
The Parliament of the Commonwealth of Australia

Report 438

Advisory Report on the Public Governance, Performance and Accountability Bill 2013

Joint Committee of Public Accounts and Audit

June 2013
Canberra

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Contents

Foreword	v
Membership of the Committee	vi
Membership of the Sectional Committee.....	vii
Terms of reference	viii
List of abbreviations	ix
List of recommendations	x
1 Background	1
Referral of the Bill	1
Scope of this inquiry.....	2
Conduct of the inquiry.....	2
2 The Commonwealth Financial Framework	5
The history of the existing legislation – FMA Act and CAC Acts.....	5
The Commonwealth Financial Accountability Review.....	8
The draft Bill	8
About the Public Governance, Performance and Accountability Bill 2013.....	9
3 The Bill in-principle	17
Overview	17
Developing the Bill.....	18
The motivation for change.....	19
Jurisdictional comparisons	20
Principles-based legislation.....	21
Development of the Rules.....	24

Consequences of not progressing legislation.....	26
Committee comment.....	28
4 The Bill – areas of impact	29
Independence.....	29
Consequential amendments.....	31
Committee comment.....	32
A new approach to risk.....	32
Achieving better outcomes through cooperation	35
Impact on the third sector.....	36
Committee comment.....	38
Performance monitoring, reporting and evaluation.....	39
Committee comment.....	41
Interaction with the <i>Public Service Act 1999</i>	42
Uniform duties of officials.....	42
Enforcement of duties and termination provisions.....	44
Committee comment.....	46
5 Committee Conclusion.....	49
Appendix A – Submissions	55
Appendix B – Exhibit.....	56
Appendix C – Public Hearing.....	57
Dissenting Report—Coalition Members	59



Foreword

On 16 May 2013, the House of Representatives Selection Committee referred the Public Governance, Performance and Accountability Bill 2013 to the Joint Committee of Public Accounts and Audit (JCPAA). The Selection Committee outlined the reasons for referral as ‘to ensure that combining the two Acts into a single Act does not impose additional and unnecessary reporting requirements on bodies subject to the Act and does not reduce transparency or remove important oversight where it is appropriate’.


The JCPAA believes all these issues are satisfied. What the Committee thinks are issues for consideration are timing; the development of detailed rules; and ongoing consultation to assist agencies and other affected bodies through this change process.

The Commonwealth Financial Accountability Review is an important reform for Australia’s public sector, and looks to be broadly supported by key stakeholders and political parties. However, what is acknowledged is a level of nervousness in the transition from the general concept of reform to this principles-based legislative framework, and then to the next stage of detailed rules.

These stages of transition need to be handled carefully, with ongoing time for listening to and talking with all 196 affected Commonwealth entities a priority, along with ensuring that the Parliament is fully informed.

It is a choice for a minister, a government and a parliament whether to progress the legislation now. If so, commitments given by both the Finance Minister and the Finance department regarding the development of the rules in detail, along with ongoing consultation, will be critical to the success or failure of this important reform.

Rob Oakeshott MP
Chair



Membership of the Committee

Chair Mr Robert Oakeshott MP

Deputy Chair Ms Gai Brodtmann MP

Members Hon Dick Adams MP

Mr Jamie Briggs MP

Mr Darren Cheeseman MP

Mr Harry Jenkins MP

Ms Laura Smyth MP

Hon Alex Somlyay MP

Mr Josh Frydenberg MP

Ms Deborah O'Neill MP


Senator Mark Bishop

Senator Dean Smith

Senator Anne Ruston

Senator Louise Pratt

Senator the Hon Kim Carr
(from 14 May 2013)



Membership of the Sectional Committee

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Deputy Chair Ms Gai Brodtmann MP

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Terms of reference

On 16 May 2013 the House of Representatives Selection Committee referred the Public Governance, Performance and Accountability Bill 2013 for inquiry and report.



List of abbreviations

ABC	Australian Broadcasting Corporation
ANAO	Australian National Audit Office
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CFAR	Commonwealth Financial Accountability Review
Finance	Department of Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
IBA	Indigenous Business Australia
JCPA	Joint Committee of Public Accounts
JCPAA	Joint Committee of Public Accounts and Audit
PGPA Bill	Public Governance, Performance and Accountability Bill 2013
PS Act	<i>Public Service Act 1999</i>
SBS	Special Broadcasting Service



List of recommendations

Recommendation 1

That the objectives of the Bill be supported, but the timing of its passage be a matter for the broader Parliament to determine.

Recommendation 2

That the issues highlighted in the referral from the Selection Committee have been examined and do not, at this stage, look to be reasons for rejection of the Bill.

Recommendation 3

That the Committee supports the introduction of additional coherence to the system – including through improving the planning, performance and accountability processes – and specifically supports the introduction of:

- more mature approaches to risk management;
- the concept of earned autonomy;
- positive obligations to cooperate and partner with others;
- better recognition of the resource management cycle of planning through to evaluation; and
- the intent of improved performance reporting and transparency to the Parliament and the public.

Recommendation 4

That, if the Bill is passed during this Parliament, that the process outlined by the Finance Minister regarding public and parliamentary consultation be closely followed.

Recommendation 5

That, if a decision is made to delay passage of the Bill, priority should be given to its consideration within the first six months of the next parliament; and that the opportunity should be taken to consult stakeholders and progress work on the rules with a view to providing:

- insight into what they look like and contain; and
- some confidence to agencies and the Parliament as to their impact.

Recommendation 6

That consequential amendments will be required to the enabling legislation of entities to ensure their independence is not compromised.

Recommendation 7

That the options developed by the Australian Government Solicitor for amendment to the Explanatory Memorandum to clarify maintenance of independence, as outlined in Supplementary Submission 9.2 from the Department of Finance and Deregulation to the Joint Committee of Public Accounts and Audit, be accepted and included in a revised Explanatory Memorandum.

Recommendation 8

That:

- evaluation requirements for the overall financial framework be explicitly included in the Bill and Explanatory Memorandum; and
- the Parliament, through the Joint Committee of Public Accounts and Audit, conduct a detailed inquiry into the financial framework following the completion of the evaluation.

Recommendation 9

That a statement on greater transparency is included in the Explanatory Memorandum, as per the Australian Information Commissioner's evidence to the Joint Committee of Public Accounts and Audit's inquiry into the Bill.

Recommendation 10

That all relevant documents are prepared in plain English and in language consistent with other relevant legislation, where practicable.

Recommendation 11

That other suggested amendments highlighted during the inquiry be further considered and changes made as appropriate.

Background

Referral of the Bill

- 1.1 The Public Governance, Performance and Accountability Bill 2013 (hereafter referred to as the Bill) was introduced into the House of Representatives on 16 May 2013.
- 1.2 On the same day, the House of Representatives Selection Committee referred the Bill to the Joint Committee of Public Accounts and Audit (JCPAA) for inquiry and report.
- 1.3 In referring the Bill, the Selection Committee provided the following reason:
 - ... to ensure that combining the two Acts into a single Act does not impose additional and unnecessary reporting requirements on bodies subject to the Act and does not reduce transparency or remove important oversight where it is appropriate.¹
- 1.4 On 16 May 2013 the Senate referred the Public Governance, Performance and Accountability Bill 2013 to the Senate Finance and Public Administration Committee for report by 3 June 2013. However the Finance and Public Administration Committee determined that as the Bill had also been referred for inquiry and report to the JCPAA it would not proceed with a separate inquiry.

1 House of Representatives Selection Committee Report No.80, 16 May 2013.

Scope of this inquiry

- 1.5 The purpose of this report is to identify and discuss matters surrounding the provisions of the Public Governance, Performance and Accountability Bill 2013.
- 1.6 With the Bill being introduced and referred to the JCPAA in the last sitting period prior to the scheduled prorogation of Parliament, the Committee decided to form a sectional committee for the purposes of examining the report at a high level in short period of time. This decision was taken to provide Parliament as a whole with as much time as possible to debate the Bill before the end of June.
- 1.7 The Committee's examination of the Bill has sought to balance the need for speed with the importance of providing sound advice to the Parliament. On this basis, the sectional committee did not examine the Bill clause by clause but instead focused on the broader issues raised in the prelude of the Explanatory Memorandum, and those mentioned in the referral.
- 1.8 A number of submissions to the inquiry raised clause specific or other matters outside the scope of this inquiry. Many of these issues have been addressed by the Department of Finance and Deregulation through supplementary submissions to the Committee. Full copies of Finance's submissions can be found on the Committee's website.²

Conduct of the inquiry

- 1.9 Details of the inquiry were placed on the Committee's website. A media release announcing the inquiry and seeking submissions was issued on 17 May 2013. The Department of Finance and Deregulation assisted in the distribution of advice on the Committee's inquiry by including a reference in information that went out with a Finance Circular released on 17 May 2013.
- 1.10 A further media release was distributed on 23 May 2013 advising interested parties of the public hearing. Social media was also utilised to publicise the inquiry, including a request for submissions and notification of the hearing.

2 Submissions to inquiry are available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcpaa/accountability_bill/subs.htm

- 1.11 To inform the Committee of key issues related to the proposed modernisation of the financial framework, submissions made to the Department of Finance and Deregulation's Commonwealth Financial Accountability Review (CFAR) process were reviewed. From this a number of stakeholders were contacted to invite further comment either through submission or attendance at the public hearing.
- 1.12 Seventeen submissions, three supplementary submissions and an exhibit were received. They are listed at Appendix A and B. A number of stakeholders also referred the Committee to their submissions made to the Finance Department as part of the CFAR.
- 1.13 The public hearing was held in Canberra on Friday 24 May 2013. A list of witnesses who appeared is at Appendix C.
- 1.14 Copies of all relevant documents, including submissions and a copy of the transcript, are available on the Committee's website at www.aph.gov.au/jcpaa.

The Commonwealth Financial Framework

- 2.1 As outlined in the Explanatory Memorandum of the Public Performance, Governance and Accountability Bill 2013, the Commonwealth financial framework underpins the use of money and resources within the Australian Government, and is an important feature of an accountable and transparent public sector.¹
- 2.2 This chapter provides a brief history of the financial framework and the ongoing role that the Joint Committee of Public Accounts and Audit (JCPAA) has played in its evolution, followed by background to the genesis of the Public Performance, Governance and Accountability Bill 2013. The final part of the chapter provides an overview of the high level features of the Bill drawn from the Explanatory Memorandum.

The history of the existing legislation – FMA Act and CAC Act

- 2.3 In April 1989 an inquiry of the Audit Office by the then Joint Committee of Public Accounts (JCPA) recommended that the *Audit Act 1901* be replaced with separate acts to deal with auditing and financial administration.²
- 2.4 The Committee's report was the result of an extensive twelve month inquiry, in which ten public hearings were conducted (with a total of 57 witnesses appearing), 47 submissions were received and comparative evidence was gathered about multiple international Auditors-General.

1 Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (PGPA Bill 2013), p. 3.

2 JCPA Report 296, *The Auditor General: Ally of the People and Parliament*, Canberra, 1989, p. 240.

- 2.5 The package of Bills was first introduced to the House of Representatives in June 1994 at which time it was referred to the JCPA for review.³ The package included the Auditor General Bill 1994, the FMA Bill 1994 and the CAC Bill 1994. The JCPA was initially asked to report its advice by 23 August 1994, however, due to the breadth and detail of evidence it received, the Committee was granted an extension to 22 September 1994. In conducting the inquiry the Committee received 66 submissions, conducted six public hearings and was also briefed on 27 July 1994 by the Comptroller and Auditor General of the UK.⁴
- 2.6 In its advisory report, the JCPA recommended a series of amendments to the CAC Bill 1994 and two minor changes to the FMA Bill 1994. These were reflected in Government amendments made in the House of Representatives before passing the Bills on 8 December 1994. However, the Bills lapsed as they did not pass both Houses in the same form before Parliament was prorogued for the 1996 Election.⁵
- 2.7 In October 1997, the following three Acts replaced the Audit Act (a similar package to that first introduced to the House of Representatives in 1994):
- *Auditor-General Act 1997* (which provided for the powers and functions of the Auditor-General)
 - *Financial Management and Accountability Act 1997* (FMA Act)
 - *Commonwealth Authorities and Companies Act 1997* (CAC Act)
- 2.8 Introducing the Acts to Parliament, the then Minister for Finance advised that the separate FMA and CAC Acts accounted for Commonwealth bodies having two different types of financial administration:
- ...Commonwealth bodies differ according to the basic legal financial status that each one has – namely, whether the body has the legal capacity, in its own right, to acquire ownership of money and other assets coming into its possession, or whether it acts only

3 The Hon Kim Beazley, Minister for Finance, FMA Bill Second Reading Speech, *House of Representatives Hansard*, 7 December 1994, p. 4148.

4 Joint Committee of Public Accounts, *Report 331, An Advisory Report on the Financial Management Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of Parliament*, Canberra, 1994, p. 1.

5 Department of the Parliamentary Library, *Bills Digest 109, 1996-97 Financial Management and Accountability Bill 1996*, <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/BD9697/97bd109#top> Accessed 27 May 2013; Department of the Parliamentary Library, *Bills Digest 108, 1996-97 Commonwealth Authorities and Companies Bill 1996*, <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/BD9697/97bd108> Accessed 27 May 2013.

as a financial and custodial agent for the Commonwealth, without acquiring separate legal ownership of such money and assets.⁶

- 2.9 Accordingly, the FMA Act pertains to Commonwealth bodies that do not acquire legal ownership of the money they raise and spend. This Act specifies the responsibilities and powers necessary for the efficient, effective and ethical use of the resources lawfully held by the Commonwealth.⁷
- 2.10 The CAC Act pertains to financially autonomous Commonwealth bodies that have legal ownership of money. The Act streamlined accountability requirements of Commonwealth authorities and companies by providing a single set of reporting and auditing requirements that replaced those in the individual enabling legislation and constitutions of these bodies.⁸
- 2.11 Both Acts were intended to clarify and strengthen transparency and accountability arrangements by introducing mechanisms that:
- placed responsibility directly on individual directors and chief executives of bodies as opposed to the bodies more broadly, and
 - increased the role of parliamentary control in decision making:
 - ⇒ The FMA Act introduced a new funding model in which all spending by Commonwealth agencies was classified as appropriation requiring tabling in parliament.
 - ⇒ The CAC Act defined the Finance Minister's Orders as disallowable instruments, creating an ongoing role for the parliament in determining the reporting obligations of directors of Commonwealth authorities.
- 2.12 In 2000 the JCPAA tabled Report 374: Review of the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*. The Committee found that in general the legislation had accommodated the new financial management framework and the needs of the public sector. The Committee made four recommendations aimed at improving consistency in terminology and ensuring reporting met the needs of Parliament.⁹

6 The Hon Kim Beazley, Minister for Finance, FMA Bill Second Reading Speech, *House of Representatives Hansard*, 7 December 1994, p. 4148.

7 Explanatory Memorandum, Financial Management and Accountability Bill 1996, pp. 1-2.

8 Explanatory Memorandum, Commonwealth Authorities and Companies Bill 1996, pp. 1-2.

9 A copy of Report 374 can be accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcpaa/fma/contents.htm.

The Commonwealth Financial Accountability Review

- 2.13 In December 2010 the Minister for Finance and Deregulation announced that the Department of Finance and Deregulation (Finance) would undertake the Commonwealth Financial Accountability Review (CFAR). The review would be an opportunity to analyse the existing Commonwealth financial framework from first principles and develop a framework that had the flexibility and capability to meet the changing demands on government.¹⁰
- 2.14 Noting that the CFAR was the first major review of the Commonwealth financial framework since the establishment of the FMA Act and CAC Act, Finance outlined that the aim of the review was to ‘improve performance, accountability and risk management across government, though a framework that is simple, easy to use and valued by all stakeholders’.¹¹
- 2.15 Finance made extensive efforts to engage with stakeholders, including with ‘town hall’ type meetings, moderating a blog and requests for submissions to inform the review. Throughout this process the department maintained a regular dialogue with the JCPAA.
- 2.16 In March 2012, Finance released the CFAR Discussion Paper, *Is Less More? Towards Better Commonwealth Performance*. This first paper was generated to stimulate debate on the financial framework and help inform the development of options to be presented to the Government at a later stage.
- 2.17 In November 2012, Finance released the CFAR Position Paper: *Sharpening the Focus*. The position paper put forward options for a number of significant reforms to the public sector financial framework, most notably a suggestion to move from prescriptiveness and towards more principles-based legislation.

The draft Bill

- 2.18 According to Finance’s submission to the Committee and evidence provided to the Senate Finance and Public Administration Committee at the most recent Estimates hearing, consultation on the draft Bill started in

10 Senator the Hon Penny Wong, Minister for Finance and Deregulation, Speech at the Commonwealth Authorities & Companies Discussion Forum “Better Government”, National Portrait Gallery, Canberra, 8 December 2010

11 Department of Finance and Deregulation, CFAR Introduction, <<http://www.cfar.finance.gov.au>>, accessed 17 May 2013.

February 2013. The draft Bill was released to a core working group, which included the Auditor-General.¹²

- 2.19 Following several iterations, the draft Bill was then released in April to all the entities that Finance had met with and to all portfolio departments and agencies with a request to distribute to agencies within the portfolio. A full list of stakeholders included in Finance's consultation process is at Attachment E of their submission to the JCPAA.¹³ In an iterative process the draft Bill was refined in response to concerns raised by stakeholders.¹⁴
- 2.20 The Public Governance, Performance and Accountability Bill 2013 was then introduced into the House of Representatives on 16 May 2013.

About the Public Governance, Performance and Accountability Bill 2013

- 2.21 Stemming from the CFAR, the Public Governance, Performance and Accountability Bill 2013 is proposed to replace the FMA Act and the CAC Act with a single Act to govern the management of public resources and the performance of Commonwealth bodies.
- 2.22 According to the Explanatory Memorandum, the Bill will set the foundation for the implementation of the broad range of reforms coming out of the CFAR. These reforms are expected to result in:
- improved quality of information to Parliament to support its constitutional role in relation to Commonwealth expenditure;
 - a more mature approach to risk across the Commonwealth;
 - improved productivity and performance of the Commonwealth public sector with concomitant benefits for a broad range of stakeholders; and
 - reduced red tape within the Commonwealth and for partners who contribute to the delivery of Australian Government programs and services, including grant recipients.¹⁵
- 2.23 The Bill provides objects of the Act as follows:
- to establish a coherent system of governance and accountability across Commonwealth entities; and
 - to establish a performance framework across Commonwealth entities; and

12 Department of Finance and Deregulation, *Submission 9*, Attachment E; and Senate Finance and Public Administration Committee, *Senate Estimates Hansard*, 28 May 2013.

13 Department of Finance and Deregulation, *Submission 9*, Attachment E

14 Senate Finance and Public Administration Committee, *Senate Estimates Hansard*, 28 May 2013.

15 Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (PGPA Bill 2013), pp. 3–4.

- to require the Commonwealth and Commonwealth entities:
 - ⇒ to meet high standards of governance, performance and accountability; and
 - ⇒ to provide meaningful information to the Parliament and the public; and to use and manage public resources properly; and
 - ⇒ to work cooperatively with others to achieve common objectives, where practicable; and
- to require Commonwealth companies to meet high standards of accountability.¹⁶

Financial Impact

- 2.24 While there are no explicit financial implications associated with the Bill, the Explanatory Memorandum suggests that there are potential gains through improved operational efficiencies for Commonwealth entities.
- 2.25 The Explanatory Memorandum notes the example of the Australian Securities and Investments Commission's (ASIC) experience transferring from the CAC Act to the FMA Act to demonstrate the current inefficiencies due to the complex regulatory burden placed on FMA Act agencies, regardless of their size.¹⁷

Issues to Address in the Existing Commonwealth Financial Framework

- 2.26 According to the Explanatory Memorandum, this Bill seeks to lay the foundation to address a number of issues that have emerged since the bifurcated model was introduced in 1998, including:
- Fragmentation and increased complexity with the FMA and CAC Acts as a result of incremental amendments made to 'maintain their serviceability and to respond to emerging issues'.
 - The distinction between entities under the FMA Act and entities under the CAC Act is overstated, and confuses operational independence with ownership. Regardless of the Act the body operates under, the money and property held are public resources.
 - A choice between the two basic governance models does not provide for the administrative and legal diversity across Commonwealth entities.¹⁸

16 PGPA Bill 2013, p. 4.

17 Explanatory Memorandum, PGPA Bill 2013, p. 1; ASIC's submission to the CFAR discussion paper provides further detail in relation to its experience transitioning between the Acts. A copy is available at www.cfar.finance.gov.au.

18 Explanatory Memorandum, PGPA Bill 2013, pp. 3-4.

- 2.27 In addition to the primary issues outlined above, the following matters have also been raised:
- Some provisions have resulted in regulatory costs disproportional to the materiality of the issues they seek to address (e.g. drawing rights and FMA Regulation 9)
 - The majority of Commonwealth entities, regardless of the Act they work under, receive all or most of their funding from the Parliament through the appropriations process
 - Independence is not defined by the Act a body exists under, with a number of FMA Act agencies having significant statutory independence (e.g. the Australian National Audit Office)
 - Greater clarity is needed in the way that employment arrangements interact with governance arrangements
 - While there is a strong focus on financial accountability, little consideration is given to the achievement of objectives and purposes or the quality of performance monitoring and evaluation.
 - There is limited focus on a whole of Australian Government perspective.¹⁹

Key elements of the PGPA Bill

- 2.28 According to the Explanatory Memorandum, the proposed reforms are based on four guiding principles, that:
- government should operate as a coherent whole;
 - uniform set of duties should apply to all resources handled by Commonwealth entities;
 - performance of the public sector is more than financial; and
 - engaging with risk is a necessary step in improving performance.²⁰

Government as a whole

- 2.29 The Bill aims to provide a consistent approach to the governance, performance and accountability of the Commonwealth, at the level of primary law. However, it is noted that:
- exceptions will be made to accommodate particular mandates contained in enabling legislation; and
 - the Bill will explicitly exempt the High Court of Australia and the Future Fund Board of Guardians (though not the Future Fund Management Agency) from its ambit.²¹

19 Explanatory Memorandum, PGPA Bill 2013, p. 4.

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

- 2.30 The Bill creates two primary categories of Commonwealth body:
- Commonwealth companies
 - Commonwealth entities
 - ⇒ non corporate Commonwealth entities
 - ⇒ corporate Commonwealth entities (legally separate from Commonwealth)
- 2.31 All Commonwealth entities will be required to keep Ministers and the Parliament informed, and the Commonwealth Auditor-General will continue to be the auditor. There will be a uniform set of duties on all accountable authorities and officials; and defined responsibilities for all Ministers when they approve proposed expenditure proposals.²²

Independence of entities

- 2.32 According to the Explanatory Memorandum, the Bill does not seek to alter the operational independence of entities as set out in their enabling legislation. The Explanatory Memorandum provides the following example:

... the ABC has a number of current exemptions from the CAC Act and, with limited exceptions, is not subject to direction by the Government (subsection 8(1) of the ABC Act). Various provisions in the SBS Act (sections 11, 12 and 13) maintain the independence and integrity of Special Broadcasting Service (SBS) in relation to the content and scheduling of programs. Other arrangements go to the independence of their respective Boards of the ABC and SBS and appointment of their Managing Directors. ... It is not intended that the ABC's or SBS's independence will be compromised by the PGPA Bill.²³

Uniform duties

- 2.33 In an attempt to align the Commonwealth sector with the private and not-for-profit sectors, the duties of officials within the Bill are based on the fiduciary duties contained in the *Corporations Act 2001*. A number of the duties imposed on officials also align with requirements under the *Public Service Act 1999* Code of Conduct.²⁴

21 Explanatory Memorandum, PGPA Bill 2013, p. 5.

22 Explanatory Memorandum, PGPA Bill 2013, p. 6.

23 Explanatory Memorandum, PGPA Bill 2013, p. 6.

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

Public resources

- 2.34 The Bill seeks to clarify the concept of public resources through the introduction of a single definition that applies to all money and all property held by Commonwealth entities.²⁵

Planning and evaluation

- 2.35 The Bill aims to establish the means to provide ‘a clear cycle of planning, measuring, evaluating and reporting of results to the Parliament, Ministers and the public’ by:
- explicitly recognising the high-level stages of the resource management cycle;
 - recognising the value of clearly articulating key priorities and objectives;
 - requiring every Commonwealth entity to develop corporate plans;
 - introducing a framework for measuring and assessing performance, including requiring effective monitoring and evaluation; and
 - maintaining the rigorous audit arrangements currently in place.²⁶
- 2.36 The Department of Finance and Deregulation indicates it will ‘play a stronger role in encouraging a more systematic approach to performance monitoring and evaluation’.²⁷

Risk management and earned autonomy

- 2.37 The Bill includes ‘an express duty on an accountable authority to ensure that the entity for which it is responsible has appropriate systems of risk oversight and management’.²⁸
- 2.38 The provision to allow the Finance Minister to prescribe matters or make different provisions in relation to particular Commonwealth entities or classes of entities underpins the proposed system of earned autonomy. Rules to the Bill, developed in consultation with Commonwealth entities, are as the proposed mechanism to operationalize earned autonomy – ‘[t]he nature and extent of oversight and regulatory intervention exercised will depend on an entity’s risk profile and performance’.²⁹

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

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

27 Explanatory Memorandum, PGPA Bill 2013, p. 8.

28 Explanatory Memorandum, PGPA Bill 2013, p. 8.

29 Explanatory Memorandum, PGPA Bill 2013, p. 8.

Cooperation and partnering

- 2.39 The Bill places explicit obligations on accountable authorities to encourage officials within their entities to cooperate with partners, and to consider the effect of compliance burdens being placed on partners when dealing with them.³⁰

Accountability

- 2.40 The Bill includes provisions for performance monitoring, evaluation and reporting, including annual reporting. In regard to annual reporting the Bill provides for an increased role for the JCPAA 'approving the proposed annual report requirements for all Commonwealth entities'.³¹

Penalties and sanctions

- 2.41 Apart from an exception relating to removal of an accountable authority in the case of breach of duties, 'the Bill does not contain specific penalties and sanctions. This is to avoid duplication of provisions already existing under other legislation or legal arrangements'.³²

Simplification

- 2.42 By moving away from prescriptive legislation to a principles-based model, the Bill aims to remove or modify undue and unnecessary regulation or administrative requirements, and instead focus on areas of high risk. However, it is noted that 'the framework will require reporting obligations to be periodically reviewed to ensure they continue to meet their intended objectives efficiently and effectively'.³³
- 2.43 Suggested future directions include 'options to streamline financial reporting requirements for Commonwealth entities, including through the introduction of tiered or differential financial reporting arrangements'.³⁴

Rules

- 2.44 As is the case with the existing FMA and CAC Acts, the Bill has provisions for the Finance Minister to issue more detailed rules, including allowing for modifications of framework requirements for intelligence, security and law enforcement agencies.

30 Explanatory Memorandum, PGPA Bill 2013, p. 9.

31 Explanatory Memorandum, PGPA Bill 2013, p. 9.

32 Explanatory Memorandum, PGPA Bill 2013, p. 9.

33 Explanatory Memorandum, PGPA Bill 2013, p. 10.

34 Explanatory Memorandum, PGPA Bill 2013, pp. 9-10.

- 2.45 The Bill makes explicit the areas in which, and in some parts the extent to which, the Finance Minister can make rules.
- 2.46 In addition to assuring that the rules will be developed in consultation with Commonwealth bodies and remain disallowable instruments, the Explanatory Memorandum also suggests that the JCPAA will have a role in the development and approval of the rules.³⁵

Consequential amendments

- 2.47 The Explanatory Memorandum provides assurance that 'the enabling legislation of all statutory authorities, including the ABC and SBS, will be updated through consequential amendments to allow for a continuation of existing exemptions from specific financial framework requirements that relate to them'.³⁶

35 Explanatory Memorandum, PGPA Bill 2013, p. 10.

36 Explanatory Memorandum, PGPA Bill 2013, p. 4.

The Bill in-principle

Overview

- 3.1 The purpose of the Joint Committee of Public Accounts and Audit's (JCPAA's) inquiry was to identify and address matters surrounding the Public Governance, Performance and Accountability Bill 2013. With the limited time remaining within the current parliament, the Committee remained focused on the higher end, and some of the principles involved, essentially testing whether 'there's enough meat on the bones for us, as a parliament, to have confidence to progress'.
- 3.2 While Chapter 4 focuses on some of the more specific areas of impact, this Chapter examines the overarching principles and broader issues that resonate across this Bill and Parliament more generally that were raised throughout the Committee's inquiry process. These include:
- The development of the Bill
 - ⇒ The motivation for change
 - ⇒ Jurisdictional comparisons
 - The concept of principles-based legislation
 - ⇒ Development of the underlying rules
 - ⇒ Consequences of not progressing the legislation.

Developing the Bill

- 3.3 As described in Chapter 2, the Public Governance, Performance and Accountability Bill is the result of work undertaken through the Commonwealth Financial Accountability Review (CFAR).
- 3.4 Over the course of the last two years, Finance has provided the JCPAA with regular updates on the CFAR process, and since the referral of the Bill to the Committee has provided a detailed submission, appeared before the Committee and provided supplementary submissions to address outstanding concerns raised by witnesses during the hearing. The Minister for Finance and Deregulation has reinforced this consultation and provided documentary support including a submission to the Committee following the public hearing.
- 3.5 In addition to keeping the Committee updated, Finance has gone to some length to ensure broad stakeholder consultation throughout the CFAR process and more recently in the drafting the Bill and Explanatory Memorandum. Finance's submission detailed the most recent consultation rounds, including listing agencies that had been consulted, advising that the draft Bill and Explanatory Memorandum had been issued to all the portfolio departments and agencies throughout the drafting process, and that independent legal advice had been sought.¹
- 3.6 Comments during the hearing supported Finance's view that they had undertaken extensive consultation and had been readily available to discuss issues of concern throughout the process. The CAC Act agencies that appeared before the Committee acknowledged Finance's open consultation process and willingness to take on board feedback and in a number of cases make amendments or provide additional assurances to mitigate concerns.²
- 3.7 The Auditor-General also noted his appreciation of Finance's efforts to engage with the Australian National Audit Office, though did express some concern that there were some entities that had not had the opportunity to examine the Bill.³

By consulting broadly and openly, you flush out the issues, you understand where the risks are and you can deal with them. My concern with the more limited consultation process with respect to the draft legislation – not the earlier work that Finance has done – is that there are conceivably issues there that have not been

1 Department of Finance and Deregulation (Finance), *Supplementary Submissions 9.1 and 9.2*.

2 *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 16–21.

3 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 12.

highlighted and which desirably would be dealt with had we had more time.

... I would like the CEOs and the directors and others to have an opportunity to buy into that debate a bit more strongly to get confidence that it will work for them.⁴

- 3.8 In addition to Commonwealth entities, external stakeholders including UnitingCare and the Institute of Chartered Accountants commended Finance on their engagement over the last twelve months or more.⁵

The motivation for change

- 3.9 According to the Explanatory Memorandum, 'the current framework is not broken but it creaks at times'.⁶ Describing the proposed new framework as evolutionary, the Finance Secretary explained that the current system whereby bodies are categorised as either CAC or FMA Act entities no longer supports the 'operational diversity of the Commonwealth'. He further suggested the existing framework is impacting productivity, limits cooperation across agencies and does not give sufficient emphasis to risk management or measuring and monitoring performance.⁷
- 3.10 The Institute of Chartered Accountants commended Finance for the work that had been undertaken to date as part of the CFAR review, and put forward that there is broad-based support for Finance's proposed single Act:
- The consensus has been in our view that whilst the delineation between the two classifications of entities has historically been appropriate, and that it certainly is not broken, such an approach should not be a feature of the evolution of the proposed new governance arrangements that are put forward as part of this bill.⁸
- 3.11 Both the Auditor-General and the Public Service Commissioner declared that they had been around at the establishment of the FMA and CAC Acts.⁹ The Auditor-General explained that the creation of the two Acts had

4 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 14–16.

5 *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 16–21.

6 Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (PGPA Bill 2013), p. 3.

7 Mr David Tune, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 1–2.

8 Mr Yasser El-Ansary, Institute of Chartered Accountants, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 28.

9 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 13; and Mr Stephen Sedgwick, Public Service Commissioner, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 33.

provided an opportunity to 'tighten the lens more on the nature of particular organisations'. However, he also acknowledged the downside is that there are some 'umbrella issues' common to all Commonwealth entities.¹⁰

- 3.12 The Public Service Commissioner indicated his strong support for the proposed consolidated legislative framework, and particularly the opportunity to move to an earned autonomy model and '[move] the FMA out of a transactional focus into one that is more a principle space'. Yet, the Commissioner suggested more could be done to reduce duplication, including with the *Public Service Act 1999*.¹¹

Jurisdictional comparisons

- 3.13 To understand the impetus to move from the existing financial framework to the new model outlined in the Bill, the Committee asked whether drafting was based on empirical evidence, and what jurisdictional comparison had taken place in the preparation of this Bill.

- 3.14 Finance drew attention to the Explanatory Memorandum and other relevant publications that reference their examination of legislation in other jurisdictions, including the US, the UK and other states and territories. Finance explained that:

...we have been able to talk through with the relevant jurisdictions what their experience has been. We have empirically looked at who does what elsewhere, how they do it and what their experience with that has been. One of the precise reasons we talked to all except one Auditor-General in Australia was to get a perspective which is not just the perspective of the people who, if you like, administer something but the perspective of the people who have to audit it.¹²

- 3.15 In addition to examining other jurisdictions, Finance advised that they had taken the opportunity to review requirements placed on the public sector, through for example the Australian Stock Exchange and the duty on risk – the principles around governance and the standards.¹³
- 3.16 Finance also pointed out that in one area the Bill will allow the Commonwealth to catch up with other jurisdictions, and that this 'is around the inclusion of the requirement to prepare financial statements in

10 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 13.

11 Mr Stephen Sedgwick, Public Service Commissioner, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 33.

12 Dr Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 25-26.

13 Mr George Sotiropoulos, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 26.

accordance with accounting standards'. Finance indicated the benefit as increased independence of the standard setter, instead of relying on the Finance Minister's rules to determine standards.¹⁴

- 3.17 The CPA commended the move to include provisions in the Bill requiring compliance with independent accounting standards, which are defined in the Bill as those issued by the Australian Accounting Standards Board.

We believe that the operation of a transparent government reporting regime benefits the Australian economy.¹⁵

- 3.18 The Australian Information Commissioner advised that while the initial CFAR discussion paper included strong remarks on 'aligning financial accountability to transparency and open government principles', the Bill and supporting information have not included explicit reference.

The importance of drawing that link to broader open government initiatives is reinforced by the announcement this week by the Attorney-General that Australia will join the Open Government Partnership, which is a multilateral partnership of 57 nations that promotes transparency in government. One of the four eligibility criteria to join the international partnership relates to fiscal transparency, to be assessed according to criteria published by the International Budget Partnership.¹⁶

- 3.19 The Information Commissioner suggested amending the Explanatory Memorandum to include an explicit link between the framework and open government initiatives.¹⁷ The Committee has provided support for this in a recommendation in Chapter 5 of this report.

Principles-based legislation

- 3.20 In the Second Reading speech the Hon David Bradbury MP, Assistant Treasurer and Minister Assisting for Deregulation, advised the Parliament that this Bill 'would, as far as practicable, apply a consistent principles-based framework to all Commonwealth entities'. He went on to outline the principles as follows:

- Government should operate as a coherent whole

14 Mr George Sotiropoulos, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 26.

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

16 Professor John McMillan, Australian Information Commissioner, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 11.

17 Professor John McMillan, Australian Information Commissioner, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 11.

- Public resources are public resources, and a common set of duties should apply to all resources handled by Commonwealth entities
 - Performance of the public sector is more than financial
 - Engaging with risk is a necessary step in improving performance.¹⁸
- 3.21 Minister Bradbury described the Bill as ‘the first step in modernising the public sector’, and explained that once this legislative framework is in place... ‘the government will progressively introduce the rules required to give effect to a number of provisions’.¹⁹
- 3.22 In his opening statement to the Committee, the Secretary of the Department of Finance and Deregulation acknowledged concerns raised by a range of stakeholders, including the Committee, about the ‘lack of visibility of the rules’. The Secretary suggested that the decision to produce a Bill based on principles aligns with the preferences of the ‘parliamentary drafters’, and was seen as an opportunity to get the Parliament’s endorsement prior to developing the rules.²⁰
- 3.23 While the Auditor-General held the Bill as having ‘honourable objectives’ and ‘some significant improvements’, he advised the Committee that he could provide only measured support for the Bill due to having no visibility of the complementary rules.²¹
- 3.24 The Auditor-General referred the Committee to his submission, bringing attention to his view that there are some provisions that could be further improved. On this basis, he suggested that if the Bill was to progress in the current truncated timeframe, it is likely that amendments will be required before the Bill comes into effect. Overall, the Auditor-General suggested that:
- ...if circumstances were different, I would prefer to have more time and to allow the committee to have more time to consider this legislation in a little more detail before it put its weight behind it.²²

18 The Hon David Bradbury MP, Assistant Treasurer and Minister for Deregulation, Second Reading Speech, *House of Representatives Hansard*, 16 May 2013, pp. 9-10.

19 The Hon David Bradbury MP, Assistant Treasurer and Minister for Deregulation, Second Reading Speech, *House of Representatives Hansard*, 16 May 2013, p. 11.

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

21 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 11.

22 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, pp. 11-12.

- 3.25 This same concern over the time allowed for consideration of the Bill and lack of clarity on the rules was echoed by a number of witnesses from Commonwealth entities that appeared before the Committee.²³

...the time frame for the consideration of the draft legislation has been overly condensed... we have some concerns around not having any visibility to date of the rules... These rules will have significant operating implications for SBS. (Mr John Torpy, SBS)

The high-level legislation generally does not present any significant concerns; our point of interest is in the detailed arrangements (Ms Rhonda Adler, Australian War Memorial)

...the devil is in the detail; once the rules become apparent, that is where the rubber hits the road. (Mr David Perceval, National Gallery Australia)

...the reservation we have about the haste is around clarity on the rules (Mr David Pendleton, ABC)

Our primary concern is the rules are not yet finalised ...as they emerge, [the rules] could be better or worse for IBA. (Mr Fry, Indigenous Business Australia)

- 3.26 Likewise, a number of external commentators at the hearing expressed the importance of not rushing this legislation, and reaffirmed that the Committee, and the Parliament, should have sufficient time to examine the underlying rules and consider the broader implications.

- 3.27 Professor Jacobs expressed strong support for the overall objectives, but felt that there were areas such as 'earned autonomy' that needed more work, and that there were opportunities missed to take advantage of other work underway on standard business reporting.²⁴

- 3.28 Mr Bartos noted the limited time the Committee had to consider the Bill and cautioned:

I do not think we can underestimate how important the legislation affecting the financial governance of all Commonwealth agencies is to the wellbeing of Australia. It is not something that I believe should be rushed.²⁵

23 *Proof Committee Hansard*, Canberra, 24 May 2013, p. 16-21.

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

25 Mr Stephen Bartos, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 27.

3.29 Professorial Fellow Burmester queried whether there was substantial change and suggested:

If the bill does not lead to substantial change in financial administration, then there is no urgency to pass this bill. If there are substantial changes that are not obvious from the explanatory memorandum, and considering the importance of the legislation, the full package should be available for scrutiny by the committee.²⁶

3.30 However, the Committee also heard from a range of stakeholders who strongly supported the early implementation of the Bill to ensure important gains are achieved as soon as possible.

3.31 The Institute of Chartered Accountants suggested that there is broad based support for the principles set out in this bill.

That broad based of support, in our view, reflects the fact that the direction being put forward will deliver the sorts of outcome that are so vitally important to ensuring that the Commonwealth public sector is able to continue to make a strong contribution to safeguarding the success and prosperity of this country over the coming years and decades.²⁷

3.32 At the Senate Finance and Public Administration Committee Estimates hearing, the Minister for Finance and Deregulation suggested that of the options available, the preferential approach is to gain endorsement on a broader principles-based Bill and allow a consultation to take place over a period of time to finalise the operational aspects such as rules.²⁸

3.33 Finance has since provided a supplementary submission outlining examples of where this has occurred in relation to primary legislation.²⁹

Development of the Rules

3.34 In referring the Bill, the House of Representatives Selection Committee asked the JCPAA to consider whether the Bill impacted on transparency or oversight. One aspect of particular concern is in relation to transparency of the rules underlying the legislation.

3.35 The Finance Secretary explained that while the rules would be used to provide 'breadth and depth' to the Bill, there are clear provisions identifying where it would be permissible to make rules. Further, he

26 Professorial Fellow Bill Burmester, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 28.

27 Mr Yasser El-Ansary, Institute of Chartered Accountants, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 28.

28 Senate Finance and Public Administration Committee, *Senate Estimates Hansard*, 28 May 2013.

29 Finance, *Submission 18*, Attachment A.

explained that provisions had been made to ensure parliamentary oversight of the rules by including an explicit role for the JCPAA and though the rules being disallowable instruments.³⁰

- 3.36 Following clarification that the ‘rules’ being referred to were in fact the same as what are currently referred to as ‘regulations’³¹, the Committee sought to confirm just how many different sets of rules might be forthcoming. The Committee also asked whether Finance could confidently state that in line with the Government’s ‘one-in, one-out’ policy that there would be no increase in regulation as a result of this process.
- 3.37 Describing the rules as one level of operationalisation of the Bill, Finance outlined the other supporting elements of the framework – the policies, procedures and guidelines – that ‘go to the things that people actually do in the public sector’, including ‘undertaking procurements, paying grants, using credit cards, having banking arrangements and providing financial reports’.³²
- 3.38 As to why there are no rules in place as yet, Finance explained:
- When we are thinking about the absence of rules this time around, it is not in a context of having to reinvent a lot of things. It is in the context of finding the right way to connect things in place now, in terms of how people conduct their business, to the bill itself.³³
- 3.39 In terms of the volume of rules, Finance noted that as it stands under the existing Acts, individually many would be around one page long, though the more complex areas may require substantially longer rules. Finance indicated that there are currently about 56 regulations under the FMA Act and 18 under the CAC Act.³⁴ From this Finance speculated that they may be able to achieve a reduction in the total number of rules similar to that of reducing the 161 sections in the FMA and CAC Acts, to 110 clauses in the Bill (including 30 which are new to this Bill), but cautioned:
- The Commonwealth is a big and complex entity and, try as we might to make the rule set clearer and to reduce it in volume, there is a limit to what you can do.³⁵

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

31 Mr David Tune, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 3; for explanation of the decision to change from ‘regulations’ to ‘rules’ see the Explanatory Memorandum, p. 65.

32 Dr Stein Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 3.

33 Dr Stein Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 3.

34 Mr George Sotiropoulos, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 5.

35 Mr Lembit Suur, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 6.

- 3.40 While confirming that the rules would not come before this Parliament, Finance indicated that many of the rules will replicate those already in place under the existing FMA and CAC Acts. Despite this, Finance estimates it would take twelve months to complete work on the rules.³⁶
- 3.41 The Finance Minister has since written to assure the Committee that the intent and form rules will be similar to the existing provisions, though with 'a modest number of new provisions to modernise the framework and its operation'. The Minister also emphasised that the intent was to continue a transparent and consultative process both in the initial development of the rules and in any material changes to the rules at a later date. The Minister gave the following assurances:
- That the Government will consult widely on the development of the rules. This would include extensive consultation within government, but also with other sectors and interested stakeholders (including the Not for Profit Sector, business and academia), including through working groups.
 - That once the rules are settled by government, they will be made publicly available for no less than 30 days for public comment and further consultation with government entities. The rules and explanatory memorandum will be made available on the Department of Finance and Deregulation's ('the Department') website. Furthermore, the Department will hold several workshops with a broad cross section of agencies to ensure they are rigorously tested.
 - Following the public consultation phase, the rules will also be made available to the Committee for scrutiny. The Government would await a report from the Committee prior to tabling in the Parliament. I would expect the Committee to have a strong and ongoing role in the formation of the rules, reflecting its position in the Parliament.
 - The rules are disallowable instruments and so following their tabling in the Parliament, there is a further opportunity for scrutiny.³⁷

Consequences of not progressing legislation

- 3.42 If the Bill does not pass prior to 30 June 2013, Finance indicated that the Bill's commencement date would have to be deferred from July 2014 to July 2015; and there is a likelihood that additional financial framework legislative amendment bills would need to be introduced as an interim measure.

36 Dr Stein Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 7.

37 Senator the Hon Penny Wong, Minister for Finance and Deregulation, *Submission 16*, p. 2.

Essentially the longer it takes to settle this level, which is the level of principle and direction, the longer we live with and the government lives with the costs that are embedded in the current arrangements. It really is a question about how long parliament and government want to wait before some of the benefits can be realised.³⁸

- 3.43 The Committee questioned whether on balance, this was sufficient reasoning to override the concerns raised, including the lack of time to reflect on the final Bill (as opposed to the consultation on the concept during the CFAR process) and limited information available on the rules. The Committee asked Finance to provide further detail on any serious consequences of not passing the bill before the end of the winter sitting (the last sitting period before the prorogation of parliament).
- 3.44 Finance's submission highlighted the importance of a '1 July' start date to 'avoid confusion and error that may arise from meeting accountability obligations for part-years'. In terms of the importance of the 1 July 2013 commencement date (with provisions coming into effect on 1 July 2014), Finance explained that this will provide a stable basis to continue the reform process and allow early realisation of the potential productivity improvements.³⁹
- 3.45 Reinforcing the department's comments, the Minister for Finance proposed that delaying the reforms would delay the benefits:

The benefits will come, in large part, from the behavioural and cultural changes that are at the core of the Bill (i.e. engaging with risk). These gains would be expected to take up to one year or longer from when the framework is in place. Were the Bill to be delayed at this point, it is realistic to assume that the benefits at the core of this Bill will be delayed by over a year. This not only would see the current shortcomings continue, it would increase the risk of the current framework shortcomings becoming more acute, and significant issues arising.⁴⁰

38 Dr Stein Helgeby, Finance, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 7.

39 Finance, *Supplementary Submission 9.2*, p. 2.

40 Senator the Hon Penny Wong, Minister for Finance and Deregulation, *Submission 16*, p. 2.

Committee comment

- 3.46 In attempting to address concerns raised about lack of time to consider the Bill, Finance referred back to the process of development and passage of the FMA Act, the CAC Act and the Auditor-General Act, which occurred between 1990 and 1997, following the then Joint Committee of Public Accounts (JCPA) recommendation in 1989. Finance suggested that the timeframe for consideration by the JCPA equated to that of the CFAR process – a total of 30 months.⁴¹
- 3.47 As detailed in Chapter 2, in each previous case the JCPA undertook multi-month inquiries with multiple public hearings acknowledging the scope of the task of examining a framework that determines the financial operations of the Commonwealth. In the case of this most recent Bill, this framework goes beyond finances to the broader governance and performance of Commonwealth entities.
- 3.48 However, the JCPAA does acknowledge that as on previous occasions, the presentation of this Bill is not a stand-alone event but rather a significant outcome of a multi-year project by the Department of Finance and Deregulation to examine options to modernise the Commonwealth financial framework.
- 3.49 The Committee also acknowledges that the Bill is not the zenith, but nevertheless a critical junction in allowing the progression to the implementation phase, and appreciates the assurances of continued consultation throughout the remainder of the reform process.
- 3.50 In terms of the JCPAA's ongoing role in scrutiny of the rules, this is a welcome inclusion, but the Committee would like to flag that the parliamentary departments that support committees, like other small agencies, have limited resources.
- 3.51 The discussion of resourcing for implementation across all entities, while not a focus of this inquiry, needs to be given due consideration. This may mean that additional resources will need to be appropriated where agencies are able to demonstrate a material impact.

41 Mr George Sotiropoulos, Finance, *Proof Committee Hansard*, 24 May 2013.

The Bill – areas of impact

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

Independence

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

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

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

3 Explanatory Memorandum, PGPA Bill 2013, p.6

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consequential amendments

- 4.11 In a supplementary submission to the Committee, Finance reiterated that the Explanatory Memorandum to the Bill contains a commitment that ‘consequential amendments to enabling legislation will be made as necessary to protect operational independence’.¹¹
- 4.12 Further, Finance advised that they had received legal advice on the process for addressing conflicts or inconsistencies between an enabling Act and this Act (once passed). Finance summarised that,
- while not always being able to conclude that the enabling Act will prevail, it is reasonable to assume that, where there is a direct inconsistency between enabling legislation and the Bill, the enabling legislation is likely to prevail in the absence of a clear indication in the Bill that a particular provision of that Bill is to prevail over enabling legislation.¹²
- 4.13 Finance also indicated that, in recognition that consequential amendments are unlikely to have occurred before the passage of this Bill, the Australian Government Solicitor (AGS) has provided options to address remaining concerns regarding the maintenance of independence. These include:
- amendments to the Explanatory Memorandum:
 - ⇒ ...to clause 19 (keeping Ministers informed) to make it clear that it only operates to the extent that it is not inconsistent with the enabling legislation of a Commonwealth entity established by legislation;
 - ⇒ ...to make clear the Government’s intention that, in the event that a bill containing consequential amendments would not commence on 1 July 2014, the Government would put a Bill

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

10 Finance, *Supplementary Submission 9.1*.

11 Finance, *Supplementary Submission 9.1*.

12 Finance, *Supplementary Submission 9.1*.

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

⇒ [to] indicate clearly the government's intention to ensure that the concerns of particular Commonwealth entities (including, for example, the broadcasters, the cultural institutions, the Reserve Bank and the Australian National Audit Office) will be addressed.

■ amendment to clause 2 of the Bill so as to provide that:

⇒ Clauses 6 to 110 of the PGPA Bill would commence on the same day as a bill containing consequential amendments on the Bill, or

⇒ Clauses 6 to 110 of the PGPA Bill would not commence unless and until such a consequential amendment bill commenced.¹³

Committee comment

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

A new approach to risk

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

13 Finance, *Supplementary Submission 9.2*

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

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

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

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

The rules may:

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

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

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

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

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

15 Explanatory Memorandum, PGPA 2013, p. 23.

16 Explanatory Memorandum, PGPA 2013, p. 34.

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

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

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

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

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

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

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

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

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

Achieving better outcomes through cooperation

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

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

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

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

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

Impact on the third sector

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee comment

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

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

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

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

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

Performance monitoring, reporting and evaluation

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

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

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

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

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

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

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

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

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

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

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

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

It is not clear how ‘purposes’, which appears to be the relevant part of the phrase, could be interpreted narrowly. For a government department, its purposes could include its functions under the Administrative Arrangements Order and the programs as set out in its corporate plan. This would address the issue that the ANAO raises.

For the avoidance of doubt, the rules under subclause 38(2) could include that measurement and assessment must be done of the effectiveness of programs.⁴⁶

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

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

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

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

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

Committee comment

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

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

Interaction with the *Public Service Act 1999*

Uniform duties of officials

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

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

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

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

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

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

48 Finance, *Submission 9*, pp. 9–10.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Enforcement of duties and termination provisions

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

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

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

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

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

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

4.65 Clause 30 of the Bill provides for the person who appoints a director, or equivalent official, of a corporate Commonwealth entity to terminate an appointee for contravening one of the general duties of officials outlined above.⁶²

4.66 Finance stated at the public hearing that these provisions ‘sit alongside the termination provisions in the enabling legislation of various statutory bodies’. Finance explained that, for people employed or appointed under the PS Act, the provisions of that Act would continue to apply, but for others, it would be a ‘supplementary power’.⁶³

4.67 The termination provisions would replace criminal provisions and civil provisions in the current CAC Act – such as fines and imprisonment – with specific provisions for issues to be managed as part of the employment relationship:

So we have done away with the regime of fines and civil penalties, largely because they have never been successfully used and the advice that we have been given from the Attorney-General's Department is that the Criminal Code is sufficient to deal with criminal provisions ... We thought the employment relationship is the best way for matters of misbehaviour and failure to meet duties to be dealt with, and that is universal ... If they do not meet their duties or they do not properly manage public resources, that issue is dealt with between them and their employer as a matter of their employment.⁶⁴

4.68 Finance indicated that it expected clause 30 of the Bill would be used ‘from time to time but rarely’, because issues relating to the performance of a director currently came up ‘every few years’.⁶⁵

4.69 Finance undertook to obtain for the Committee the number of senior appointment terminations that had taken place over the last three to five years.⁶⁶ In a written response, Finance said:

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

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

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

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

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

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

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

Any attempts to dismiss a director of a board of a Commonwealth authority would have been actioned under the engagement arrangements for that director. There are no explicit provisions for termination of a board member under the CAC Act for breaching their general duties.⁶⁷

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

Committee comment

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

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

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

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

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

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

Committee Conclusion

- 5.1 How public money and resources are used by governments has direct consequences for Australia's wellbeing. This goes further than just the policy priorities of the government of the day. The principles, controls and culture surrounding officials who spend public money are also critical factors.
- 5.2 The significance of the financial framework should not be underestimated. The current financial framework, with the FMA and CAC Acts at its heart, was world leading when introduced and has served Australia well over the last 15 years. Almost 200 organisations are operating under this framework and the associated rules, which largely set the controls for spending of around \$400 billion per year.
- 5.3 It flows that any improvement in the efficiency and effectiveness of the financial structure will have major on-the-ground benefits. The JCPAA, perhaps more than any other parliamentary committee, knows that improvements to government administration remain to be realised. Therefore, the Committee commends the renewed focus and fresh thinking brought by Finance in an aim of modernising Australia's financial framework.
- 5.4 The Committee strongly supports the broad objectives of the CFAR process and the Bill, as do most stakeholders. Attempts to bring additional coherence to the system, including through improving the planning, performance and accountability processes, are welcome. Specifically, the Committee supports the introduction of: more mature approaches to risk management; the concept of earned autonomy; positive obligations to cooperate and partner with others; better recognition of the resource management cycle of planning through to evaluation; and the intent of improved performance reporting and transparency to the Parliament and the public.

- 5.5 The Committee recognises that there has been significant consultation efforts to date through the CFAR policy development process, and highly commends Finance in this regard. It is obvious they have taken a genuinely open and collaborative approach to this significant task and this should be given due acknowledgement. The months of effort and consultation on the options and position papers has allowed a high level of engagement from stakeholders at the conceptual level.
- 5.6 Due to the significance of the financial framework to how money is spent and how the public sector is organised, the Committee believes that care is warranted as we move from concept, to a piece of legislation based on principles, to rules. Stakeholders, from the public through to key officials such as the Auditor-General, need to be convinced of the virtue of the objectives and that the practical implications have been well considered.
- 5.7 Maintaining stakeholder support from concept through to the detailed rules stage is critical when a principle-based approach to legislative change is followed. Despite principle-based approaches being considered best practice, if stakeholders are not provided with comfort on how they will be impacted from day to day they are understandably hesitant. Although some stakeholders may argue that the rules should be available for scrutiny at the same time as the legislation, the Committee understands this is often impractical and sometimes undesirable.
- 5.8 As noted above, there has been extensive consultation during the conceptual stage, including the Committee receiving regular updates from Finance during the CFAR process. In addition, Finance has made efforts to consult broadly on the draft Bill, but the Committee retains questions about whether this consultation has allowed enough time for full and proper consideration by the many stakeholders involved. There is a clear need, however, for ongoing open engagement on development of the rules, as many agencies seem to be reserving judgement on the entire process until the rules are known.
- 5.9 Regarding consultation on development of the rules, the Committee is pleased that the Finance Minister has made a series of undertakings to consult publicly and also formally with the Committee. Finance's additional clarification that the more complex new rules, such as those for earned autonomy, will be developed over a longer period provides further assurance.
- 5.10 At the outset, the Committee's intention was to take a high level approach to scrutiny of the Bill – focusing on its intent and longer term benefits to the public sector and to Australia. The inquiry process gave a voice to

many stakeholder views and allowed important additional information to be made public.

- 5.11 The Committee found that the intent and potential benefits of the Bill were supported by almost all stakeholders. The Committee therefore strongly supports the broad intent of the CFAR process and objectives of the Bill. At the same time the Committee heard that many stakeholders wanted time to digest the impacts of the changes before implementation commenced.
- 5.12 Ultimately the issue of timing of the Bill's passage is one for the responsible Minister and the Parliament, not one for this committee. However the Committee does acknowledge that if the Bill is not passed during this Parliament, it is highly likely that commencement will be delayed until 1 July 2015. This will mean the Bill's potentially significant benefits will also be delayed.
- 5.13 If the Minister and the Parliament make the decision to pass the Bill now, it is critical that the undertakings made by Finance and the Minister are followed. Thorough public and parliamentary consultation must be completed before the rules are tabled in parliament as disallowable instruments.
- 5.14 As an alternative course, if a decision is made to delay passage of the Bill, the Committee strongly recommends that consideration be given to the Bill early in the next Parliament. Additionally, if passage is delayed, the opportunity should also be taken to bring on board concerned stakeholders, including providing further assurance on how the clauses of the Bill will be articulated in potential rules. The same opportunity should be taken regarding the extent and form of necessary consequential amendments.
- 5.15 With the above considerations in mind the Committee commends the Bill to the House for further debate and makes the following recommendations:

Recommendation 1

That the objectives of the Bill be supported, but the timing of its passage be a matter for the broader Parliament to determine.

Recommendation 2

That the issues highlighted in the referral from the Selection Committee have been examined and do not, at this stage, look to be reasons for rejection of the Bill.

Recommendation 3

That the Committee supports the introduction of additional coherence to the system – including through improving the planning, performance and accountability processes – and specifically supports the introduction of:

- more mature approaches to risk management;
- the concept of earned autonomy;
- positive obligations to cooperate and partner with others;
- better recognition of the resource management cycle of planning through to evaluation; and
- the intent of improved performance reporting and transparency to the Parliament and the public.

Recommendation 4

That, if the Bill is passed during this Parliament, that the process outlined by the Finance Minister regarding public and parliamentary consultation be closely followed.

Recommendation 5

That, if a decision is made to delay passage of the Bill, priority should be given to its consideration within the first six months of the next parliament; and that the opportunity should be taken to consult stakeholders and progress work on the rules with a view to providing:

- insight into what they look like and contain; and
- some confidence to agencies and the Parliament as to their impact.

Recommendation 6

That consequential amendments will be required to the enabling legislation of entities to ensure their independence is not compromised.

Recommendation 7

That the options developed by the Australian Government Solicitor for amendment to the Explanatory Memorandum to clarify maintenance of independence, as outlined in Supplementary Submission 9.2 from the Department of Finance and Deregulation to the Joint Committee of Public Accounts and Audit, be accepted and included in a revised Explanatory Memorandum.

Recommendation 8

That:

- evaluation requirements for the overall financial framework be explicitly included in the Bill and Explanatory Memorandum; and
- the Parliament, through the Joint Committee of Public Accounts and Audit, conduct a detailed inquiry into the financial framework following the completion of the evaluation.

Recommendation 9

That a statement on greater transparency is included in the Explanatory Memorandum, as per the Australian Information Commissioner's evidence to the Joint Committee of Public Accounts and Audit's inquiry into the Bill.

Recommendation 10

That all relevant documents are prepared in plain English and in language consistent with other relevant legislation, where practicable.

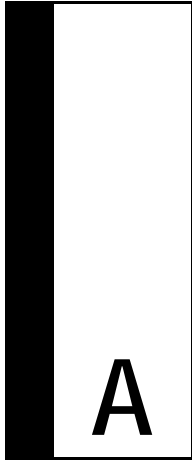
Recommendation 11

That other suggested amendments highlighted during the inquiry be further considered and changes made as appropriate.

Rob Oakeshott MP

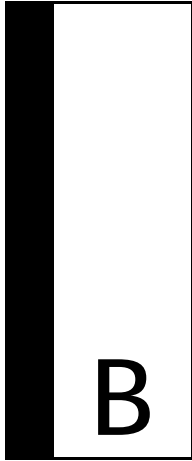
Committee Chair

June 2013



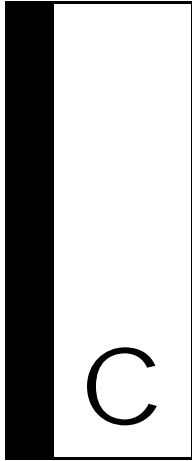
Appendix A – Submissions

- 1 Professor Kerry Jacobs
- 2 Australian War Memorial
- 3 Mr Michael Wunderlich
- 4 Mr Peter Goon
- 5 CPA Australia
- 6 House of Representatives
- 7 Mr Stephen Bartos
- 8 Australian National Audit Office
- 9 Department of Finance and Deregulation
 - Supplementary Submission 9.1
 - Supplementary Submission 9.2
 - Supplementary Submission 9.3
- 10 UnitingCare Australia
- 11 Special Broadcasting Service
- 12 Professorial Fellow Bill Burmester
- 13 Australian Public Service Commission
- 14 UnitingCare Australia
- 15 National Congress of Australia's First Peoples
- 16 Senator The Hon Penny Wong, Minister for Finance and Deregulation
- 17 Australian Public Service Commission



Appendix B – Exhibit

- 1 Professorial Fellow Bill Burmester
*Submission to the Commonwealth Financial Accountability Review
(CFAR) (Related to Submission No. 12)*



Appendix C – Public Hearing

Friday, 24 May 2013 – CANBERRA

Department of Finance and Deregulation

Mr David Tune, Secretary

Dr Stein Helgeby, Deputy Secretary, Financial Management Group

Mr Lembit Suur, First Assistant Secretary, Financial Framework

Mr George Sotiropoulos, Assistant Secretary, Governance

Australian National Audit Office

Mr Ian McPhee, Auditor-General

Dr Tom Ioannou, Group Executive Director, Performance Audit Services Group

Mr Russell Coleman, Senior Director, Professional Services Branch

Office of the Australian Information Commissioner

Professor John McMillan, Australian Information Commissioner

Australian War Memorial

Ms Rhonda Adler, Assistant Director and Branch Head, Corporate Services

Ms Leanne Patterson, Chief Finance Officer

National Gallery of Australia

Mr David Perceval, Chief Financial Officer

Special Broadcasting Service Corporation

Ms Lesley Power, General Counsel

Mr Jonathan Torpy, Chief Financial Officer

Australian Broadcasting Corporation

Mr David Pendleton, Chief Operating Officer

Mr Robert Simpson, Director Legal and Business Affairs

Indigenous Business Australia

Mr Chris Fry, Chief Executive Officer

Mr Satish Kumar, Chief Financial Officer

Ms Kirsty Gowans, General Counsel

UnitingCare Australia

Mr Joseph Zabar, Director Services Sustainability

Mr James Mein AM, National Coordinator, ACNC and NFP Reforms Responses

Institute of Chartered Accountants

Mr Yasser El-Ansary, General Manager Leadership and Quality

Individuals

Professor Kerry Jacobs

Professorial Fellow Bill Burmester

Mr Stephen Bartos

Australian Public Service Commission

Mr Stephen Sedgwick, Australian Public Service Commissioner

Ms Karin Fisher, Group Manager, Ethics



Dissenting Report—Coalition Members

Public Governance, Performance and Accountability Bill 2013

Dissenting Report from Coalition Members

The Joint Committee of Public Accounts and Audit Committee has been asked to inquire whether the creation of the Public Governance, Performance and Accountability Bill 2013 will impose additional and unnecessary reporting requirements on bodies subject to the Act and whether the application of this new Act will reduce transparency or remove important oversight where appropriate. While recognising the extensive consultation that has been undertaken as part of the broader Commonwealth Financial Accountability Review (CFAR), Coalition members are concerned that undue haste in securing Parliaments approval of the Bill may overshadow legitimate hesitations about the whether the time allowed for consultation over the Bill has been sufficient to ensure the practical implications of the new approach are fully understood.

Further, widespread concerns have been raised that none of the proposed Rules contemplated to give effect to the principles detailed in the Bill were able to be presented to the Committee in draft form during its deliberations or to agencies across Government.

Coalition members note the assurances provided by the Minister for Finance and Deregulation to the Committee regarding the development, scrutiny and finalisation of the Rules.

Coalition members are of the view that priority should be given to achieving precision in the Bill rather than securing a hasty approval by Parliament and that reform of this magnitude should proceed only after widespread endorsement for the Bill has been secured.

Coalition members believe the inquiry process has revealed sufficient caution on the part of a number of prominent agencies directly responsible for implementation and oversight of the administration of the Commonwealth's financial affairs.

In particular, Coalition members note the cautious attitude of the Auditor-General and the Australian Public Service Commissioner (APSC) about whether the Bill has undergone the necessary detailed review and consultation.

The Auditor General stated in evidence:

I normally appear before this Committee and give a fairly high level of assurance with respect to the work of my office. I am saying today to you ... that is not that same high level of assurance. I am giving you what an auditor would call limited assurance.¹

1 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 12.

He added:

We would feel more comfortable with this legislation if the Bill had been subject to a more open process, given the number of entities and officials affected by it and because of the fundamental importance of the legislation ... We have also had no visibility of the complementary rules which, together with the legislation, will establish the Commonwealth's financial management framework and contribute significantly to it. For these reasons, our support for the legislation is more measured than it may have been under different circumstances and with more time.²

He echoed this concern at the Senate Estimates hearings the following week:

... some more time for consultation in respect of the draft Bill would have been, I think, helpful to increase the awareness of proposals within it and to bring everyone on board with the new approach.³

The APSC has stated in evidence to the Committee:

The Public Service Commissioner is sympathetic to the Auditor-General's view that it would have been preferable if the Bill had been subject to a longer exposure process, given the number of entities and officials affected by it and because of the fundamental importance of the legislation. It is to be hoped that the associated draft Rules will be made available for scrutiny at the earliest possible date.⁴

Coalition members note the Explanatory Memorandum states that one of the 'long lasting benefits' of the Bill is to deliver 'reduced red tape within the Commonwealth and for partners who contribute to the delivery of Australian Government programs and services, including grant recipients'. In this regard, Coalition members note further evidence from the Auditor General:

... The ANAO considers that the Bill provides less obvious support for achieving reforms in other areas, particularly in the areas of joined-up government (to better accommodate the concepts of collective responsibility and multiple accountabilities), and reducing red tape, including the compliance burden.⁵

and

In this latter respect, it is noteworthy that one of the key features of the Bill is that a range of duties are imposed on both

2 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 11.

3 Mr Ian McPhee, Auditor-General, *Finance and Public Administration Committee Senate Estimates Hansard*, 28 May 2013, p. 24.

4 Australian Public Service Commission, *Submission 17*, p. 1.

5 Australian National Audit Office, *Submission 8*, p. 3.

accountable authorities and officials. For accountable authorities and officials, many of these, while not unreasonable, are additional to existing obligations reflected in the FMA and CAC Acts.⁶

The Coalition does not agree with comments from the Department of Finance that delay in the passage of the Bill will result in the benefits of the reform not being realised. Instead, a proper analysis of the full benefits and costs of the new approach to financial management can only be accurately understood following consideration of the Rules. To do so will require that the Rules be released for public consultation.

Coalition members draw attention to comments of the Auditor General that a delay in passage of the legislation would not undermine the future benefits of the reform.

There are no glaring issues that I am aware of at the moment that absolutely need to be dealt with in the next few months, rather than the next 12 months.⁷

Further, the Explanatory Memorandum clearly states 'the reforms will take several years to implement and integrate fully into the practices and processes of Commonwealth entities. Gradual introduction of the reforms will ensure they are appropriately tested and refined in light of experience.'

Coalition members are of the view that further consultation over a defined period would significantly enhance the benefits of reform by allowing for the refinement, enhancement and improvement of the Bill.

Coalition members recognise that successive Parliaments have endorsed the increasing use of 'Principles based' legislation where the Principles are delivered through the use of Rules and Regulations that are often developed and scrutinised after the passage of legislation.

However, we do not accept the statement in the Committee Report that:

Although some stakeholders may argue that the rules should be available for scrutiny at the same time as the legislation, the committee understands this is often impractical and sometimes undesirable.

Given this Bill is designed to drive significant financial reform across the bureaucracy, a more prudent approach would have been to adopt a more integrated approach to the development of the Bill and its accompanying Rules.

On this point, Coalition members agree with the sentiments of the Australian Institute of Company Directors which noted in private correspondence:

When governments are considering new laws, there should be appropriate consultation and full transparency of all aspects of the

6 Australian National Audit Office, *Submission 8*, p. 3.

7 Mr Ian McPhee, Auditor-General, *Proof Committee Hansard*, Canberra, 24 May 2013, p. 14.

proposal, including for associated regulations. This will ensure that issues of principle, unintended consequences and practical problems can be identified and addressed.

Recommendations

Coalition members are strongly of the view that financial reform of the magnitude proposed by the Bill should only proceed with bipartisan support of Parliament and with the widest possible endorsement across government.

Given the absence of bipartisan agreement on the extent of consultation on the Bill and the reservations of the Auditor General and the Australian Public Service Commissioner the Bill should not proceed without a further 6 months consultation period.

During this period of further consultation, particular attention and focus should be given to:

- drafting and circulating as many of the Rules as is practically possible as a means of building confidence for the new approach across government; and
- securing the unqualified endorsement of the ANAO and the APSC.

If the Parliament passes the Bill before 30 June, Coalition members require:

- (a) the commitments made by the Minister for Finance and Deregulation in the correspondence of 28 May 2013 be closely monitored; and
- (b) a progress report on the development and drafting of the Rules be made available to the JCPAA by both the Department of Finance and the ANAO by 30 November.

Senator Dean Smith

Senator Anne Ruston

Mr Josh Frydenberg MP

Mr Jamie Briggs MP

Hon Alex Somlyay MP