about the activities of the entity and about significant issues.

Accountable authorities will need to take into account Commonwealth policy in governing their entities (see cl 20 and 21). Corporate Commonwealth entities will be required to comply with government policy orders made by the Finance Minister, while non-corporate Commonwealth entities will be subject to an obligation to govern their entities in a way that is not inconsistent with Commonwealth policy.

**Officials** will have duties:

- of care and diligence (cl 25)
- to act in good faith and for a proper purpose (cl 26)
- not to improperly use their position to gain a benefit or cause a detriment (cl 27)
- not to improperly use information they have obtained because they are an official (cl 28)
- to disclose any material personal interest that relates to the affairs of the Commonwealth entity (cl 29).

These duties are similar to duties currently imposed on officers of Commonwealth authorities under the CAC Act. Some of the duties are imposed on employees of Commonwealth authorities under the CAC Act. While no duties along these lines are imposed on employees by the current FMA Act, officials of FMA Act agencies who are engaged under the *Public Service Act 1999* are subject to similar duties set out in the APS Code of Conduct in that Act (other than the duty to act in good faith and for a proper purpose). Under the Bill, no sanctions are attached to breach of these duties, but breach could give rise to sanctions under the Public Service Act (via a breach of the element of the APS Code of Conduct that requires APS employees to comply with all applicable laws, or via a breach of other elements of that Code that overlap with these duties) or under other employment arrangements.

### ***Planning, performance and accountability***

---

The Bill contains rules about planning by, and the performance and accountability of, all Commonwealth entities. Amongst other things, the accountable authority of a Commonwealth entity will be required to prepare a corporate plan and budget estimates for the entity. The accountable authority will also need to prepare annual performance statements about the entity's performance for inclusion in the entity's annual report, as well as annual financial statements for inclusion in the annual report.

The Bill contemplates that the Australian Government may, from time to time, publish a statement setting out its key priorities and objectives (cl 34). The corporate plan of entities will be required, where this is not inconsistent with any enabling legislation for the entity, to indicate how the activities of the entity will contribute to achieving those priorities and objectives (cl 35).

These aspects of the Bill are intended ensure that ministers, the Parliament and the public have more, and more useful, information about the financial position of entities and also about their performance in achieving planned objectives.

### ***Other provisions***

---

The Bill replicates a number of existing provisions from the FMA Act and CAC Acts relating to matters including banking, borrowing, investment and the granting of indemnities, guarantees and warranties.

One important change is that the Finance Minister is conferred with the exclusive power to grant indemnities, guarantees and warranties on behalf of the Commonwealth.

There are a number of provisions that only apply to the Commonwealth (that is, not to corporate Commonwealth entities). These include provisions dealing with waiver, set-off and act of grace. There are also provisions that replicate current ss 28 and 31 of the FMA Act to deal with repayments by the Commonwealth, net appropriations and transfer of functions between entities, as well as clauses dealing with special accounts. All of these provisions generally reflect existing provisions in the FMA Act.

Importantly, the Bill does not contain any reference to drawing rights. However, there is a provision that confers on the Finance Minister the power to control the timing of release of appropriated funds to Commonwealth entities (cl 51).

### ***Commonwealth companies***

---

Even though Commonwealth companies currently governed by the CAC Act will not be 'Commonwealth entities' for the purposes of the Bill, the Bill does contain particular provisions relating to Commonwealth companies which generally replicate the provisions in the CAC Act dealing with Commonwealth companies.

The Bill will provide the Finance Minister with an express power (on behalf of the Commonwealth) to form, or participate in forming, particular companies and acquire shares in particular companies (cl 85).

### ***Rules***

---

As is presently the case, it is intended that much of the detail of the legislative framework will be contained in legislative instruments – namely, rules made by the Finance Minister – and the Bill provides that rules may be made in relation to a number of subject matters including:

- the commitment and expenditure of relevant money (cl 52)
- ensuring or promoting the proper use and management of resources (cl 102(a))
- grants and procurement (cl 102(c))
- performance management (cl 102(g))
- recovery of debts (for non-corporate Commonwealth entities) (cl 103(c)).

The Bill will enable the Finance Minister to make different rules for different entities or classes of entities (cl 101). This mechanism may be used to allow particular entities to be given 'earned autonomy' – that is, by having less onerous requirements imposed on them than might apply to others – in appropriate circumstances.

### ***Consequential amendments and rules***

---

Significant consequential and transitional amendments will need to be made to other legislation if the Bill is passed. It is intended that a bill containing consequential and transitional provisions will be introduced and it will commence at the same time as this Bill.

It is also intended that rules will be drafted, and we understand that the Department of Finance and Deregulation will be consulting widely with Commonwealth entities about the content of the rules.

## ***AGS involvement***

---

AGS advised the Department of Finance and Deregulation throughout the drafting of the Bill.

*For further information please contact:*

**Kathryn Graham**

Senior General Counsel

T 02 6253 7167

[kathryn.graham@ags.gov.au](mailto:kathryn.graham@ags.gov.au)

**Guy Aitken**

Deputy General Counsel

T 02 6253 7084

[guy.aitken@ags.gov.au](mailto:guy.aitken@ags.gov.au)

**Olivia Abbott**

Counsel

T 02 6253 7023

[olivia.abbott@ags.gov.au](mailto:olivia.abbott@ags.gov.au)

---

**Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.**

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:

<mailto:unsubscribe@ags.gov.au>