



Australian National Preventive Health Agency Bill 2009

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Australian National Preventive Health Agency Bill 2009

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Portfolio: Health and Ageing

Commencement: 1 January 2010

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Australian National Preventive Health Agency Bill 2009 (the Bill) would establish the Australian National Preventive Health Agency (ANPHA) to support the Australian Health Ministers' Conference and Council of Australian Governments (COAG) in creating a framework for a national approach to preventive health.¹ At the outset, it should be stated that the establishment of the ANPHA is one of several strategies proposed by the Preventative Health Taskforce (the Taskforce) in its National Preventative Health Strategy (see below for further discussion).²

Background

Basis of policy commitment

Whilst in opposition, the Australian Labor Party (the ALP) signalled that it intended to make preventing chronic disease a priority for Australia's health system, if elected.³ It argued that the Commonwealth Government needed to invest much more in prevention in order to: 'help deal with the rising incidence of chronic diseases', 'help prevent

1. Explanatory Memorandum, Australian National Preventive Health Agency Bill 2009, p. 1.
2. Preventative Health Taskforce, *Australia: the healthiest country by 2020 – National Preventative Health Strategy – Overview*, Canberra, 2009, viewed 15 September 2009, <http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/nphs-overview>
3. K Rudd (Federal Labor Leader) and N Roxon (Shadow Minister for Health), *New Directions for Australian Health, Taking Responsibility: Labor's plan for ending the blame game on health and hospitals*, Policy document, August 2007, viewed 15 September 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%20pol%20FGT1O6%22>

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Australians from getting sick in the first place' and reduce 'their need to end up in hospital'.⁴ The ALP outlined a number of promises including:

- making prevention a focus within the health system by developing a National Preventative Healthcare Strategy
- providing incentives for General Practitioners (GPs) to deliver quality preventive services
- broadening the focus of the Australian Healthcare Agreements between the Commonwealth and state and territory governments so they include a Preventive Healthcare Partnership
- commissioning Treasury to investigate the economic impact of chronic disease on the economy.⁵

Previously, federal governments have established inquiries and commissions designed to help re-orient Australia's health system towards prevention: the Whitlam Government established the National Hospitals and Health Services Commission in 1973; the Fraser Government initiated the Davidson inquiry into health promotion in 1979; and the Hawke Government created the Better Health Commission in 1985. Despite these repeated attempts, disease prevention and health promotion have, arguably, never gained the same priority as acute health care services in Australia.

Since coming to power, the Rudd Government has negotiated new National Partnership Agreements on Preventive Health with the state and territory governments. As part of these Agreements, the Commonwealth Government committed to provide \$872.1 million in funding over six years for a range of preventive health activities, including the establishment of a national prevention agency.⁶

The Government has also commissioned three major inquiries into the health system—the National Health and Hospitals Reform Commission, the Preventative Health Taskforce (the Taskforce) and, through the Department of Health and Ageing, the External

4. K Rudd (Federal Labor Leader) and N Roxon (Shadow Minister for Health), *Fresh Ideas, Future Economy: Preventative health care for our families and our future economy*, policy document, June 2007.

5. K Rudd and N Roxon, *Fresh Ideas, Future Economy*.

6. Council of Australian Governments, *National Partnership Agreement on Preventive Health*, December 2008, viewed 15 September 2009, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_preventive_health.pdf

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Reference Group on primary health care. All three have now reported to Government and reinforced the view that more vigorous efforts in the field of prevention are needed.⁷

Unsurprisingly, the Taskforce outlined the most comprehensive plan to advance the prevention agenda in Australia. It made numerous recommendations on prevention, focusing particularly on obesity, and tobacco and alcohol use. It also outlined a comprehensive strategy and set four ambitious prevention targets that align with interim targets previously outlined by COAG.⁸ One of the Taskforce's recommendations was to establish a National Prevention Agency, similar to the one foreshadowed in the National Partnership Agreement on Preventive Health.

The following section of this Bills Digest focuses on details of the proposed structure and functions of the ANPHA. The Bill concentrates on establishing the ANPHA, not on broader issues relating to preventive health, or on issues relating to the actual implementation of the national preventive health strategy. Consequently, it is beyond the scope of this Digest to address those broader issues or, indeed, issues relating to the implementation of the national preventive health strategy.

Structure, function and operations of the Australian National Health Preventive Health Agency

The ANPHA would be a statutory agency made up of a Chief Executive Officer (CEO), an Advisory Council, and staff employed under the *Public Service Act 1999*. The Bill proposes that the ANPHA commence operating from 1 January 2010.⁹

CEO

The main responsibilities of the CEO would be to:

- advise and make recommendations to the Minister for Health and Ageing (the Minister) on matters relating to preventive health

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7. National Health and Hospitals Reform Commission (NHHRC), *A healthier future for all Australians: final report*, NHHRC, Barton, ACT, 2009, viewed 15 September 2009, <http://www.nhhrc.org.au/internet/nhhrc/publishing.nsf/Content/nhhrc-report>; Preventative Health Taskforce, *Australia: the healthiest country by 2020 – National Preventative Health Strategy – Overview*; Australian Government Department of Health and Ageing, *Primary Health Care Reform in Australia: Report to Support Australia's First National Primary Health Care Strategy*, Canberra, 2009, viewed 15 September 2009, <http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/NPHCS>
 8. Preventative Health Taskforce, *Australia: the healthiest country by 2020 – National Preventative Health Strategy – Overview*.
 9. As to provisions of the Bill relating to the establishment of the ANPHA, see Main Provisions pp. 12–13.

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- develop triennial strategic plans that specify the main prevention objectives and strategies for achieving them
- advise the Australian Health Ministers' Conference (the Ministerial Conference); state and territory governments; and the Australian Local Government Association on preventive health, if requested
- collect, analyse, interpret, and disseminate information on preventive health
- publish a report on the state of preventive health in Australia every two years, starting from 2011
- conduct educational, promotional and community awareness programs on preventive health
- make grants of financial assistance on behalf of the Commonwealth to the states and territories for preventive health
- encourage preventive health initiatives through partnerships with industry, non-government organisations and the community sector
- develop national standards and codes of practice on preventive health

The CEO of ANPHA will be full-time and appointed by the Minister, in consultation with the Ministerial Conference, for a five year period with the possibility of re-appointment.¹⁰

Advisory Council

The purpose of the Advisory Council is to provide advice and recommendations, but not directions, to the CEO on preventive health.¹¹ Members would be appointed on a part-time basis by the Minister, in consultation with the Ministerial Council for a period of three years with the possibility of re-appointment. The Council would have a minimum of seven and maximum of 11 members and would include:

- one member representing the Commonwealth
- at least one, but no more than two members, representing the governments of the States and Territories, and
- at least five, but no more than eight, other members with expertise relating to preventive health.

The Advisory Council would be required to meet twice in the first six months after the ANPHA was established, and four times in every subsequent financial year.

10. As to provisions of the Bill relating to the CEO, see Main Provisions pp. 13–15.

11. As to provisions of the Bill relating to the Advisory Council, see Main Provisions pp. 16–18.

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In addition to the Advisory Council and ANPHA staff, the CEO would be able to establish committees; and engage consultants and officers or employees of other state or territory governments to provide advice on prevention initiatives.

Developing a strategic plan for prevention

One of the most important functions of the ANPHA would be producing its triennial year strategic plans.¹² The first plan would need to be prepared by 31 March 2010 in order to begin on 1 July 2010.¹³ The CEO would develop the strategic plan in consultation with the Advisory Council. The Bill makes it clear that the strategic plan is not a legislative instrument and must be given to the Minister for approval. The Minister in turn is required to seek the agreement of the Ministerial Council. The Bill also gives the Minister the power to approve an interim strategic plan if the Ministerial Council cannot agree on a plan within one month of the commencement of a new triennial period. Variations to a strategic plan once it has been approved also require the approval of the Minister and Ministerial Council. However if the Ministerial Council take six months or longer to agree to the variations, the Bill allows the Minister alone to approve them.

The Bill proposes that the ANPHA would also be required to develop annual operational plans outlining the CEO's intended actions relating to the strategic plan for that year.¹⁴ Operational plans would include performance indicators that could be used to evaluate the performance of the ANPHA. Similar to the arrangements regarding strategic plans, annual operational plans must be given to the Minister for approval, who must then seek agreement from the Ministerial Council. If the Ministerial Council does not agree to the operational plan, the Minister would have the power to approve an interim annual operational plan.

Funding

The funds to establish and operate the ANPHA were agreed upon in the National Partnership Agreement on Preventive Health. More details on funding arrangements are outlined in the Financial Implications section of this Digest.

12. As to provisions of the Bill relating to strategic plans, see Main Provisions pp. 18–19.

13. It is noted that there would be a short period of time between this legislation commencing on 1 January 2010 and the deadline for preparing the first strategic plan.

14. As to provisions of the Bill relating to operational plans, see Main Provisions p. 19.

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Reporting

The Bill proposes that the CEO must present a copy of the Annual Report to the Minister as soon as practicable after the end of each financial year.¹⁵ That report must provide information on:

- the extent to which the CEO's operations have contributed to the objectives outlined in the strategic and operational plans for the year
- details on variations from the strategic and operational plans for the year
- an evaluation of the ANPHA's performance against performance indicators set out in the operational plan
- financial statements and an audit of those statements

Committee consideration

As at the time of writing, the Bill has not been referred to any parliamentary committee.

Commentary on the Bill

Position of significant interest groups/press commentary

The proposal has generally been welcomed by some of the major stakeholders in health.

The Heart Foundation indicated its support for the Bill and stated that the establishment of the ANPHA:

‘heralds an important and proactive focus for preventative health care, especially in the major health risk areas of tobacco and obesity, that could potentially shift the significant burden of cost that accompanies chronic diseases such as cardiovascular disease.’¹⁶

The Public Health Association of Australia and Royal Australian College of Physicians have also signalled their support for the ANPHA and urged its quick passage through the Parliament.¹⁷ The Australian Medical Association has not yet commented on the proposal

15. As to the provisions of the Bill relating to Annual Reports, see Main Provisions p. 20.

16. Heart Foundation, *Heart Foundation Applauds focus on National Preventative Health*, media release, 10 September 2009, Melbourne.

17. Royal Australasian College of Physicians, *Quick Action on Prevention Great for Nation's Health*, media release, 10 September 2009; Public Health Association of Australia, *National Preventive Health Agency – Massive Step Forward for Australia's Health*, media release, 10 September 2009, Canberra.

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to establish the ANPHA, but had previously stated that it supports ‘a national strategic approach to prevention as set out in the report of the Preventative Health Taskforce’.¹⁸

Whilst no stakeholder groups have specifically come out against the proposal to establish a national prevention agency, some commentators have expressed negative views on the Taskforce’s recommendations and its approach to prevention. The Institute of Public Affairs (IPA) has been one of the harshest critics. Its central claim is that the Taskforce (and by implication the Government if it adopts any of its recommendations) takes a paternalistic approach by recommending that governments rather than individuals take on greater responsibility for managing the risk of ill health. In an article published in *The Australian*, Tim Wilson from the IPA, argues that

‘people may make decisions about what they consume and do that government does not like, and there may be legitimate measures that can be taken to stop people making the poorer choices. But to bring Australians along, public health activists need to learn to treat us as grown-ups. The 26 potential pieces of legislation, 18 new programs and frameworks, seven new bureaucracies and 71 other recommendations by the taskforce do not communicate respect for the individual's choices.’¹⁹

He goes on to say that ‘instead of encouraging responsibility, the taskforce is trying to shove us into thinking it can make those decisions for us’ and argues that:

‘the real decision facing the government isn't about whether to accept the report's recommendations. It is about whether government thinks its role is to ensure consumers can take the responsibility to make informed choices or to decide for them’.²⁰

Another commentator, David Gillespie, an author and lawyer, has come out against the proposal to establish the ANPHA, arguing that people should:

‘get ready to be told you need to exercise more, eat less fat, stop smoking and stop drinking. Nicola’s health taskforce has observed that the stuff we’ve been told to do for 30 years isn’t working, and their solution is, ah, to do more of it?’²¹

Prominent social commentator, Eva Cox, has also criticised the Taskforce’s report and approach to prevention saying that it ‘managed to avoid any acknowledgement of the toxic effects of inequality’. She argued that preventive health services are the sector of health

18. Australian Medical Association, *Preventative Health Taskforce Report: AMA supports national strategic approach to prevention*, media release, 1 September 2009, Canberra.

19. T Wilson, ‘Nanny knows best’, *The Australian*, 4 September 2009, viewed 15 September 2009, <http://www.ipa.org.au/news/1942/nanny-knows-best>

20. T Wilson, Nanny knows best.

21. D Gillespie, ‘All this nagging, Nicola, isn’t making us thin’, crikey.com.au, 10 September 2009, viewed 13 September 2009.

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that depends the most on ‘relationships, trust and cultural appropriateness, [so] the absence of the social factors is serious’.²²

And finally, Australian health economist, Paul Gross, does not criticise the prevention agenda or proposed Agency, but points out the challenges the Government now faces financing them, even if it succeeds in increasing taxes on cigarettes and alcohol.²³

Political parties’ policy positions/commitments

There has been little comment so far from the opposition parties on the proposed Australian National Preventive Health Agency.

Financial implications

The measures outlined in this Bill have a total cost of \$133.2 million over four years.²⁴ Table 1 below provides more detail on how funds will be used over this time.²⁵

Initiative (\$millions)	2009-10	2010-11	2011-12	2012-13
ANPHA costs	2.0	5.1	5.2	5.3
Social marketing campaigns	2.0	33.8	32.7	33.5
Preventive health research fund	2.0	4.0	4.0	3.0
Workforce audit and strategy	2.0	4.0	4.0	3.0

The proposed Agency would also be able to establish and operate a Special Account. Funds for this account would be raised by charging the state and territory governments or Local Government Association fees if they request, in writing, advice or recommendations on preventive health. Other organisations would be able to make financial contributions into this Special Account. The Special Account would be used to carrying out the functions of the ANPHA described previously.

22. E Cox, *Social inequality is toxic to our health*, crikey.com.au, 8 September 2009, viewed 13 September 2009.

23. P Gross, ‘Hard decisions needed on health care’, *Australian Financial Review*, 7 September 2009.

24. Explanatory Memorandum, op. cit., p. 3.

25. *ibid.*

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Key issues

It is generally accepted that preventing ill health is difficult because many of the determinants of an individuals' health status are wholly or partly beyond the reach of governmental legislative instruments—biology and genetics, health beliefs and behaviours, and broader societal factors such as the degree of social cohesion or inequality. In her second reading speech on the Bill, Minister Roxon acknowledged that success in changing lifestyles goes beyond 'the capacity of any single sector, government or portfolio' and explains that it 'cannot be about Government's imposing solutions on the community'.²⁶

Fostering collaboration and co-operation across portfolios, levels of governments, different sectors of the economy and parts of society is critical to advancing the prevention agenda. However there are several elements of this Bill that may make successful collaboration and co-operation difficult.

The process for approving or varying the ANPHA's strategic and operational plans for prevention is one such element.²⁷ In the situation where the Minister has approved the plans but the Ministerial Council has not, the Bill stipulates that the Minister has the power to approve an interim strategic plan so that the ANPHA can continue to function. The Bill does not explain whether or not the Ministerial Council will have the opportunity to review this interim plan or if the Minister is required to seek its agreement at some point in the future. Therefore, the process outlined in the Bill grants the Federal Minister for Health substantially more power in determining the agenda for preventive health than his or her state and territory counterparts, if there is disagreement. This is likely to be controversial, particularly given the importance of the state, territory and local governments in delivering preventive health services.

The membership structure for the Advisory Council proposed in this Bill is another potential obstacle to successful collaboration and co-operation with the state and territory governments on prevention.²⁸ The Bill stipulates that the Advisory Council will have 'at least one, but no more than two members, representing the states and territories'. It is likely that there will be intense competition for membership on the Advisory Council, and that those states and territories not represented will be dissatisfied with the arrangements.

Finally, the funding arrangements outlined in this Bill may also make it difficult for the three levels of government to successfully collaborate and co-operate. Clause 12 provides that the ANPHA will be able to charge a 'fee for service' from the state and territory governments and Local Government Association for seeking written advice or recommendations on prevention. While this additional funding source may make

26. N Roxon, 'Second reading speech: Australian National Preventive Health Agency Bill 2009', House of Representatives, *Debates*, 10 September 2009, p. 4.

27. See also Main Provisions, p. 19.

28. See also Main Provisions, pp. 16–17.

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budgetary sense, it is likely to make working relationships between governments more complicated.²⁹

Under the proposed arrangements, the ANPHA will set national goals and objectives for prevention and the ability to make financial grants to the states and territories for preventive health. The states and territories, on the other hand, have substantial responsibilities in delivering preventive health services, but may be charged fees for seeking advice and recommendations on prevention initiatives. Because the Commonwealth relies on the state and territory governments for service delivery in some areas of preventive health, in practice it will probably be difficult for the ANPHA to determine whether or not it is appropriate to charge fees.

Main provisions

The Bill contains nine parts.

Part 2

Part 2 of the Bill sets out provisions relating to the establishment, constitution, function and immunities of the ANPHA.

The ANPHA, established by **clause 6**, would consist of the Chief Executive Officer (CEO) and ANPHA staff (**clause 7**). Under **clause 8**, the function of the ANPHA would be to assist the CEO in the performance of his or her functions (as set out in **clause 11**).

The Note to **clause 7** makes clear that the Authority will not have a legal identity separate from the Commonwealth and the Explanatory Memorandum states:

The ANPHA will be a prescribed agency for the purposes of the *Financial Management and Accountability Act 1997*. This means that the ANPHA will be subject to that Act.³⁰

The Review of the Corporate Governance of Statutory Authorities and Office Holders (the Uhrig review) was released on 12 August 2004.³¹ One of the recommendations of the Uhrig review was that the legislative basis for statutory agencies should be simplified—the *Financial Management and Accountability Act 1997* should be applied to budget funded statutory authorities.

It is stated in the Explanatory Memorandum:

29. See also Main Provisions, p. 14.

30. Explanatory Memorandum, op. cit., p. 4.

31. J Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, Commonwealth of Australia, June 2003, viewed 11 September 2009, <http://www.finance.gov.au/financial-framework/governance/docs/Uhrig-Report.pdf>

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The governance structure of the ANPHA is broadly modelled on that of several other statutory authorities within the Health and Ageing portfolio, including the Australian Organ and Tissue Donation and Transplantation Authority and the National Health and Medical Research Council. Functions and powers will be conferred on the CEO and the CEO will be advised by an Advisory Council drawn from government representatives (including Australian, State and Territory governments) and experts in preventive health (refer to Part 4 for details on the Advisory Council).³²

It is also noted that under **clause 9**, the ANPHA will have all of the Crown's privileges and immunities.

Comment

It is arguable that the proposed legal identity of the ANPHA is not entirely consistent with what was proposed by the Taskforce in its report *Australia: the healthiest country by 2020*.³³ The Taskforce proposed that the ANPHA be an incorporated Commonwealth statutory authority—an independent agency, but working closely with government.³⁴

It is also noted that concerns about the proposed arrangements have been expressed. According to the Consumers Health Forum of Australia (CHF):

If the Agency is to fall within the Health and Ageing portfolio and be answerable to Health Ministers, it is extremely unlikely to be truly independent and able to provide frank and possibly uncomfortable advice.³⁵

Part 3

Part 3 Division 1

Division 1 of Part 3 of the Bill contains provisions on matters relating to the CEO, which include the appointment, conditions of employment, functions and powers of the CEO.

32. Explanatory Memorandum, op. cit., p. 5.

33. National Preventative Health Taskforce, *Australia: the healthiest country by 2020 – National Preventative Health Strategy – Overview*.

34. *ibid.*, pp. 25, 41; National Preventative Health Taskforce, *Australia: the healthiest country by 2020 – National Preventative Health Strategy – the roadmap for action*, 30 June 2009, p. 72, viewed 15 September 2009, [http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/CCD7323311E358BECA2575FD000859E1/\\$File/nphs-roadmap.pdf](http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/CCD7323311E358BECA2575FD000859E1/$File/nphs-roadmap.pdf)

35. Consumers Health Forum of Australia, CHF Consultation Paper on the National Health and Hospitals Reform Commission Final Report – *A Healthier Future for All Australians*, August 2009, viewed 15 September 2009, <http://www.chf.org.au/Docs/Downloads/cons-544-nhhrc-final-report.pdf>

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Under **clauses 10** and **11**, there will be a CEO of the ANPHA, whose functions will include:

- either at the Minister's request or on the CEO's own initiative, to advise and make recommendations to the Minister on preventive health matters
- if the Chair of the Ministerial Conference requests in writing and confirms the Ministerial Conference's agreement to that request, to advise and make recommendations to the Ministerial Conference on preventive health matters
- if requested in writing by a state or territory government; or the Australian Local Government Association, to advise and make recommendations to the relevant body, on preventive health matters
- to collect, analyse, interpret and disseminate preventive health information
- on behalf of the Commonwealth, to make financial assistance grants relating to preventive health
- to conduct educational, promotional and community awareness programs relating to preventive health, and
- to develop national standards and codes of practice on preventive health matters.

In performing these functions, the CEO would be able to do whatever was necessary or convenient relating to performing his or her functions. It is stated in the Explanatory Memorandum that this would include day-to-day operations such as entering into contracts.³⁶ However, in doing so, under **clause 13**, the CEO must consider advice and recommendations given by the Advisory Council established by **clause 28** (see below). The CEO must also take into account existing strategic and operational plans, interim or otherwise, when performing his or her functions (**clause 49**). See below for discussion on proposed provisions relating to these plans.

It is also noted that the CEO may charge fees for performing certain functions as long as the fee charged does not amount to a tax (**clause 12**).

Comment

As previously mentioned, the charging of fees to states, territories and the Australian Local Government Association for seeking advice and recommendations on prevention initiatives could have a prohibitive effect on attempts to build and maintain strategic partnerships in addressing preventive health measures.

It is also noted that the Bill is silent as to how fees will be calculated and the range of fees that may be charged. It is envisaged that this would be a matter of great interest and debate for stakeholders.

36. Explanatory Memorandum, op. cit., p. 7.

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The CEO is appointed by the Minister for a term not to exceed five years (**clauses 14 and 15**). The CEO may not engage in any other paid employment without the Minister's approval (**clause 18**) and must make full disclosure of any pecuniary or other interests to the Minister, involving an actual or potential conflict of interest (**clause 19**). The Minister may terminate the appointment for standard reasons, such as misbehaviour, incapacity and bankruptcy (**clause 22**).

It is noted that the Minister may appoint a person to act as CEO and if the acting CEO does something in accord with his or her appointment and the appointment is invalid for a reason, the acting CEO's action remains valid irrespective of the irregularity in their appointment (**clause 23**).

The CEO may delegate any his or her functions and powers, except the function of developing national standards and codes of practice, to a staff member of the ANPHA, who must comply with any written direction of the CEO when exercising delegated powers (**clause 24**).

Subclause 11(5) sets out the constitutional limits of the CEO's functions, which include the following constitutional powers:

- corporations
- statistics
- trade and commerce
- health and associated benefits
- making laws for people of a particular race
- granting financial assistance to a state, and
- implied nationhood power.

Part 3 Division 2

Division 2 of Part 3 of the Bill contains provisions relating to the employment of ANPHA staff and consultants.

ANPHA staff members are engaged under the *Public Service Act 1999* (**clause 25**). **Clause 26** sets out what staff may assist the CEO, such as:

- officers and employees of Agencies as defined in the *Public Service Act 1999* and of Commonwealth authorities whose services are made available to the ANPHA, and
- officers and employees of state and territory government and government authorities under a specific arrangement, whereby the Commonwealth may reimburse the state or territory for that person's services.

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The CEO may also engage a consultant with suitable qualifications and experience under terms and conditions as determined by the CEO in writing (**clause 27**).

Part 4

Part 4 of the Bill contains provisions on matters relating to the Advisory Council. These matters include the Advisory Council's establishment, membership and function; as well as the terms and conditions of the Advisory Council's membership.

The Advisory Council of the ANPHA, established by **clause 28**, would consist of:

- one Commonwealth member
- one but no more than two members representing the state and territory governments, and
- five to eight members with preventive health expertise (**clause 29**).

Comment

It is noted that in the Explanatory Memorandum, it is stated that the Advisory Council will have a maximum of 11 and a minimum of seven members, which effectively means that there would not be members representing each state and territory.³⁷ It would be interesting to know how the states and territories respond to the proposed arrangement that there would be only one to two members representing all of their interests, in light of the *National Partnership Agreement on Preventive Health* and the National Preventive Health Strategy.³⁸

According to the Taskforce:

The Taskforce believes that health is a shared responsibility, with *individuals*, *families* and *local neighbourhoods* being at the centre of the Strategy ...

Local governments play a pivotal role in providing local amenities, and can partner with local organisations in areas such as exercise, active recreation and sport, food security, managing alcohol outlets and tobacco regulations. They can also assist with planning to increase physical activity and active use of the local government area ...

State and territory governments are key leaders, funders, legislators, regulators, service providers and employers across a range of sectors that underpin the nation's capacity to promote health and prevent illness; for example, health, education, alcohol licensing, law enforcement, urban planning, transport and housing.

37. *ibid.*, p. 13.

38. See Council of Australian Governments, *National Partnership Agreement on Preventive Health*.

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Non-government organisations play a vital role at the national and state levels as providers of research and development, advocacy, social marketing and primary care

Whether as producer, marketer or employer, the private sector has a profound influence on the health of Australians. The most relevant are the food, beverage and alcohol industries, media, advertising, private health insurance, workplace insurance, self-medication, fitness and weight-loss industries.³⁹

As mentioned previously, failure to provide adequate representation for states and territories could be detrimental to any attempt at promoting partnerships. This is especially so given that fees could be charged for the CEO advising or making recommendations to a state or territory government, or to the Australian Local Government Association in relation to preventive health matters under **proposed paragraph 11(1)(c)**.

It is also noted that although the Bill does not specify what knowledge or expertise is required of Advisory Council members (beyond expertise relating to preventive health), it is stated in the Explanatory Memorandum that:

... it is anticipated that the following expertise would be represented amongst members: public administration, business/employer groups, education, intersectoral collaboration, sports and recreation, preventive health including health promotion, community and non-government organisations, consumer issues, social inclusion and disadvantage (including Indigenous Australians), local government, legal/regulatory, and finance.⁴⁰

The Minister would appoint part-time members for up to three years, as well as the Chair and Deputy Chair of the Advisory Council, only after consulting the Ministerial Conference (**clauses 31 and 32**). In order to be eligible for appointment as a member, a person would have to be an Australian resident. Interestingly, a defect or irregularity relating to a person's appointment to the Advisory Council would not negate that person's appointment per se. Such a provision, however, is not uncommon in Commonwealth legislation.

The Minister may also make acting appointments in certain circumstances (**clause 40**). However, interestingly, as with the CEO, it is also noted that if someone does something in accord with their acting appointment, but for some reason their appointment is invalid, that person's action remains valid despite the irregularity in the appointment (**subclause 40(5)**).

Advisory Council members must not engage in other paid employment involving an actual or potential conflict of interests and must disclose all actual and potential conflicts of

39. National Preventative Health Taskforce, *Australia: the healthiest country by 2020 – National Preventative Health Strategy – Overview*, p. 28.

40. Explanatory Memorandum, op. cit., p. 14.

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interests to the Minister (**clauses 35 and 36**). Failure to comply could result in the Minister terminating the member's appointment (**paragraphs 39(1)(d)–(e)**).

The Minister would be also able to terminate an Advisory Council member's appointment for other usual reasons, which include misbehaviour, incapacity or bankruptcy (**clause 39**).

Under **clause 30**, the Advisory Council's functions would be to advise and make recommendations to the CEO about the CEO's functions either generally under the Act (at the CEO's request) or specifically under section 11 of the Act (on the Advisory Council's own initiative). It is important to note that the Advisory Council's power is restricted to advising or making recommendations to the CEO—it could not actually give any directions to the CEO.

Under **subclause 30(3)**, in performing its functions, the Advisory Council would be able to do whatever was necessary or convenient, but under **subclause 30(2)**, when acting on its own initiative, the Advisory Council must do so in a manner consistent with the existing strategic or annual operational plan of the ANPHA (see below for discussion on proposed provisions relating to these plans).

Clause 41 sets out requirements relating to Advisory Council meetings.

Part 5

Part 5 of the Bill sets out the CEO's powers relating to establishing committees.

Under **clause 42**, the CEO would have discretionary power to establish committees to assist him or her; or the Advisory Council in performing their functions. Such committee would comprise of persons as determined by the CEO, who must also determine the terms and conditions of appointment of those committee members. In addition, it is proposed that the CEO would have discretionary power to determine a committee's terms of reference and procedures. The CEO's written instrument establishing a committee would not be a legislative instrument and would therefore not be disallowable by Parliament.

Part 6

Part 6 of the Bill contains provisions relating to ANPHA strategic and operational plans.

Under **clause 43**, the CEO must develop and prepare a three-year strategic plan in consultation with the Advisory Council. The strategic plan must state what the CEO's main objectives are, in performing his or her functions over that period of time; and broadly outline how the CEO will achieve those objectives.

Clause 44 sets out the requirements of approval relating to the strategic plan. The CEO must give the Minister a copy of the plan for approval by a particular date.

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Comment

However, although the Bill states that the Minister cannot approve the strategic plan without the Ministerial Conference's agreement, the Bill allows the Minister to approve an interim strategic plan if the Ministerial Council fails to agree within a specific time frame. It is stated in the Explanatory Memorandum that:

This provision will ensure the ANPHA is able to continue functioning in the case that Health Ministers cannot come to agreement on a set of objectives and activities that the ANPHA should be tasked with.⁴¹

Yet the Bill and the Explanatory Memorandum are silent as to what should be done in relation to achieving Ministerial Conference agreement for the purposes of a final strategic plan. This raises the question about the importance of the Ministerial Conference's agreement. A similar question arises in relation to approval of variation of the strategic plan in **clause 45**.

As previously mentioned, these proposed provisions would also grant the Federal Minister for Health substantially more power in determining the agenda for preventive health than his or her state and territory counterparts, if there is disagreement. This is likely to affect attempts to foster and maintain strategic partnerships.

Similar requirements are proposed in relation to annual operational plans in **clauses 46–48**. Such plans must set out details of what the CEO intends to do to operationalise objectives set out in the strategic plan, including performance indicators (**subclause 46(2)**).

Part 7

Part 7 of the Bill relates to financial and reporting requirements for the ANPHA.

An ANPHA Special Account is established under **clause 50** and is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*. The aims of the Special Account are:

- settling the Commonwealth's costs and other expenses related to the CEO performing his or her functions
- paying remuneration or allowances under the Act, and
- meeting expenses of the Special Account's administration (**clause 52**).

The following amounts would be credited to the Special Account:

41. *ibid.*, p. 19.

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- fees charged for the CEO advising or making recommendations to a state or territory government, or to the Australian Local Government Association in relation to preventive health matters under **proposed paragraph 11(1)(c)**; and any other preventive health function set out by the Minister in a legislative instrument under **proposed paragraph 11(1)(k)**
- money that the Commonwealth receives relating to the CEO's functions under the Act
- money that the Commonwealth receives in relation to property paid for with money debited from the Special Account, and
- gifts given or bequests made for the purposes of the Special Account.

Comment

As the only fees chargeable under the Bill relate to the CEO advising or making recommendations to a state or territory government, or to the Australian Local Government Association in relation to preventive health matters under **proposed paragraph 11(1)(c)**; or to any other preventive health function set out by the Minister in a legislative instrument under **proposed paragraph 11(1)(k)** as mentioned above, it is difficult to ascertain what other money the Commonwealth could receive in relation to the performance of CEO's functions in **paragraph 51(b)**.

It is noted that the note at the end of **clause 51**, states that an Appropriation Act enables for amounts to be credited to a Special Account if the Account's purposes are covered in the Appropriation Act itself.⁴²

Clause 53 provides for the requirements relating to the ANPHA annual report.⁴³

Part 8

Part 8 of the Bill contains particular requirements of financial assistance grants made by the CEO to a state; territory; or individual or body corporate, in relation to preventive health.⁴⁴

Under **clause 54**, there must be a written agreement between the Commonwealth and state; territory; or individual or body corporate (as the case may be) setting out the terms and conditions on which such financial assistance may be granted. The CEO or delegate (**clause 24**) would be able to enter into such agreement on the Commonwealth's behalf.

The Government states that examples of such grants would include:

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42. See *ibid.*, p. 21. As to the Commonwealth's appropriations power under the Constitution, see the *Australian Constitution* section 81; *Combet v Commonwealth* [2005] HCA 61 at [5].
 43. For further explanation of these requirements, see Explanatory Memorandum, *op. cit.*, pp. 22–23.
 44. 'Person' refers to individual or body corporate: see *ibid.*, p. 23; *Acts Interpretation Act 1901* paragraph 22(1)(a). 'Individual' means a natural person: *ibid.*, paragraph 22(1)(aa).

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□ administer research grants from the preventive health research fund through a competitive process to universities, academics, State and Territory governments and maybe NGOs (similar to National Health and Medical Research Council grant rounds);

□ provide the equivalent of a sponsorship, example. provide funding to an NGO or industry group (such as a sports organisation) on the proviso that they will not allow advertising by alcohol or tobacco groups at an event or for their organisation. This would also be through a competitive process.⁴⁵

Part 9

Part 9 of the Bill setting out miscellaneous provisions relating to how the Ministerial Conference gives agreement and the Governor-General's regulation making powers.

Under **clause 55**, for purposes of the proposed legislation, the Ministerial Conference gives its agreement by resolution of the Conference passed according to procedures determined by the Conference.

Under **clause 56**, the Governor-General may make regulations prescribing:

- anything as required or allowed by the proposed legislation, and
- what is necessary or convenient to be prescribed in order to carry out or give effect to the proposed legislation.

Concluding comments

By establishing the ANPHA, the Bill is one of several strategies to be implemented in creating the framework for a national approach to prevention.

The Taskforce's National Preventive Health Strategy acknowledges that successful health promotion and disease prevention requires strategic partnerships between governments, non-governments organisations, industry and individuals. Indeed, it could be argued that the creation of such strategic partnerships is the lynchpin of the Strategy. However, some of the proposed provisions could make it difficult for the various partners to sustain a collaborative and co-operative approach as envisaged by the National Partnership Agreement on Preventive Health and the National Preventive Health Strategy.

45. Explanatory Memorandum, op. cit., p. 23.

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